NO. 04-15306

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EARL F. ARAKAKI, et al., Plaintiffs-Appellants, vs. LINDA LINGLE, in her official capacity as GOVERNOR OF THE STATE OF HAWAII, et al., State Defendants-Appellees,	D.C. No. CV-02-00139 SOM/KSC ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAI'I

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ANSWERING BRIEF OF STATE DEFENDANTS-APPELLEES AND HHCA/DHHL DEFENDANTS-APPELLEES

CERTIFICATE OF SERVICE

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THE UNITED STATES OF AMERICA, and JOHN DOES 1-10)
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Defendants-Appellees,)
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SCHAA Defendants/Intervenors-Appellees)
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)
HUI Defendants/Intervenors-Appellees.)
_____)

I. STATEMENTS OF JURISDICTION, CASE, AND FACTS

Plaintiffs literally seek to destroy longstanding programs provided by Congress and the State of Hawaii designed to better the conditions of indigenous Native Hawaiians and/or native Hawaiians,[1] including the **1921** Hawaiian Homes Commission Act ("HHCA"), 42 Stat. 108 (1921), and programs of the Office of Hawaiian Affairs ("OHA"), HRS Chapter 10, established in **1978**. See Hawaii Constitution Article XII, Sections 1-6. Plaintiffs base their Article III standing primarily on their state taxpayer status.

Because, as explained below, plaintiffs' case fails on numerous jurisdictional grounds, including lack of standing, and the political question doctrine, the District Court correctly ruled that it lacked jurisdiction over the entire case.

II. SUMMARY OF ARGUMENT

The District Court correctly ruled that plaintiffs' state taxpayer standing did not allow them to challenge Native Hawaiian qualifications in DHHL Hawaiian homelands programs, or in OHA programs receiving federal matching funds, because those challenges necessarily implicated the constitutionality of federal programs and laws (which mandate the Native Hawaiian qualification). Because

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[1] Unless the context suggests otherwise, this brief uses the terms "**Hawaiian**" or "**Native Hawaiian**" to refer to all descendants, regardless of blood quantum, of the indigenous people who inhabited the Hawaiian Islands prior to 1778. The term "**native Hawaiian**" (with lower case "n") refers to the subset of Native Hawaiians with 50% or more Hawaiian blood quantum. The Department of Hawaiian Home lands, which carries out the HHCA, will be abbreviated "**DHHL**."

none of those federal laws require the expenditure of state taxpayer dollars, plaintiffs' state taxpayer standing afforded them no ground to sue the United States, and thus no ability to challenge the qualifications mandated by federal law. This does not mean that state taxpayer funding of the programs is immune from constitutional attack, but simply that those wishing to make the challenge must establish their standing on some basis other than their state taxpayer status.

More fundamentally, plaintiffs' entire state taxpayer suit should have been dismissed because their state taxpayer status should have been ruled insufficient to confer any Article III standing. As made clear by the Supreme Court in ASARCO Inc. v. Kadish, state taxpayers are to be treated like federal taxpayers and denied standing because their interest is shared with millions, comparatively minute, and the effect upon future taxation too remote and uncertain. This Circuit's contrary decision in Hoohuli v. Ariyoshi is no longer good law (at least not outside of the Establishment Clause arena) in light of the subsequent ASARCO ruling, and the absence of Ninth Circuit cases post-ASARCO applying the lenient state taxpayer standing doctrine followed in Hoohuli.

Even if, however, the Hoohuli position is followed, the District Court correctly ruled that plaintiffs' state taxpayer standing only allowed challenges to the direct expenditure of state taxpayer monies, and not expenditures of all sorts of non-taxpayer monies, including ceded land revenues, monies used to settle claims,

and general obligation bond proceeds. This Ninth Circuit Court has carefully limited state taxpayer standing to "direct injury caused by the expenditure of tax dollars," and has refused to extend it to cover anything with a "fiscal impact," as plaintiffs wrongly contend.

Accordingly, plaintiffs cannot challenge OHA's expenditure of receipts generated from the use of the public land trust ceded lands (including rent), nor DHHL's use of monies it receives from leasing any of the roughly 200,000 acres of "available lands" set aside by the federal government for Hawaiian homesteads.

Nor can plaintiffs challenge DHHL's use of the annual $30 million settlement payments it receives from the State, as only settlement monies, not taxpayer monies, are directly financing the Hawaiian programs. Moreover, general obligation bond proceeds from private bondholders, not taxpayer monies, finance the settlement payments.

Similarly, plaintiffs have no state taxpayer standing to challenge OHA's use of the roughly $130 million (a portion of OHA's $300 million plus trust fund) it received in 1993 as the money came from general obligation bond proceeds, and was in settlement of claims by OHA against the State of Hawaii for Hawaii's alleged failure to turn over 20% of ceded land revenues from 1980 through 1991.

Plaintiffs cannot achieve standing under their trust beneficiary theory either, because, like their state taxpayer standing theory, their interest is shared with

millions, comparatively minute, and the effect upon future taxation too remote and uncertain. Moreover, the 1898 Newlands Resolution created no true "trust" in any event. Finally, the breach of trust claim is frivolous as any purported "trust" has been modified by the 1921 HHCA and Section 5 of the 1959 Admission Act expressly to authorize the native Hawaiian qualifications challenged in this case.

Furthermore, the prudential standing barrier to generalized grievances shared in substantially equal measure by a large class of citizens counsels against both plaintiffs' taxpayer and trust beneficiary standing theories, especially when other persons more directly and uniquely injured could bring these challenges.

Plaintiffs' motion for partial summary judgment was properly denied for multiple procedural reasons, including being brought in the wrong phase of the "trifurcation," and for untimeliness.

Moreover, the relief sought -- a direction on remand that Mancari is inapplicable, and application of strict scrutiny -- is inappropriate because this merits issue is not before this Court, the case having been dismissed on justiciability grounds. In any event, the Mancari doctrine, which allows governmental preferences for indigenous peoples that are "tied rationally" to the fulfillment of the government's unique obligation to its indigenous peoples, does apply. The Rice v. Cayetano decision is not to the contrary as that case "stay[ed] far off [the] terrain" of deciding the applicability of that doctrine to Native

Hawaiians, and instead barred the doctrine's application in the Fifteenth Amendment voting rights context (for tribal Indians, as well as Hawaiians).

Because Native Hawaiians share the same critical characteristics common to tribal Indians -- distinct indigenous people who lost their land and sovereignty, resulting in significant suffering and need for special protection -- Congress may exercise its Indian affairs powers to deal specially with them, a determination that is not "arbitrary" and thus may not, under Sandoval, be second guessed by the courts. Furthermore, Congress has in fact exercised this authority in dozens of statutes by repeatedly singling out Native Hawaiians for special treatment, and by acknowledging a "special relationship" with, and trust obligation to, Native Hawaiians.

The issues upon which plaintiffs assert collateral estoppel from the Arakaki I decision are irrelevant or not determinative, because Arakaki I is limited to voting and the Fifteenth Amendment. In any event, the Arakaki I decision cannot be given collateral estoppel effect in this case: the issues here are legal, not factual, there would be an adverse impact on the public interest and persons not parties to the Arakaki I decision, and the stakes are much higher in this action.

Plaintiffs' allegations of delay by the trial court are frivolous. Plaintiffs themselves caused the biggest delay by declining to pursue preliminary injunctive relief for nearly two years. As for the trial court's "delay," plaintiffs simply ignore

the very good reasons the court provided for its actions, all of which ensured that efficient, yet careful, consideration would be given to the weighty matters before it.

Lastly, the cost award should be affirmed as no evidence of indigency or chilling effect was provided, and no argument was given for overturning the discovery order.

III. ARGUMENT

A. The District Court Properly Dismissed the Remaining Claims on Political Question Grounds.

After disposing of most of plaintiffs' case on justiciability grounds, Clerk's Record ("CR")323/Excerpts of Record ("ER")14; CR354/ER28, the District Court properly dismissed the remaining claims on the basis of the political question doctrine. CR354/ER28. OHA, which filed the motion to dismiss on political question grounds, will address this argument in its Answering Brief, and we will not burden this Court by repeating the argument.

However, because plaintiffs in the course of their anti-political question argument, as well as in their counter-motion for summary judgment section, Open.Br. 47-55, wrongly suggest that regardless of Congress' past actions, the law demands that strict scrutiny apply to their equal protection attack, and that the Morton v. Mancari (417 U.S. 535 (1974)) doctrine has already been rejected, we are compelled to respond to this patently false argument. In fact, we will show that Congress already has, in existing legislation, fully recognized and dealt with

Native Hawaiians under their Indian Commerce Clause powers. We will do so, however, in Section E, infra, in response to plaintiffs' request that this Court "direct, on remand, that Mancari is inapplicable to this case and the standard of review . . . is strict scrutiny." Open.Br. 55.

B. State Taxpayer Standing

1. Dismissal of challenges to programs which have Native Hawaiian qualifications rooted in federal law.

The District Court correctly ruled that even if plaintiffs had state taxpayer standing to bring some of their lawsuit, they could not use that state taxpayer standing to bring an equal protection challenge to state taxpayer funding of DHHL Hawaiian homelands programs, or OHA programs that receive federal matching funds, because those challenges necessarily involve a challenge to the constitutionality of federal programs. CR323/ER14 at 24-28; CR354/ER28 at 2 & 7n.2. The District Court correctly relied upon this Circuit's decision in Carroll v. Nakatani, 347 F.3d 934, 944 (9th Cir. 2003), which had ruled:

> The native Hawaiian classification is both a state and a federal requirement. Consequently, any change in the qualification requires the participation of the State of Hawaii and the United States.

(emphasis added). Therefore, plaintiffs' challenge to the native Hawaiian classification in the HHCA requires the United State's participation. Yet, plaintiffs have no standing to sue the United States or challenge federal law at least under a state taxpayer basis as nothing in the relevant federal laws -- Sections 4 and 5 of

the Admission Act [73 Stat. 4 (1959)] and federal matching fund programs -- requires the expenditure of state taxpayer dollars. Accordingly, the District Court properly concluded that plaintiffs could not use state taxpayer standing to challenge the HHCA, CR323/ER14 at 24-28, or OHA' s use of State monies for programs receiving matching federal dollars, CR354/ER28 at 2 & 7n.2, as neither the HHCA nor the federal matching fund statutes require the expenditure of state taxpayer dollars.[2] In Western Mining Council v. Watt, 643 F.2d 618, 631-32 (9th Cir. 1981), this Court held that plaintiffs have no state taxpayer standing to challenge a federal law that merely set policy, but did not itself command appropriation of state taxpayer monies or impact state taxpayers in a direct way. In the case at bar, of course, none of the federal laws (containing the objected to native Hawaiian or Native Hawaiian qualification) to which plaintiffs object -- whether the Admission Act, the HHCA, or federal matching funds statutes -- require the appropriation of state taxpayer monies, or otherwise directly impact

[2] Indeed, the District Court should have extended its ruling to dismiss plaintiffs' challenges to state taxpayer expenditures on any OHA programs that also use Admission Act § 5(f) ceded land (or proceeds or income from those lands), not just those OHA programs receiving federal matching funds. For an injunction against these taxpayer expenditures would have to rest upon a determination that the program' s native Hawaiian qualification was unconstitutional, which in turn would necessarily mean finding federal Admission Act § 5(f)' s identical native Hawaiian qualification unconstitutional as well. But state taxpayer standing cannot be used to attack a federal law that does not require the expenditure of state taxpayer monies (Section 5(f) authorizes use of the ceded land or its proceeds or income for programs bettering the condition of native Hawaiians, but does not require the state to expend a single state taxpayer dollar in support of such programs).

state taxpayers.

In short, even if state taxpayer standing may sometimes provide a jurisdictional basis for attacking certain state program qualifications, it cannot be used to attack qualifications mandated by the federal Admission Act, or prescribed or endorsed by other federal statute (indeed, Section 4 of the Admission Act requires the United States' consent to change homesteader qualifications), when those federal laws do not require the expenditure of state taxpayer dollars. Of course, this does not mean that these particular state programs are necessarily immune from constitutional challenge; it simply means that those wishing to make the challenge must establish their standing on some basis other than state taxpayer standing.

Plaintiffs' statement that Congress cannot authorize a State to violate the Fourteenth Amendment, Open.Br. 45, although perhaps true, has no bearing whatsoever upon whether plaintiffs have state taxpayer standing to bring their Fourteenth Amendment challenge.

Plaintiffs' reliance upon Gwinn Area Community Schools v. Michigan, 741 F.2d 840 (6th Cir. 1984), is misplaced as the local school district taxpayer challenged a state's action -- lowering the amount of state aid to the local school district based upon federal assistance -- that directly impacted the local school district's coffers. Here, on the other hand, the federal statutes -- Sections 4 and 5 of

the Admission Act, the HHCA, and the federal matching fund statutes -- do not directly impact state taxpayers at all (as they don't require expenditures of state taxpayer dollars). In any event, the Sixth Circuit's position in Gwinn cannot override this Circuit's own ruling in Western Mining, or this Circuit's other rulings limiting state taxpayer standing to challenges to the direct expenditure of taxpayer dollars. See discussion, infra, at 13-17.

Green v. Dumke, 480 F.2d 624 (9th Cir. 1973), which plaintiffs cite, has no relevance to the matter at hand. Green simply ruled that the **"under color of [State law]"** jurisdictional prerequisite to a Section 1983 action is satisfied by a state actor because it is a state institution, and that this point is not undermined by the fact that such a state institution acts pursuant to federal law. Of course, the State has never argued that the HHCA/DHHL or OHA Defendants do not satisfy the "under color of [State law]" jurisdictional prerequisite to a Section 1983 action. And the District Court, in dismissing the claims challenging the DHHL programs, and OHA's programs receiving federal matching funds, did **not** rely upon any such position either. Accordingly, Green's ruling regarding the "under color of [State law]" issue is manifestly irrelevant to this case and provides no basis for reversing the District Court's ruling[3].

The District Court dismissed the challenges to the HHCA and OHA programs

[3] As Green explained further, "[t]he 'under color of law' component of section 1983 is the equivalent of the **state action** requirement of the Fourteenth Amendment." The District Court's dismissal of the claims had absolutely nothing to do with any claim of no state action, and we have never argued any such position to date.

receiving federal matching funds because it correctly determined that **state taxpayer standing** could not properly be employed to bring challenges implicating the validity of federal laws, where nothing in those laws required the expenditure of state taxpayer money. Nothing in Green, of course, says anything about Article III standing requirements, much less anything about state taxpayer standing in particular. Green rejected a wholly unrelated argument attempting to narrow the "under color of [state law]" prerequisite to Section 1983 actions, which has nothing to do with the District Court's ruling throwing out plaintiffs' claims for lack of Article III standing.

2. Plaintiffs should not have been given **any** state taxpayer standing.

There is an even more fundamental standing-based reason why **all** of plaintiffs' claims should have been thrown out (not just their challenges to DHHL programs and the federal matching fund programs of OHA): namely, that plaintiffs should not have been granted state taxpayer standing **at all**, as the District Court erred in following the **pre**-ASARCO ruling in Hoohuli v. Ariyoshi, 741 F.2d 1169 (9th Cir. 1984).

As the United States Supreme Court in ASARCO makes clear:

> [S]uits premised on federal taxpayer status are not cognizable in the federal courts because a taxpayer's "interest in the moneys of the Treasury . . . is shared with millions of others, is comparatively minute and indeterminable; and the effect upon future taxation, of any payments out of the funds, so remote, fluctuating and uncertain that no basis is afforded for [judicial intervention]." Frothingham v. Mellon, 262 U.S. 447, 487 (1923). . . . **[W]e have likened state taxpayers to federal taxpayers**, and thus we have

> refused to confer standing upon a **state** taxpayer absent a showing of "direct injury," pecuniary or otherwise. Doremus.

ASARCO, Inc. v. Kadish, 490 U.S. 605, 613-14 (1989) (plurality opinion).

And, as further explained in ASARCO, 490 U.S. at 614:

> Even if [the suit would yield money for the school trust fund], it is pure speculation whether the lawsuit would result in any actual tax relief for respondents. If they were to prevail, it is conceivable that more money might be devoted to education [rather than taxes being cut]. . . . The possibility that taxpayers will receive any direct pecuniary relief from this lawsuit is "remote, fluctuating and uncertain."

For these reasons, therefore, plaintiffs' claim to standing based upon their alleged state taxpayer status, a status they share with virtually the entire state' s adult population, does not provide them Article III standing in this case.

Even though the decision in Hoohuli v. Ariyoshi, 741 F.2d 1169 (9th Cir. 1984), appears to contradict the very stringent standard for state taxpayer standing set forth in ASARCO above, because Hoohuli predates ASARCO, we submit that Hoohuli has effectively been overruled, at least outside the Establishment Clause arena. For example, although Cammack v. Waihee, 932 F.2d 765 (9th Cir. 1991), stated that "Hoohuli remained the controlling circuit precedent," 932 F.2d at 770 n.9, Cammack was an Establishment Clause case. Most importantly, Cammack went on to state that the broad and lenient state taxpayer standing position it was applying was "consistent with the traditional judicial hospitality extended to establishment clause challenges by taxpayers generally." id. at 772. Thus, we

submit that the broad state taxpayer standing doctrine applied in Hoohuli is no longer good law in the Ninth Circuit except in Establishment Clause cases.[4] Indeed, we have found not a single Ninth Circuit case, after ASARCO, that granted state taxpayer standing in a non-Establishment Clause case using the lenient standard set forth in Hoohuli. In fact, to the contrary, the Ninth Circuit case of Bell v. City of Kellogg, 922 F.2d 1418 (9th Cir. 1991), cited in Cammack, expressly states that the "same constitutional standing principles [applicable to federal taxpayers] apply to those suing in federal court as state taxpayers." Id. at 1423 (citing ASARCO).[5]

Accordingly, plaintiffs' entire lawsuit should have been thrown out as it was based upon a theory of state taxpayer standing that no longer exists.

3. Even if state taxpayer standing exists, the District Court correctly ruled that plaintiffs could only attack the direct expenditure of taxpayer monies, thereby precluding plaintiffs from challenging the use of ceded land revenues, settlement monies, or bond revenues.

Finally, although plaintiffs should not have had any state taxpayer standing as just explained, plaintiffs argue that the District Court improperly limited their

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[4] Even if one could read Cammack's statement that "Hoohuli remained the controlling circuit precedent" as suggesting Hoohuli would apply even outside the Establishment Clause area, that reading would obviously be dicta, given that Cammack **was** an Establishment Clause case.

[5] And although Bell cites Hoohuli, it does so only for its statement that "state taxpayer[s] must show 'direct injury,' pecuniary or otherwise." Id. At no time, however, has the Ninth Circuit, after ASARCO, approved of Hoohuli's lenient state taxpayer standing theory in a non-Establishment Clause case.

taxpayer standing to challenges of direct expenditures of state taxpayer monies, rather than expanding their state taxpayer standing to allow challenges to the expenditure of all sorts of non-taxpayer monies, including ceded land revenues, monies used to fund settlements, and general obligation bond proceeds. Of course, the District Court was correct to insist that any state taxpayer standing would, at minimum, have to be based upon the direct expenditure of taxpayer dollars. See Cantrell v. City of Long Beach, 241 F.3d 674, 683 (9th Cir. 2001) ("To establish standing in a state . . . taxpayer suit under Article III, a plaintiff must allege a **direct injury** caused by the expenditure of tax dollars"); Cammack v. Waihee, 932 F.2d 765, 769 (9th Cir. 1991) ("The **direct injury** required by Doremus is established when the taxpayer brings a "good-faith pocketbook action"; that is, when the challenged statute involves the expenditure of state tax revenues.")

Plaintiffs wrongly claim that taxpayer dollars are not essential to taxpayer standing, and that instead **anything with a fiscal impact** generates Article III taxpayer standing. This position is contradicted by all the case law.

Plaintiffs cannot point to a single case that affords state taxpayer standing where the challenged program does not directly implicate taxpayer monies. As noted above, both Cantrell and Cammack insist on a "direct injury caused by the expenditure of tax dollars." Plaintiffs wrongly cite Cammack as supporting their "**any** fiscal impact" theory. In fact, Cammack makes very clear that the "fiscal

impact" has to be one involving "the expenditure of state tax revenues." 932 F.2d at 769. Cammack specifically relied upon the fact that the challenged Good Friday law involved "the expenditure of tax revenues to public employees for not working on that day," and stated that the "necessary injury" for standing purposes was the "actual expenditure of tax dollars." 932 F.2d at 771-72.

Cammack reaffirmed the critical fact supporting standing in that case: "The complaint asserts that section 8-1 proclaims a state holiday in violation of the federal and state constitutions, and that state and municipal **tax revenues** fund the paid holiday for government employees." Id. Thus, Cammack directly supports the principle that to the extent DHHL and OHA programs rely on funds other than tax money, plaintiffs do not have taxpayer standing to challenge those programs. See also Cammack, 932 F.2d at 771-72 ("Appellants have asserted the **necessary** injury -- actual expenditure of **tax dollars**).

Even Hoohuli v. Ariyoshi, 741 F.2d 1169 (9th Cir. 1984), upon which the District Court erroneously relied to give plaintiffs their limited taxpayer standing, makes clear that state taxpayer standing is only available where taxpayer dollars are expended on the challenged program, not where there is simply some impact upon the State' s finances.

> [Pleadings are] sufficient if they set forth the relationship between taxpayer, tax dollars, and the allegedly illegal government activity.
> . . . .

> The challenge is to the "appropriating, transferring, and spending . . . . of taxpayers' money from the General Fund . . . ."

Hoohuli, 741 F.2d at 1178, 1180.

Plaintiffs also wrongly cite Hawley v. City of Cleveland, 773 F.2d 736, 741-42 (6th Cir. 1985), to support the notion that any "detrimental impact on the public fisc" supports state taxpayer standing. Open. Br. at 33. First, the Hawley case was an Establishment Clause case, for which standing jurisprudence has been significantly relaxed. See Cammack, 932 F.2d at 772 (noting "traditional judicial hospitality extended to Establishment Clause challenges by taxpayers"). Second, to the extent Hawley might suggest that any revenue loss is sufficient for taxpayer standing, Hawley is additionally distinguishable because it involved municipal taxpayer standing.[6] And while Johnson v. Economic Development, 241 F.3d 501 (6th Cir. 2001), says Hawley was not expressly limited to municipal taxpayer standing, Johnson, also involved the Establishment Clause. Thus, any suggestion beyond those limits is dicta. Finally, both Hawley and Johnson are Sixth Circuit cases, not controlling in the Ninth Circuit, where the latter has made clear that taxpayer dollars must be directly at stake.

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[6] The Ninth Circuit's statement in Cammack that "municipal taxpayer standing simply requires the 'injury' of an allegedly improper expenditure of municipal funds, and in this way mirrors our threshold for state taxpayer standing," 932 F.2d at 770, is only speaking about the requirement of an "expenditure." It thus provides no support for the claim that state taxpayer standing can be supported simply by demonstrating any **revenue** loss.

Plaintiffs then misleadingly suggest that Doremus v. Bd. of Educ., 342 U.S. 429 (1952), supports the notion that any financial interest of a taxpayer in the dispute is sufficient for state taxpayer standing. Open.Br. 34-35. In fact, Doremus requires plaintiffs to possess not just any financial interest, but rather the:

> **requisite** financial interest that is, or is threatened to be, injured by the unconstitutional conduct. We find no such direct and particular financial interest here.

342 U.S. at 435. As explained many times above, mere impact upon State finances is insufficient -- taxpayer monies themselves must be directly impacted.

Despite plaintiffs' attempts to read Doe v. Madison School District No. 321, 177 F.3d 789 (9th Cir. 1999), to the contrary, by taking quoted snippets from non-Ninth Circuit cases out of context, Open. Br. 33-34, Doe in fact reaffirms very explicitly that:

> "taxpayer standing," by its nature, requires an injury resulting from a government's expenditure of **tax revenues**.
> . . . .
> By contrast, when a plaintiff has failed to allege that the government spent **tax dollars** solely on the challenged conduct, we have denied standing.

Doe, 177 F.3d at 793, 794.

Given the Article III framework just spelled out above -- limiting state taxpayer standing (even under Hoohuli) to challenges to the "direct" expenditure of taxpayer dollars -- receipts generated from the use of public ceded lands (including rent), of course, are not state taxpayer monies at all. Moreover, the original source

of the ceded lands is the federal government. Admission Act Section 5(b).[7] Accordingly, plaintiffs had no standing to seek below (or here) an injunction prohibiting the State from distributing public land trust revenues to OHA, or barring OHA from expending its $300 million plus trust monies which came from prior distributions of public land trust revenues.[8] As the District Court repeatedly

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[7] Plaintiffs' theory that where the amount of taxpayer monies used to improve ceded lands exceeds the receipts collected for use of that land, those receipts must be deemed to be taxpayer monies, is baseless. First, the premise is false, as taxpayer monies are generally not used to improve the revenue-producing ceded lands. See, e.g., Act 200, Hawaii Session Laws 457-58, 462 (2003) (no "A" funds, i.e., general funds, finance improvements to Honolulu International Airport). Second, even if taxpayer monies are used, the receipts are still generated by the ceded lands and the operations thereupon, and are not taxpayer monies themselves, even if taxpayer monies contributed to the improvements and operations; at best, the receipts would constitute **in**direct taxpayer monies, not sufficient to confer standing. Cantrell, supra. After all, the state monies are not simply "passed through" a shell and funneled onto OHA; rather, they go into improving the ceded lands, making them productive, and the improved lands then, in turn, generate receipts, part of which goes to OHA.

However, plaintiffs' theory is flawed for another more fundamental reason: state monies are used to improve the ceded lands, not so that the ceded lands generate receipts per se, but in order to make them useful. For example, the Honolulu International Airport is partly situated on ceded land, and the mere fact that state dollars went into constructing the airport, and that such dollars might exceed any direct revenue generation from the airport is hardly of any consequence. The state dollars went to improve the ceded lands in order to provide Hawaii residents a valuable public service -- namely access to inter-island, national, and international air transportation -- not to provide Hawaii residents a revenue stream exceeding state inputs. It is thus illogical to view any incidental revenue stream as taxpayer dollars.

[8] See discussion, infra at 21, regarding the roughly $130 million dollar portion of the OHA trust monies appropriated by the legislature in 1993.

ruled, "Plaintiffs' state taxpayer status does not allow Plaintiffs to challenge spending by . . . OHA that involves rental income." CR323/ER14 at 5.

Similarly, the District Court correctly ruled, id., that plaintiffs have no state taxpayer standing to stop DHHL from using any monies it receives from the leasing of the roughly 200,000 acres of "available lands" the federal government set aside in 1921 (out of the roughly 1.8 million acres of then-federally-owned lands) for Hawaiian homesteading. See Admissions Act 5(b); HHCA Section 203. Like all the ceded lands, these available lands were not derived from state taxpayer monies, but from the federal government.

As to the $30 million **settlement** proceeds the State deposits annually into DHHL's Hawaiian Homelands Trust Fund,[9] even if the settlement were funded directly by taxpayers (it is not, as explained below), those deposits would not involve the direct use of taxpayer monies. For any taxpayer monies would be expended directly only to finance the settlement, not the DHHL programs themselves.[10] That the recipient of the settlement monies, DHHL, in turn uses

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[9] See Act 14, Haw. Spec. Sess. Laws 696-700 (1995) (explaining that the annual $30 million deposits are to settle past alleged breaches of trust by the State of Hawaii); HHCA Section 213.6.

[10] Plaintiffs' assertion that Act 14 did not effect a settlement is baseless; regardless of whether it settled "any lawsuit," Act 14 certainly settled claims. See id. at 699 ("The passage of this Act is in full satisfaction and resolution of all controversies at law and in equity . . . arising out of . . . the management, administration, . . . or disposition by the State . . . of any lands . . . which are . . . . Hawaiian home lands .

those monies to finance DHHL capital projects to put native Hawaiians on the land amounts to, at best, the indirect use of taxpayer monies for the DHHL Hawaiian programs.[11]

Moreover, even the settlement is not financed directly by taxpayers, because general obligation bond proceeds -- obtained from private bondholders -- not state tax receipts, are used to fund the annual payment. See, e.g., id. at 701, Section 8(b). Even if the bondholders are ultimately repaid from the State treasury, the taxpayer monies would only be indirectly financing the settlement. In sum, expenditure of the $30 million dollar annual Trust Fund receipts is at most a doubly **indirect** use of taxpayer monies, with both the settlement process, and the bond financing method, severing any direct connection between Trust Fund expenditures and taxpayer monies. Accordingly, plaintiffs had no taxpayer standing below, or here, to seek to enjoin Trust Fund expenditures or to enjoin the State from making the $30 million annual payments into the Hawaiian Home Lands Trust Fund.

. . arising between August 21, 1959 and July 1, 1988. The passage of this Act shall have the effect of res judicata as to all parties, claims, and issues . . . ."). Although plaintiffs may be correct that the use of settlement proceeds for Hawaiian programs is not immune from constitutional challenge, the District Court simply held that state taxpayer standing was not a permissible way of making such a challenge.

[11] In fact, because the settlement simply returns to DHHL control monies that it, rather than the State treasury, should have received in the first place had the State not allegedly breached trust duties, the $30 million payments should not be considered taxpayer monies at all (direct or indirect), as the taxpayers -- through the treasury -- should never have had that money to begin with.

Finally, the roughly $130 million dollar portion of **OHA's** $300 million plus trust fund appropriated to OHA in 1993 also does not involve "direct" tax money. That $130 million was in **settlement** of claims by OHA against the State of Hawaii for Hawaii' s alleged failure to turn over 20% of revenues generated on public land trust ceded lands from 1980 through 1991; and it was **financed by general obligation bonds**, too. See Act 35, Haw. Session Laws 41 (1993) and Section 8 of Act 304, Haw. Session Laws 947, 951 (1990).[12] Thus, for reasons analogous to those given with respect to the Act 14 annual $30 million payments to **DHHL**, discussed supra at 19-20, the $130 million comes first from settlement proceeds, and then from private bondholders. Accordingly, any OHA expenditure from the $130 million is at most a doubly indirect use of taxpayer monies, which is not sufficient to confer state taxpayer standing.[13]

Importantly, rejecting plaintiffs' unjusfied expansive taxpayer standing theory does **not**, as plaintiffs suggest, immunize the DHHL and OHA programs

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[12] See id. at 947-48, Act 304, Section 1 (noting that OHA "has been provided only a portion of the funds contemplated upon enactment of section 10-13.5 in 1980" and thus the Act provides "a process to determine the actual amounts payable to [OHA]" based upon "the revenues derived from the public land trust").

[13] Indeed, such settlement monies should not even be considered indirect taxpayer monies, because this roughly $130 million settlement money for OHA, even if indirectly financed by taxpayer money, is simply money replacing ceded land revenue that the State had collected during that 11 year interval, but had used primarily for education purposes, rather than for the benefit of native Hawaiians as contemplated by HRS § 10-13.5. Compare footnote 11, supra.

from constitutional attack. Any otherwise qualified persons who sincerely desire and apply for DHHL or OHA benefits but are denied because they are not Hawaiian would have standing to bring such a challenge.

C. The District Court Properly Rejected Plaintiffs' Trust Beneficiary Standing Theory.

For virtually the same reasons as given above, supra at 11-13, plaintiffs do not have standing as beneficiaries of the 1898 so-called "trust." Even assuming that the terms of the 1898 Newlands Resolution -- revenue and proceeds of the ceded lands to be "used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes" -- were still operative (in fact, as explained in more detail later, its terms have been superseded or modified by the Hawaiians Homes Commission Act and the Admission Act of 1959), the breadth of the beneficiary group -- "inhabitants of the Hawaiian Islands" -- is even greater than the Hawaii state taxpayer base. Accordingly, the very same problems that plague plaintiffs' taxpayer standing argument -- objection shared by "millions," each individual beneficiaries' interest is "comparatively minute and indeterminable," and the effect upon beneficiaries of stopping the challenged expenditures is "so remote, fluctuating and uncertain," ASARCO, supra -- apply equally, if not more compellingly, to their trust beneficiary standing argument.

As with the taxpayer situation, not only is each plaintiff's beneficiary interest in the 1898 so-called "trust" incredibly "minute" and "shared with millions,"

plaintiffs do not and cannot show that if the moneys currently flowing to benefit Hawaiians were stopped, plaintiffs would directly benefit, however minutely, from that money savings, as the savings could be diverted to other programs or uses from which plaintiffs might derive no benefit (e.g., say, educational assistance to the blind). Cf. ASARCO, 490 U.S. at 614 (denying teachers association standing to attack state expenditures which deplete school trust fund in part because "it does not follow that there would be an increase in teacher salaries or benefits, [noting that] [t]hese policy decisions might be made in different ways by the governing officials, depending on their perceptions of wise state fiscal policy and myriad other circumstances").

Furthermore, plaintiffs cannot establish trust beneficiary standing here because the 1898 "trust" is not a true "trust." There is nothing in the language of the Newlands Resolution -- stating that the revenue and proceeds from the ceded lands "be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes" -- that suggests that a trust of any kind was being created. The word "trust" was never used in the Resolution. Rather, this language is no different than any other kind of statutory command dictating that the revenues from a particular parcel of land be used for public purposes, i.e., to fund the government' s operations. Nor is there any reason to infer a "trust" given that the purposes for which the revenue could be used are so broad (for "public

purposes" that benefit "inhabitants") that they contradict any notion of a "trust."

Plaintiffs attempt to confuse this Court by "mixing together" the 1898 Newlands Resolution with the Admission Act,[14] and citing cases discussing or finding a public trust arising out of Section 5(f) of the **Admission Act**. See, e.g., Price v. State of Hawaii, 921 F.2d 950, 955 (9th Cir. 1990), and Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Commission, 739 F.2d 1467, 1471-72 (9th Cir. 1984). Of course, unlike the 1898 Newlands Resolution, §5(f) of the Admissions Act specifically proclaims that the ceded lands and the proceeds and income therefrom "shall be held by said State as a **public trust** [for five purposes.]" The Newlands Resolution says nothing about a "trust," public or otherwise. Thus, plaintiffs cannot assert trust beneficiary standing because the 1898 Newlands Resolution created no true trust.

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[14] Plaintiffs also carelessly use the term "public land trust" applying it to anything and everything, including the Newlands Resolution. In fact, no "public land trust" existed until the United States enacted **1)** the Hawaiian Homes Commission Act in 1920, setting aside 200,000 acres of the lands ceded by the Republic to the United States in 1898 for the rehabilitation of native Hawaiians, see Ahuna v. Dep't of Hawaiian Home Lands, 64 Haw. 327, 336-38, 640 P.2d 1161, 1167-68 (1982); Admission Act, Section 4 (requiring Hawaii to adopt HHCA as part of its Constitution and barring changes in the qualifications of the lessees without the consent of the United States); Haw. Const. Article XII, Sections 1, 2 & 3, Article XVI, Section 7 (adopting HHCA as part of Hawaii's constitution, and mandating compliance with such trusts); and **2)** the Admission Act in 1959, which created a public land trust out of the ceded lands as a whole. See Section 5(f) (stating that the "lands granted to the State of Hawaii by subsection (b) . . . together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust.").

In addition, and perhaps most significantly, even if the Newlands Resolution created a trust, that "trust" has been modified by the HHCA and §5(f) of the Admission Act to expressly authorize use of the lands for native Hawaiians. The HHCA specifically authorized a portion of the lands to be used for homestead leases to native Hawaiians, HHCA Section 207, and Section 5(f) of the Admission Act expressly authorized use of the ceded land and its proceeds and income to be used for "the betterment of the conditions of native Hawaiians." Accordingly, plaintiffs' breach of trust claim is frivolous.

Moreover, this proves that plaintiffs are actually trying to use their purported trust beneficiary status to sue the State not for non-compliance, but for **complying** with the current terms of the trust. As the District court accurately determined in its 3/18/02 Order, CR26/Supplemental Excerpts of Record ("SER")26 at 29:

> [a] claim for mismanagement of a public trust must involve some deviation from the terms of the trust. Plaintiffs, however, are complaining that trustees are complying with express trust requirements that trust assets be used for the betterment of native Hawaiians. Far from alleging that these trustees are violating the terms of the trust as set forth in the HHCA and the Admission Act, Plaintiffs are 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. The present trustees, however, were never trustees of the 1898 Newlands Resolution trust. The present trustees are charged with enforcing the present trust, which is a modified version of what was in effect in 1898. Plaintiffs' claim turns out to be an attempt to have the present trustees ignore the modifications, on the ground that they violate the Constitution. This is not a claim that a trust beneficiary may pursue on trust mismanagement grounds.

In short, even if the Newlands Resolution did create a "trust" for the benefit of all inhabitants of the Hawaiian islands, both the HHCA and Section 5(f) of the Admission Act modified that trust to impose the very native Hawaiian qualifications that plaintiffs seek to invalidate in this suit. In sum, plaintiffs are not claiming defendants are violating the terms of the "trust," but rather are unconstitutionally complying with the terms of the modified trust. Plaintiffs can cite no case supporting trust beneficiary standing in such a situation.

Plaintiffs' statement that nothing in federal law "requires" the State to use its 5(f) land proceeds to fund OHA projects for native Hawaiians, Open.Br. 28-29, is plainly beside the point -- Section 5(f) of the Admission Act surely and expressly **authorizes** the State to use the proceeds "for the betterment of the conditions of native Hawaiians."

Plaintiffs make an equally frivolous argument that the State is breaching its duty to administer the trust in an impartial manner by providing native Hawaiians special treatment. Of course, because Section 5(f) and the HHCA law both, by their very terms, dictate the special treatment, the claim of impartiality is absurd. As plaintiffs' own quotation of the Uniform Principal and Income Act states: "a fiduciary shall administer a trust . . . impartially, . . . except to the extent the terms of the trust . . . clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries". HRS §557A-103.

Finally, even if this Court, contrary to the above, found Article III standing based upon plaintiffs' alleged trust beneficiary status, plaintiffs could use that status only to pursue their breach of 1898 "trust" claim, not their much broader equal protection claim, as the latter claim is not rooted in the terms of the 1898 "trust," but is a claim independent of that 1898 "trust," and can thus be pursued only if plaintiffs have valid taxpayer standing, there being no other basis for their Article III standing.[15]

D. Plaintiffs' claims should have been dismissed, in the alternative, on **prudential** standing grounds.

In addition, even if this Court rejects the above analysis and finds Article III standing under either plaintiffs' state taxpayer or trust beneficiary theories, **prudential** standing barriers counsel against this court hearing any of plaintiffs' claims. As stated in Warth v. Seldin, 422 U.S. 490, 499 (1975):

> Apart from [the Article III] minimum constitutional mandate, this Court has recognized other [prudential] limits on the class of persons who may invoke the courts' decisional and remedial powers. First, the Court has held that when the asserted harm is a **'generalized grievance' shared in substantially equal measure by all or a large class of citizens**, that harm alone normally does not warrant exercise of jurisdiction.

Plaintiffs' claims in this case fall squarely within Warth's language, as both the

[15] Cf. Rifkin v. Bear Stearns & Co., 248 F.3d 628, 634 (7th Cir. 2001) ("plaintiffs must establish the district court's jurisdiction over each of their claims independently; they are not permitted to use one count of their complaint to establish federal subject matter jurisdiction and a separate count to establish standing").

state taxpayer base (literally hundreds of thousands), and certainly the "trust" beneficiary base (over 1 million "inhabitants"), surely constitute a "large class of citizens."

Moreover, it is not as if denying standing to these particular plaintiffs would mean that nobody would have standing to challenge the OHA and DHHL laws. Persons who would otherwise qualify for OHA or DHHL benefits (except for their non-Hawaiian status), and who actually desire them and take steps to obtain them, could challenge the Hawaiian-only prerequisite for those benefits. There is simply no reason to allow these particular plaintiffs, who assert a claim shared by virtually all citizens of Hawaii, to bring this generalized grievance, when there are likely persons who are directly and particularly injured that could bring the challenge.

Accordingly, the District Court's dismissal of plaintiffs' entire lawsuit can be upheld on this alternative theory. See Maldonado v. Harris, 370 F.3d 945, 949 (9th Cir. 2004) (court can "affirm a dismissal on any basis supported by the record, even if the district court relied on different grounds").

E. The District Court Properly Rejected Plaintiffs' Motion for Partial Summary Judgment.

Plaintiffs moved for partial summary judgment seeking to have established that strict scrutiny applies, and that the Mancari doctrine does not, relying upon a misreading of the Rice v. Cayetano, 528 U.S. 495 (2000), and Arakaki I, ER25 Exh. 1, decisions, as well as an erroneous theory of collateral estoppel.

CR332/ER25. The District Court properly denied their motion because the filing of that motion at that time violated various prior procedural court rulings or court rules. CR336/ER26. In this appeal, they attack that ruling, and demand that this Court direct that strict scrutiny apply, and that the Mancari doctrine is inapplicable. As demonstrated below, their argument is utterly baseless.

1. The District Court correctly denied the motion for multiple procedural reasons.

This Court need not reach the merits of plaintiffs' counter motion for partial summary judgment, as it can affirm the District court's denial of plaintiffs' motion on the procedural grounds the District court cited. As the District court properly found, plaintiffs' motion was procedurally deficient in multiple ways.

First, and most importantly, the District Court had "trifurcated" the case into three separate and consecutive "rounds" or phases, wherein phase 2 would address "the level of scrutiny applicable to Plaintiffs' claims," and phase 3 would address the "application of the facts of this case to the level of scrutiny decided upon in the second round of motions." CR230/SER230 at 7. This ordering was a justified and logical means of ensuring that the parties would not have to deal with the very expensive and time consuming issues of compelling state interests or narrow tailoring when phase 2 could very well determine that Mancari's "tied rationally" standard was the appropriate one instead. As the District court explained, the consecutive phases "will ensure presentation of the issues in an orderly and

efficient manner without the confusion and delay that unnecessary issues could cause." Id. at 8.

And because there were potential motions that could be filed that would preliminarily dispose of plaintiffs' claims without even reaching the level of scrutiny issue, the District court appropriately provided for a phase 1 for resolving "any issue that this court must decide before this case ends but that do not turn on whether strict scrutiny or some other level of scrutiny applies to this case." Id. at 6. The court further stated as to phase 1 motions, that "[a]ny such motion must demonstrate why it is necessary for this court to decide the issues raised by the motion." Id. at 6.

Plaintiffs' counter motion, however, patently violated this efficient 3-part phasing, because that motion, filed during phase 1, sought to have the court determine that the Mancari standard of review was not applicable, a pure phase 2 matter.[16] CR336/ER26 at 4. Accordingly, this Court can simply affirm the District

[16] Indeed, a review of the numerous issues plaintiffs sought to have determined in their motion -- e.g., that the "definitions of ' native Hawaiian' and ' Hawaiian' in HRS § 10-2 are racial classifications," that the "State of Hawaii does not have the same unique relationship with Hawaiians or native Hawaiians as the federal government has with Indian tribes," that "Hawaiians do not have a unique trust relationship with the federal government," that the "scope of the rule announced in Mancari . . . is limited to member of federally recognized Indian tribes," that the "rule announced in Mancari . . . applies only to the Bureau of Indian Affairs, that there "is no currently existing federally recognized Hawaiian tribe," etc., see CR332/ER25 at 1-3 -- reveals that all of them deal with matters that plaintiffs believe (albeit erroneously) dictate the non-applicability of the Mancari doctrine.

court's denial of plaintiffs' partial summary judgment motion on this straightforward procedural ground. And the procedural ground, flowing from the efficient phasing structure the District court created, makes sense, too, as there would be no reason to waste everyone's time addressing the phase 2 level of scrutiny issue if the case could be dismissed on some other ground presented in phase 1. Indeed, that is precisely what happened, as the case was dismissed in phase 1 through a variety of justiciability rulings.

Plaintiffs claim, however, that the District court's framework should be ignored because:

> OHA's motion injected the Mancari issues into the first round and Plaintiffs were faced with the possibility that the court would dismiss their case without taking into account that key elements of the Mancari issues had already been adjudicated against OHA and were factually insupportable. The trial court did exactly that."

Open.Br. 47-48. Even if parts of OHA's motion could be construed as injecting Mancari issues into the first round, that would simply mean that those parts of OHA's motion would have to be rejected for the same reason plaintiffs' motion must be rejected -- namely, because they injected phase 2 issues into phase 1. It would not mean that the District court erred in rejecting plaintiffs' motion for that reason. And contrary to plaintiffs' suggestion otherwise, the District court did **not** resolve any Mancari issues raised in OHA's motion either. Instead, the court determined that the political question doctrine applied and dismissed the case

without reaching the applicability of the Mancari standard. See CR354/ER28 at 24 ("This court declines to make any pronouncement at this time concerning the level of scrutiny applicable to Hawaiians."). In sum, plaintiffs' motion was properly rejected as injecting phase 2 issues into phase 1.

Second, even if plaintiffs' motion were properly considered a phase 1 motion (which it is not, as explained above), it was untimely filed on December 15, 2003, after the phase 1 motions deadline. CR336/ER26 at 4.

Furthermore, plaintiffs cannot escape the untimeliness of their motion by claiming it was a timely countermotion, as countermotions were prohibited without leave of court. CR336/ER26 at 2. But even if countermotions were allowed, the District court properly found that plaintiffs' motion was not a true countermotion because it raised issues that were very different from the primary issued raised in OHA's motion, which was to have plaintiffs' claims dismissed under the political question doctrine. CR336/ER26 at 2-4.

2. Beyond the procedural defects, Plaintiffs' motion can be denied because Existing Congressional Legislation Demonstrates the Applicability of the Mancari doctrine.

It is unnecessary to address the applicability of the Mancari doctrine, because that merits issue is not technically before this Court, plaintiffs' claims having been dismissed on justiciability grounds. Moreover, the District Court has not yet had a chance to address the issue (phase 2 was never reached).

Nevertheless, plaintiffs have raised and argued the issue on appeal and ask this Court to "direct, on remand, that Mancari is inapplicable to this case and [that] the standard of review . . . is strict scrutiny." Open.Br. 48-55. Accordingly, out of an abundance of caution, we will briefly demonstrate the applicability of the Mancari doctrine. In addition, the discussion will provide an appropriate background for our showing that the issues upon which plaintiffs assert collateral estoppel are irrelevant or have not in fact been decided. See Subsection 3, infra.

Plaintiffs rely principally on standard Adarand doctrine, 515 U.S. 200 (1995), which has little or no applicability to programs benefiting indigenous peoples. The critical issue for the underlying merits of this case, of course, is whether the Mancari doctrine applies. That doctrine -- allowing governmental preferences for indigenous peoples to survive equal protection attacks as long as the programs are "tied rationally" to the fulfillment of the government' s unique obligation to the indigenous people, Mancari, 417 U.S. at 555 -- is the critical equal protection issue in the underlying case.

Plaintiffs rely upon Rice, but that case does not resolve the issue of whether the Mancari doctrine applies to benefit programs for Native Hawaiians. Rice merely decided that in the context of Fifteenth Amendment voting rights, the Mancari doctrine was inapplicable -- the Mancari case, after all, did not involve voting rights or the Fifteenth Amendment -- and thus a state could not restrict

voting rights in elections of its public officials to Native Hawaiians **or to tribal Indians**. Id. at 520. Rice made no distinction whatsoever between Native Hawaiians or tribal Indians, saying it would "stay far off that difficult terrain." Id. at 518-19. Accordingly, nothing in Rice precludes the applicability of the Mancari doctrine to the Native Hawaiian benefit programs challenged in this case under the Fourteenth Amendment. Rice merely decided that when it comes to the Fifteenth Amendment, the Mancari doctrine could not be used to save restrictions on who may vote for elected public officials, whether the restrictions were in favor of tribal Indians, or Native Hawaiians. This Court, in Arakaki v. State ("Arakaki I"), 314 F.3d 1091 (9th Cir. 2002), merely extended the Rice ruling to strike down restrictions on who may be the public official (as opposed to the voter for the public official) as well, again solely on Fifteenth Amendment and Voting Rights Act grounds, id. at 1094-97; however, it expressly struck out all of Judge Gillmor' s Fourteenth Amendment ruling. Id. at 1097-98.

In short, plaintiffs have not, and cannot, demonstrate the inapplicability of the Mancari doctrine to the Native Hawaiian benefit programs they challenge here. Native Hawaiians have the same critical characteristics common to tribal Indians, to whom the Mancari doctrine indisputably applies. Most importantly, Native Hawaiians, like tribal Indians, are a distinct indigenous people, unlike the typical minority group that simply immigrated to the United States from another

homeland.[17] Second, like tribal Indians, Native Hawaiians lost their land and full sovereignty to the expanding United States frontier, resulting in significant suffering and need for special consideration and protection.[18] Given these critical shared similarities, therefore, Congress certainly has the authority to treat Native Hawaiians specially as it does the Indian tribes. As the United States Supreme Court has made clear:

> Of course, it is not meant by this that Congress may bring a community or body of people within the range of [its Indian affairs] power by **arbitrarily** calling them an Indian tribe, but only that in respect of distinctly Indian communities **the question whether**, to what extent, and for what time **they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts.**

United States v. Sandoval, 231 U.S. 28, 46 (1913). Thus, Congress' authority to deal specially with Native Hawaiians is almost beyond court review, subject at

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[17] Rice v. Cayetano, 528 U.S. at 500 ("the first Hawaiian people . . . were Polynesians who voyaged from Tahiti and began to settle the islands around A.D. 750. When England' s Captain Cook made landfall in Hawaii . . . in 1778, the Hawaiian people had developed, over the preceding 1,000 years or so, a cultural and political structure of their own.").

[18] See, e.g., Apology Resolution, 107 Stat. at 1512-13 (Congress acknowledges that Hawaiians "never directly relinquished their claims to their inherent sovereignty as a people or over their national lands," and that 1.8 million acres of land of the Kingdom of Hawaii were taken "without the consent of or compensation to the Native Hawaiian people"); 42 U.S.C. § 11701(22) (noting that the "health status of Native Hawaiians continues to be far below . . . the general population"); 20 U.S.C. § 7902(17) (noting numerous educational deficiencies and other social problems among Hawaiian children and adults).

most to a highly deferential "arbitrariness" standard.[19]

And it is beyond dispute that Congress has in fact exercised its Indian Commerce Clause authority to deal specially with Native Hawaiians in dozens of statutes by repeatedly singling out Native Hawaiians for special treatment, either uniquely,[20] or in concert with other Native Americans, including Indian tribes.[21] This Court and Congress have repeatedly acknowledged that the United States continues to have a "special relationship" with, and trust obligation to, Native

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[19] Indeed, although Alaska Natives are not organized into "tribes" in an anthropological sense (and were not even recognized by the BIA until 1993), Hynes v. Grimes Packing Co., 337 U.S. 86, 110n.32 (1949), the Supreme Court has never questioned Congress' authority to single out and deal with Alaska Natives as such. See, e.g., Alaska v. Native Village of Venetie, 522 U.S. 520, 523-24 (1998) (never questioning the validity of the Alaska Native Claims Settlement Act of 1971, which gave Alaska Natives 44,000,000 acres of land and almost $1,000,000,000).

[20] See, e.g., Admission Act § 5(f); Hawaiian Homes Commission Act; Hawaiian Homelands Homeownership Act of 2000; Native Hawaiian Education Act, 20 U.S.C. § 7901 et seq.; the Native Hawaiian Health Care Improvement Act of 1992, 42 U.S.C. § 11701 et seq.; 20 U.S.C. § 4441 (Program for Native Hawaiian and Alaska Native Culture and Arts); 20 U.S.C. § 7118 (allotting money for drug and violence prevention programs); 42 U.S.C.§ 254s (Native Hawaiian Health scholarship); 42 U.S.C. § 3057 et seq. (Native Hawaiian Health Program).

[21] See, e.g., Native Americans Programs Act of 1974 (See 42 U.S.C. § 2991 et seq.); American Indian Religious Freedom Act of 1978 (42 U.S.C. § 1996); National Museum of the American Indian Act (20 U.S.C. § 80q et seq.); Native American Graves Protection and Repatriation Act (25 U.S.C. § 3001 et seq.); National Historic Preservation Act (16 U.S.C. § 470 et seq.); the Native American Languages Act (25 U.S.C. § 2901 et seq.); 42 U.S.C. §3011 (establishing Office for American Indian, Alaska Native, and Native Hawaiian Programs on Aging).

Hawaiians.[22] Indeed, Congress has expressly stated, "the political status of Native Hawaiians is comparable to that of American Indians." Hawaiian Homelands Homeownership Act of 2000 ("HHHA 2000"), Section 202(13)(D). For plaintiffs to cavalierly suggest that Hawaiians "have no . . . unique status," Open.Br. 20, contradicts the dozens of congressional statutes recognizing the special relationship the United States has with the Native Hawaiian people.

Consequently, contrary to plaintiffs' assertion that we are asking "federal courts to change Congress' decision not to deal with Native Hawaiian groups as political entities," Open.Br. 20, Congress has **already** decided to use its Indian affairs powers (including the Indian Commerce Clause -- Art. I, Section 8, Clause 3) to deal specially with the Native Hawaiian people, both by acknowledging a "special relationship" with, and trust obligation to, Native Hawaiians, and by providing them with numerous special benefits, either uniquely, or in common with other indigenous peoples. That the federal government's relationship with

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[22] See, e.g., Admissions Act § 5(f) (requiring Hawaii to hold ceded lands "as a public trust" for "the betterment of the conditions of native Hawaiians") -- Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n, 739 F.2d 1467, 1471 (9th Cir. 1984) ("The Admission Act clearly mandates establishment of a trust for the betterment of native Hawaiians."); 42 U.S.C. § 11701(13) (Congress finds that the Hawaiian Homes Commission Act "affirm[s] the trust relationship between the United States and the Native Hawaiians"); 20 U.S.C. §7902(13) ("special relationship . . . exists between United States and the Native Hawaiian people"); Homelands Homeownership Act of 2000, Section 202(13)(B) (Congress states that Hawaiians have a "unique status as [a] people . . . to whom the United States has established a trust relationship").

Native Hawaiians may not be precisely identical to its relationships with other Native American Indian tribes, or even with Alaska Natives, of course, hardly means that Congress has not exercised its Indian affairs powers to deal specially with Native Hawaiians. As we quoted from Sandoval earlier, "the question whether, [and] **to what extent** . . . they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts. 231 U.S. at 46.[23] In short, Congress need not deal with all of the United States' indigenous peoples in precisely the same way; but it plainly has the authority to deal specially with Native Hawaiians as indigenous peoples, and has in fact done so.

In sum, the Mancari doctrine easily applies to the Native Hawaiian benefit programs challenged in this case, and thus, even if this Court were to reject the District Court's political question basis for dismissal, it should not direct, on remand, that Mancari is inapplicable to this case or that the standard of review is

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[23] Thus, plaintiffs' attempt to distinguish Alaska Chapter v. Pierce, 694 F.2d 1162 (9th Cir. 1982), because Alaska Natives were recognized by treaty, Open.Br. 19-20, is without merit. Recognition of Native Hawaiians by congressional legislation, rather than by treaty, is within Congress' prerogative. Indeed, "final" resolution of Alaska Natives' status came via the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 et seq., a piece of congressional legislation, not a treaty. Nor is there any merit to plaintiffs' suggestion that Congress has no power to deal specially with Native Hawaiians just because they were treated as full citizens of the United States, Open.Br. at 20n.4, as the United States to this day continues to deal specially with tribal Native Americans and Alaska Natives who are also full citizens of the United States.

strict scrutiny. Indeed, if this Court remands, it could, if it agrees with the above argument, direct instead that the standard of review is the deferential rational basis standard specified in Morton v. Mancari, although the issue ought to be left to the District Court to consider in the first instance.

3. The issues upon which plaintiffs assert collateral estoppel are either irrelevant or not determinative of the key issues in the underlying case.

As just demonstrated in the previous subsection, the Mancari doctrine should apply to plaintiffs' challenge to the DHHL and OHA Native Hawaiian qualifications. Nevertheless, by pointing to certain language in either the Rice case or Judge Gillmor's summary judgment ruling in Arakaki I (**"SJruling"**), ER25 Exh.1, plaintiffs feebly attempt to suggest that Mancari does not apply. They are patently wrong.

First, plaintiffs cite to Rice and the SJruling for the proposition that "the definitions of 'native Hawaiian' and 'Hawaiian' in SHR 20-2 are racial classifications." Open.Br. 48. Although Rice found the Native Hawaiian voting qualification to be "race-based," it only did so in opposition to a special argument (not made in this case) that the restriction was based on time and place, not race, in that the Native Hawaiian category was both racially underinclusive and overinclusive. See Rice, 528 U.S. at 514-17. The Mancari argument, however, is a wholly different argument, and the Rice Court addressed it only to the extent of saying that it would not apply in the context of Fifteenth Amendment voting rights.

Id. at 519-22. But Rice plainly did **not** say the doctrine could not apply in the Fourteenth Amendment benefits program context, or that it could not apply to Native Hawaiians. It thus does not matter that Rice found the Native Hawaiian classification to be "race-based" in the Fifteenth Amendment context, as nothing in Rice precludes this or any other court from holding that Native Hawaiian benefit programs are nonetheless entitled to Mancari "tied rationally" review in the Fourteenth Amendment context, the same way benefit programs for American Indian tribes are reviewed. As pointed out before, the Rice decision made no distinction whatsoever between Indian tribes and Native Hawaiians, explicitly choosing to "stay far off [the] difficult terrain" of deciding whether "Congress may treat the Native Hawaiians as it does the Indian tribes." Id. at 518-19.[24]

Second, plaintiffs note that Rice stated that OHA is a state agency, and "is not itself a quasi-sovereign," Open.Br. 48-49. That hardly dictates the outcome in this case. That OHA is a state agency and not a quasi-sovereign simply means, according to Rice, that OHA' s actions are "state action" for purposes of the Fourteenth or Fifteenth Amendments, a position we have never disputed. Rice, 528 U.S. at 520-22 ("OHA is a state agency . . . [and] an arm of the State. . . . [Accordingly,] the elections for OHA trustee are elections of the State, not of a

[24] Similarly, the SJruling is equally irrelevant, as that ruling, too, was limited to the Fifteenth Amendment (and Voting Rights Act), and thus cannot control the critical issue of Mancari' s applicability to the currenFourteenth Amendment challenge.

separate quasi sovereign, and [thus] they are elections to which the Fifteenth Amendment applies"). In short, Rice held that OHA elections involved "state action," thereby subjecting them to the Fifteenth Amendment, whereas internal Indian tribal elections were elections of a quasi-sovereign not involving state action, and thus were not even subject to the Fifteenth Amendment at all. Internal Indian tribal elections can be limited to Indians, therefore, **not** because of the Mancari doctrine, but because the Fifteenth Amendment does not even apply.

In sum, OHA's status as a state agency non-quasi-sovereign is **not** what prevented application of the Mancari doctrine in Rice. (Instead, as explained supra at 33-34, 39-40, it was the unique Fifteenth Amendment voting rights context that precluded application of the Mancari doctrine in Rice.) This is obviously true, too, as the Bureau of Indian Affairs in the Mancari case itself was, like OHA, a governmental agency, and not a quasi-sovereign, making its Indian hiring preference "state action," too, but that did not prevent the Supreme Court from upholding the preference and rejecting the equal protection attack under the Mancari doctrine.

Third, plaintiffs cite the SJruling for the notion that the "State does not have the same unique relationship with Hawaiians and native Hawaiians as the federal government has with Indian tribes." Open.Br. 49 (referencing SJruling at 25). But that hardly controls the result in this case, as that same SJruling went on to note

that "the Mancari rule extends to state legislation favoring tribal Indians under certain circumstances," including legislation "identifying [Native Hawaiians as] the beneficiaries of [the ceded] lands." SJruling at 25, 27. The SJruling simply rejected the notion that Congress had authorized Hawaii to "discriminate . . . as to who may serve as a state official to administer these lands," SJruling at 27, **but acknowledged that Congress had authorized Hawaii "to use public lands for the betterment of native Hawaiians."** SJruling at 27. For the same reason, plaintiffs' reference to the SJruling's statement that Congress "did not authorize the State to restrict the **administration** of [the] trust to a particular race," Open.Br. 49, has no bearing whatsoever upon the issue in this case, which is whether Congress authorized the State to use the trust for the betterment of native Hawaiians, to which the SJruling clearly and correctly answered "yes." See bold-faced quotation in prior sentence.

Fourth, plaintiffs note that the SJruling rejected the State's Mancari argument, Open.Br. 49, but of course, that was a Fifteenth Amendment voting rights case, which the Ninth Circuit affirmed on appeal based simply upon Rice's rejection of the Mancari doctrine's applicability to the unique Fifteenth Amendment voting rights context. See Arakaki v. State, 314 F.3d at 1095 (9th Cir. 2002) ("There is no principled basis on which to distinguish [the Rice] holdings in this case."). The SJruling thus has no bearing on Mancari's applicability to this

Fourteenth Amendment case.

Similarly, Plaintiffs' final sentence on p.49 of their brief is simply Rice's rejection of Mancari's applicability to Fifteenth Amendment challenges; it thus has no bearing upon this Fourteenth Amendment case.

Plaintiffs' citation to the SJruling for the proposition that the "scope of the rule announced in Mancari is limited to tribal Indians," Open.Br. 50, is inaccurate. The SJruling only said that the scope of the ruling in Mancari is "limited," and simply parenthetically quoted Mancari's own language noting that tribal Indians receive unique favored treatment. SJruling at 22. But Rice itself makes clear that the Mancari doctrine (outside the Fifteenth Amendment context) could very well apply to Hawaiians -- noting the existing "dispute [as to] whether Congress may treat the [N]ative Hawaiians as it does the Indian tribes" -- but chose to "stay far off that difficult terrain." 528 U.S. at 518-19.

Plaintiffs' citation to the SJruling's statement that the "preference at issue in Mancari only applied to the BIA," Open.Br. 50, is, of course, simply an insignificant statement of fact: namely, that the preference in the Mancari case was a hiring preference in the BIA. That fact, of course, says nothing as to the applicability of the Mancari doctrine to the Hawaiian benefit programs challenged in this case.

That the SJruling noted that the "legal status of the BIA is truly sui generis,"

Open.Br. 50, of course, does not mean that OHA or DHHL Hawaiian benefit programs cannot receive the benefit of the Mancari doctrine. Indeed, dozens of congressional programs providing special benefits to tribal Indians wholly independent of the BIA are constitutional because of the Mancari doctrine.

Finally, the SJ ruling's noting that Rice excluded Mancari's application to the OHA voting scheme precisely because OHA is an agency of the State," can only mean what Rice originally said -- namely, that because OHA is an agency of the State, its voting scheme constitutes "state action," and is thus subject to the Fifteenth Amendment. 528 U.S. at 522 (Because "the elections for OHA trustee are elections of the State . . . they are elections to which the Fifteenth Amendment applies"). It was the Fifteenth Amendment voting rights context, however, not the "state action" component, that precluded Mancari's application in Rice as well as in Arakaki I. As pointed out before, the mere fact that the native qualification or preference is given out by a governmental agency, and not a quasi-sovereign (thus yielding "state action"), does not preclude Mancari's applicability, as the Mancari case itself upheld the preference provided by the BIA, a non-quasi-sovereign governmental agency.

All of plaintiffs' discussion, Open.Br. 55, regarding their being no "federally recognized native Hawaiian or Hawaiian tribes" is immaterial. Hawaiians and native Hawaiians may receive Mancari treatment if they are "Indian tribes" within

the meaning of the **Indian Commerce Clause**. For it is the Indian Commerce Clause that provides the key source of Congress' ability to provide special treatment to indigenous peoples. See Mancari, 417 U.S. at 552 ("Article I, § 8, cl. 3, provides Congress with the power to ' regulate Commerce … with the Indian Tribes,' and thus, to this extent, singles Indians out as a proper subject for separate legislation.").

That Hawaiians are not an Indian tribe under the latest executive meaning of those terms[25] is irrelevant, because, as distinct indigenous people, they certainly are "Indian tribes" within the meaning of the Indian Commerce Clause. See supra at 34-36. Indeed, the Framers used "Indian" to refer to the aboriginal "inhabitants of our Frontiers." Declaration of Independence paragraph 29 (1776); see also Thomas Jefferson, Notes on the State of Virginia, 100 (William Peden ed. 1955) (1789) (referring to Indians as "aboriginal inhabitants of America"). Even Captain Cook and his crew called the Islanders who greeted their ships in 1778 "Indians." 1 Ralph S. Kuykendall, The Hawaiian Kingdom at 14 (1968) (quoting officer journal).

The word "tribe" also should include Hawaiians, for at the time of the founding, "tribe" simply meant a "distinct body of people as divided by family or

[25] Hawaiians do not meet the criterion of being within the continental United States, and might not have a governing body that has maintained continuous political influence over its members. See 25 CFR §§ 83.1, 83.7.

fortune, or any other characteristic." Thomas Sheridan, A Complete Dictionary of the English Language (2d ed. 1789). And, as explained supra at 35-36, as long as it is not acting "arbitrarily," it is Congress' exclusive prerogative to decide which indigenous peoples to treat specially under its Indian Commerce Clause powers. See Sandoval, 231 U.S. at 46.

4. The Arakaki I decision cannot be given collateral estoppel effect.

As just demonstrated above in subsection 3, supra, the issues decided by District Judge Gillmor in her SJruling in Arakaki I did not resolve any key issues relevant to this case given that this case involves a Fourteenth Amendment challenge to benefit programs, not the Fifteenth Amendment challenge to elected trustee candidate qualifications decided in Arakaki I. But even if Judge Gillmor's Arakaki I ruling had decided issues of relevance to this very different case, it is not entitled to collateral estoppel effect in any event.

First, a federal court has broad discretion not to apply the doctrine offensively. See Robi v. Five Platters, Inc., 838 F.2d 318, 321 (9th Cir. 1988) ("As to issue preclusion, '[o]nce we determine that [it] is available, the actual decision to apply it is left to the district court's discretion.'"); U.S. v. Sandoz Pharmaceuticals Corp., 894 F.2d 825, 826 (6th Cir. 1990) (citing Plaine v. McCabe, 797 F.2d 713, 718 (9th Cir. 1986)) (even where "elements of collateral estoppel are present, a district court has **broad discretion** to determine when the doctrine should be

applied offensively"). That discretion should be exercised against the doctrine's application here because: 1) the issues previously decided were, at minimum, not the same, 2) Judge Gillmor's entire Fourteenth Amendment ruling was withdrawn pursuant to the Ninth Circuit's direction, 3) the issues are issues of law, not of fact, 4) collateral estoppel would have an adverse impact on the public interest and the interest of persons not parties to the initial action, and 5) the stakes are much higher here than in Arakaki I.

As to point 1, and as explained above, supra at 39-40 & n.24, 42-43, the issues are not the same at all, as Arakaki I addressed the Mancari doctrine only in the very special context of Fifteenth Amendment voting rights issues (the context presented in Rice), not in the Fourteenth Amendment equal protection context relevant here. Indeed, and as to point 2 as well, Judge Gillmor's initial ruling on the Fourteenth Amendment was **withdrawn** pursuant to the Ninth Circuit's direction on appeal, see ER25 Exh.1 at 28, 34; 314 F.3d at 1098, and thus there is nothing left of Judge Gillmor's ruling that has any applicability to the Fourteenth Amendment challenge brought in this case. Accordingly, any statements made in Judge Gillmor's ruling regarding Mancari have no bearing whatsoever on whether the Mancari doctrine applies in this Fourteenth Amendment case.

As to point 3, the Ninth Circuit has stated that "[i]ssue preclusion has never been applied to issues of law with the same rigor as to issues of fact." Segal v.

AT&T, 606 F.2d 842, 845 (9th Cir. 1979). The issues plaintiffs seek to preclude are purely issues of law, and so this factor alone counsels against application of the collateral estoppel doctrine.

As to point 4, the general rule is that:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is **not** precluded [where]: . . . There is a clear and convincing need for a new determination of the issue (a) because of the **potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action**.

Restatement of Judgments 2d § 28(5) (1982). In this case, of course, subjecting the challenged programs to strict scrutiny would have serious adverse impact on both the public interest and persons not parties to the Arakaki I action. The public interest is threatened because a) plaintiffs are attacking the validity of programs constitutionally adopted by the people of Hawaii, see Haw. Const. Art. XII, Sections 1-6, and b) a successful attack would destroy the public interest in fulfilling historically-rooted trust obligations to the indigenous people of Hawaii. Finally, the interests of roughly 200,000 persons **not parties to Arakaki I** -- i.e., potentially all Hawaiian and native Hawaiian people in the islands -- are threatened by plaintiffs' collateral estoppel claim.

As to point 5, because the stakes in this case are much higher than they were in Arakaki I -- unlike the narrow elected trustee restriction challenged in Arakaki I,

the **entire purpose, and existence**, of OHA and DHHL is threatened here -- this Court should not apply collateral estoppel in a case with such profound consequences. See Disimone v. Browner, 121 F.3d 1262, 1268 (9th Cir. 1997) (citing Parklane Hosiery, 439 U.S. at 331 (1979)) (**collateral estoppel inappropriate where "the second action involves substantially higher stakes than the first"**). Even after the defeat in Arakaki I, although Hawaiians could no longer be the only candidates for OHA trustee, Hawaiians still had an OHA to provide a multitude of programs and benefits to deal with their special needs. Plaintiffs in this case, however, seek to essentially wipe out OHA in its entirety, by invalidating its entire mission, and thereby depriving OHA of the ability to provide special benefits for Hawaiians.

For the above reasons, therefore, even if this Court concluded that Judge Gillmor's ruling in Arakaki I did resolve some important issues presented in the case at bar, it should not give that resolution collateral estoppel effect.[26]

E. 22 Months of "Delay."

Plaintiffs' allegations of delay are especially frivolous. **Plaintiffs themselves** were the biggest cause of any delay in their attempt to stop the

[26] Nor would Judge Gillmor's sub-rulings incorporated in Arakaki I carry any **stare decisis** effect, as a "decision of a federal district judge is not binding precedent in [even] the same judicial district, or even upon the same judge in a different case," Moore's Federal Practice 3d, § 134.02[1][d] (2000), much less this superior Ninth Circuit Court.

expenditure of monies on DHHL and OHA programs. Plaintiffs could have sought immediate preliminary injunctive relief when they filed their lawsuit. Instead they withdrew their preliminary injunction request, CR164/SER164, and let nearly **2 years** go by in the District Court without ever seeking such an injunction. After the District Court threw out their case, plaintiffs filed this appeal, and then waited **2 months** to file a motion for injunction pending appeal. Finally, they failed to seek an expedited appeal in this case. Thus, plaintiffs themselves have contributed more to the alleged delay than any other party to this case. For them to now complain about the District Court's delay is absurd and hypocritical.

Indeed, given plaintiffs' failure to seek preliminary injunctive relief in the District Court for that nearly 2 year time period, the District Court had every reason to believe that plaintiffs' cries of "justice delayed is justice denied" was sheer nonsense. See Oakland Tribune v. Chronicle Pub. Co., 762 F.2d 1374, 1377 (9th Cir. 1985) ("Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm.").

As to the precise objections plaintiffs raise regarding alleged "delaying" actions of the District Court, plaintiffs conveniently fail to address the very good reasons the District Court had for its actions. Plaintiffs' attack on the District Court for insisting that summary judgment motions not be filed until after motions challenging plaintiffs' standing were first heard is patently absurd, as the District

Court was surely right to confirm the extent of its own jurisdiction over the case before exercising such jurisdiction by resolving a summary judgment matter. Indeed, the standing motions resulted in the court substantially limiting plaintiffs' challenge.

Given the complexity of the Equal Protection challenge in this case, the District Court's then setting plaintiffs' preliminary injunction motion less than 5 months after the case was filed is hardly inordinate delay. Indeed, plaintiffs have no right to complain when they chose to withdraw that very motion and then wait nearly 2 years before seeking similar injunctive relief. See discussion supra at 49-50.

Plaintiffs' objection to the purported delay in the court's actions in ultimately "trifurcating" the case into three phases is certainly baseless as the court was simply ensuring that this complex case would be heard in an orderly and logical fashion, and in a manner that would avoid forcing the parties and the court to deal with issues that might never arise depending upon the outcome of prior phases. Although plaintiffs wished to jump the gun and even concede bifurcation -- after initially opposing it -- the court properly insisted that the defending parties set forth the exact parameters and effects of the various phasing schemes they proposed, CR200/SER200 at 2, in order to ensure that the case would be resolved in the most efficient and fair manner. Pending resolution of the bifurcation issue, other

significant matters occurred, including dismissal of the United States, CR205/ER8, and denial of plaintiffs' motion for reconsideration of that dismissal and of plaintiffs' suggestion that the court reconsider its previous standing rulings. CR209/SER209.

Plaintiffs' objection to the court's decision to reschedule hearings upon learning of the serious medical condition of one of plaintiffs' lead attorneys is facially absurd, as the court was actually protecting plaintiffs' interest by insisting that they be fully and competently represented at a critical hearing. By the time the attorney sadly passed away, another case had been placed in the original hearing slot, and the court placed the deferred hearing into the court's next earliest possible time slot for hearings of significant magnitude. ER32 Exh. 8.

Plaintiffs then object to the "delay" resulting from the issuance by the Ninth Circuit of its critical decision in the separate Carroll case, which the District Court believed could have an impact upon plaintiffs' standing in this case. As it turned out, and after briefing by the parties, the Carroll case did indeed substantially narrow plaintiffs' standing and resulted in the dismissal of a substantial portion of plaintiffs' caseSee discussion supra at 7-8. Rather than acknowledge this good reason, plaintiffs only quote their attorney's cries of anguish over the postponement. Open.Br. 63-64.

Next, plaintiffs complain that the political question dismissal should have

come earlier if it was to come at all, neglecting the fact that plaintiffs vigorously opposed such dismissal when it was raised earlier, CR87, and the fact that the District Court construed the later political question motion as being substantively different from the first political question motion. CR354/ER28 at 13-16.

Finally, plaintiffs' request for assignment to a different judge in the event of remand is unwarranted and insulting to Judge Mollway, a well-respected federal judge, whose actions in this case should be commended for ensuring that careful consideration was given to all of the dozens of motions, rather than attacked as a delay tactic.

F. Bills of Cost and Discovery Order

Plaintiffs' suggestion that the cost award should be reversed based upon indigency is frivolous, as they cite no evidence of their indigency. Nor is there any evidence that the roughly $5,300 cost award, CR373/ER34, spread over 13 plaintiffs, would chill future civil rights litigants.

Lastly, plaintiffs simply ask for reversal of a discovery order without providing any argument whatsoever as to why reversal is warranted. Not only does that speak for itself, but it violates HRAP 28(a)(9)(A), which requires that appellants give "reasons for" their contentions on appeal.

IV. CONCLUSION

For the foregoing reasons, the District Court' s ruling should be AFFIRMED.

DATED: Honolulu, Hawaii, August 3, 2004.

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_____
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CERTIFICATION OF COMPLIANCE TO FED. R. APP. 32(a)(7)(C)
AND CIRCUIT RULE 32-1 FOR **CASE NUMBER 04-15306**

I certify that:

_X_ 1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **answering** brief is:

Proportionately spaced, has a typeface of 14 points or more and contains

_13,863_ words (**answering** briefs must not exceed **14,000** words).

August 3, 2004
Date

_____
Girard D. Lau
Deputy Attorney General
Attorney for **State Defendants-Appellees and HHCA/DHHL Defendants-Appellees**

STATEMENT OF RELATED CASES

State Defendants-Appellees and HHCA/DHHL Defendants-Appellees are unaware of any cases pending in this Court that are related to this case.

DATED: Honolulu, Hawaii, August 3, 2004.

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ADDENDUM

The Admission Act, Sections 1-5

Hawaiian Homes Commission Act (HHCA) -- selected sections

Apology Resolution, 107 Stat. 1510

Hawaiian Homelands Homeownership Act of 2000

20 U.S.C. § 7902

42 U.S.C. 11701

Hawaii State Constitution, Article XII, Sections 1-6

Hawaii State Constitution, Article XVI, Section 7

Hawaii Revised Statutes (HRS) §10-2

Hawaii Revised Statutes (HRS) §557A-103

Act 304, Hawaii Session Laws 947 (1990) -- selected sections

Act 35, Hawaii Session Laws 41 (1993) -- sections 1-3

Act 14, Hawaii Special Session Laws 696 (1995)

Act 200, Hawaii Session Laws 457 (2003) -- selected sections

NO. 04-15306

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EARL F. ARAKAKI, et al., Plaintiffs-Appellants, vs. LINDA LINGLE, in her official capacity as GOVERNOR OF THE STATE OF HAWAII, et al., State Defendants-Appellees,	D.C. No. CV-02-00139 SOM/KSC ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAI' I

[caption continued on next page]

SUPPLEMENTAL EXCERPTS OF RECORD
OF STATE DEFENDANTS-APPELLEES
AND HHCA/DHHL DEFENDANTS-APPELLEES

CERTIFICATE OF SERVICE

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HHCA/DHHL Defendants-Appellees,)
)
THE UNITED STATES OF AMERICA, and JOHN DOES 1-10)
)
Defendants-Appellees,)
)
STATE COUNCIL OF HAWAIIAN HOMESTEAD ASSOCIATIONS, and ANTHONY SANG, SR.,)
)
SCHAA Defendants/Intervenors-Appellees)
)
HUI KAKO' O' AINA HO' OPULAPULA, BLOSSOM FEITEIRA and DUTCH SAFFERY,)
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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing were duly served on each of the following persons by depositing the same in the U.S. mails, first class postage prepaid, on August 3, 2004:

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August 3, 2004

Clerk
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San Francisco, CA 94119-3930

RE: Arakaki v. Lingle, No. 04-15306

Dear Clerk of Court:

This is to inform you that in the above-entitled case, we have a motion for a 28-day extension of time (extended due date, if granted, would be August 3, 2004) to file our Answering Brief pending before this Honorable Court, and that as of today, the motion has not yet been ruled upon.

Sincerely,

Girard D. Lau
Deputy Attorney General
State of Hawaii
Attorney for State Defendants-Appellees
and HHCA/DHHL Defendants-Appellees