NO. 04-15306

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EARL F. ARAKAKI, et al.,

Plaintiffs-Appellants,

vs.

LINDA LINGLE, et al.,

Defendants-Appellees.

DEFENDANTS-APPELLEES OFFICE OF HAWAIIAN AFFAIRS' MEMORANDUM IN RESPONSE TO PLAINTIFFS-APPELLANTS' MOTION FOR INJUNCTION TO PRESERVE STATUS QUO PENDING APPEAL

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I. INTRODUCTION.

Plaintiffs-Appellants Arakaki State Taxpayers have filed an unorthodox and wholly unsubstantiated "Motion for Injunction to Preserve Status Quo Pending Appeal." These State Taxpayers withdrew their Motion for Preliminary Injunction at the District Court on June 24, 2002. Docket 164. Had the State Taxpayers' Motion for Preliminary Injunction been denied, the State Taxpayers would have had the right to appeal and then properly present the issue to this Honorable Court. (*See* 28 USC 1292). State Taxpayers have proved by their affirmative refusal to pursue a preliminary injunction at the District Court that a preliminary injunction is not needed. This Motion should be summarily dismissed.

Federal Rules of Appellate Procedure, Rule 8(a) does not ordinarily permit State Taxpayers' motion. It provides that a motion for preliminary injunction must ordinarily first be made in the district court and is governed by FRCP Rule 62. *(See Cumberland Tel. Co. v. Louisiana Pub. Serv. Comm'n*, 260 U.S. 212 (1922); *Moore's Federal Practice - Civil* Sec. 308.12 (2004 ed.). There is nothing exceptional here to justify granting State Taxpayers' motion (*see* FRAP, Rule

8(a)(2)).

State Taxpayers are not, in fact, seeking to "preserve status quo" but rather they are asking this Honorable Court to alter the status quo dramatically. Under the "status quo," Native Hawaiians[1] have been receiving certain payments for long-term programs to support their housing, education, and other legitimate needs as established by Congress and the Hawaii State Legislature. These revenue streams are based on partial settlements of property-based claims of Native Hawaiians that have been recognized as valid and legitimate repeatedly by the federal and state governments. As the District Court explained, the claims of Native Hawaiians are based on the occurrences of January 17, 1893, when "the United States overthrew the Kingdom of Hawaii" and the acknowledgment by Congress a "century later...that this overthrow was illegal, and that it deprived native Hawaiians of their right to self-determination. *See* P.L. 103-50 (November 23, 1993), *reprinted in* 107 Stat. 1510

[1] In light of the claims presented by State Taxpayers, the OHA Appellees use the term "Native Hawaiian" in the same manner it is used in the Hawaiian Homelands Homeownership Act of 2000, Pub. L. No. 106-568, 114 Stat. 2868 (2000), sec. 801(a), where this term is defined as any individual who is (A) a citizen of the United States and (B) a descendant of the aboriginal people, who prior to 1778, occupied and exercised sovereignty in the area that currently constitutes the State of Hawaii. This definition has been used by Congress in legislation dealing with Native Hawaiians since 1974. The Hawaiian Homes Commission Act, 1920, 42 Stat. 108 (1921), as amended, defines "native Hawaiian" to refer to persons with 50% Hawaiian blood and also permits those with 25% Hawaiian blood to hold leases as successors.

('Apology Resolution')." *Arakaki v. Cayetano*, 198 F.Supp.2d 1165, 1170 (D.Hawaii 2002), Docket 26.

State Taxpayers argue that the programs established to provide partial compensation for the wrongs done to Native Hawaiians violate the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. As the Office of Hawaiian Affairs (OHA) Appellees will demonstrate below, and as OHA is prepared to demonstrate more fully when the normal briefing occurs, State Taxpayers' arguments are completely without foundation, and the District Court acted properly in dismissing State Taxpayers' Complaint.

State Taxpayers have a particularly difficult uphill struggle, because they must establish that they have a "likelihood of success" on the merits and also that they will suffer "irreparable harm" if their Motion is denied. In fact, based on the careful decisions rendered by the District Court dismissing State Taxpayers' Complaint, it must be presumed that State Taxpayers have little likelihood of success, and they have not demonstrated, nor can they demonstrate, that they are or will suffer any harm of any sort, much less an "irreparable" type of harm.

State Taxpayers presented a similar Motion for a Temporary Restraining Order when this case began in early 2002, Docket 4, and the District Court denied the TRO, concluding that they had only limited standing as taxpayers to challenge the programs

they disagreed with and that they could not demonstrate likelihood of success. *Arakaki v. Cayetano,* 198 F.Supp. 1165 (D.Hawaii 2002), Docket 26. The District Court explained that State Taxpayers had 'failed to demonstrate any possibility that they will be harmed during the time period for which this court may issue a temporary restraining order." *Id.* at 1173-74. State Taxpayers filed a motion for a preliminary injunction with the District Court, Docket 4, but withdrew this motion on June 24, 2002. Docket 164.

It is in fact the Office of Hawaiian Affairs (OHA), the Department of Hawaiian Home Lands (DHHL), and their beneficiaries that would suffer the irreparable harm if this Motion were to be granted. Their efforts to maintain well-established and ongoing programs to support the housing, education, health, and welfare needs of Native Hawaiians would be crippled if the injunction sought by State Taxpayers were to be issued. The District Court stated that it could 'foresee that an injunction precluding such an expenditure would conceivably endanger programs on which many people, both native Hawaiian and otherwise, depend." 198 F.Supp.2d at 1178, Docket 26. The District Court also concluded that even if the Plaintiffs (now State Taxpayers) had been persuasive in their argument that they might prevail on the merits, 'the balance of hardships appears to favor Defendants [now Appellees]. *See, e.g.,* Declaration of Jobie M.K.M. Yamaguchi [Docket 9]... (discussing the hardships

that a restraining order on the HHC and DHHL would cause)." *Id.* at 1181-82. State Taxpayers, who have the burden of proof regarding its Motion for an injunction, have presented no evidence that would persuade any decisionmaker to reach a contrary conclusion.

State Taxpayers' present Motion is totally frivolous and meritless, and this Honorable Court should consider awarding attorneys' fees and costs to the Appellees.

II. THE STANDARD GOVERNING THE ISSUANCE OF AN INJUNCTION ON APPEAL.

As State Taxpayers have acknowledged, the standard governing the issuance of an injunction on appeal is the same as the standard that applies to the issuance of an injunction by a trial court. State Taxpayers' Memorandum at 7 (*citing Walker v. Lockhart,* 678 F.2d 68, 70 (8th Cir. 1982)). To obtain a preliminary injunction, a party must demonstrate either: (1) probable success on the merits *and* irreparable injury; or (2) sufficiently serious questions going to the merits, with the balance of hardships tipping *decidedly* in favor of the party requesting relief. *Baby Tam & Co., Inc. v. City of Las Vegas,* 154 F.3d 1097, 1100 (9th Cir. 1998); *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1528 (9th Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994). When the public interest is involved, a court must examine whether the public interest favors the plaintiff. *Fund for Animals, Inc. v. Lujan,* 962 F.2d 1391,

1400 (9th Cir. 1992).

A party must demonstrate *immediate threatened injury* as a prerequisite to preliminary injunctive relief. *Associated Gen. Contractors of Cal., Inc. v. Coalition for Econ. Equity,* 950 F.2d 1401, 1410 (9th Cir. 1991), *cert. denied*, 503 U.S. 985 (1992). "A preliminary injunction is not a preliminary adjudication on the merits, but *a device for preserving the status quo* and preventing the irreparable loss of rights before judgment." *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1234 (emphasis added), *rehrg. en banc, affirmed and remanded*, 236 F.3d 115 (9th Cir., 2001)(*citing Sierra On-Line, Inc. v. Phoenix Software, Inc.,* 739 F.2d 1415, 1422 (9th Cir. 1984)). The issuance of an injunction is thus particularly inappropriate because State Taxpayers are not attempting to "preserve the status quo," but rather seek to shut down constructive governmental programs addressing specific needs that have been in existence for decades.

The cases cited by State Taxpayers to support their quest for an injunction are particularly inapt. Neither *Plomb Tool Co. v. Fayette R. Plumb, Inc.*, 171 F.2d 945 (9th Cir. 1949), nor *Tribal Village of Akutan v. Hodel*, 859 F.2d 662 (9th Cir. 1988), involved the issuance of an injunction by an appellate court, but rather both involved appellate action to stay the effect of an injunction issued by a lower court. In *Eastern Greyhound Lines v. Fusco*, 310 F.2d 632, 634-35 (6th Cir. 1962), the court declined

to issue an injunction pending appeal explaining that '[w]e will ordinarily withhold such relief unless the litigant seeking it is *presently* threatened with *irreparable* injury" and that '[t]he fear now entertained by Eastern does not, in our opinion, amount to the *present threat* of *irreparable* injury necessary to persuade us to employ the extraordinary remedy of injunction" (emphasis added). In *Public Utilities Comm'n of D.C. v. Capital Transit Co.*, 214 F.2d 242, 245, 250 (D.C. Cir. 1954), the court did enjoin the city's regulated bus company from issuing a dividend, but only for a "fixed" period to allow the Commission – "a governmental agency clothed by Congress with special responsibility in the matters involved" – to complete an ongoing investigation, and it rejected the Commission's request that it enjoin the company from redeeming its outstanding bonds.

These cases all demonstrate that the issuance of an injunction pending an appeal will be a rare and unusual occurrence and is not justified in this case.

III. STATE TAXPAYERS CANNOT DEMONSTRATE THAT THEY WILL SUFFER IRREPARABLE HARM AS TAXPAYERS.

A. State Taxpayers Have Standing Only as Taxpayers.

State Taxpayers filed their Complaint primarily as State Taxpayers. Their only alleged personal injury is the injury to their pocketbook that they might suffer as State Taxpayers. All other injuries are political in nature, and thus are "generalized

grievances" that are inadequate to obtain a forum in a federal court. The Supreme Court has said on many occasions that federal courts should not adjudicate abstract questions of wide public significance that are "pervasively shared and most appropriately addressed in the representative branches." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 475 (1982); *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *United States v. Hays*, 515 U.S. 737, 743 (1995).

The District Court ruled that State Taxpayers – as taxpayers – could challenge only the general fund expenditures from the State of Hawaii that funded the Office of Hawaiian Affairs (OHA) and the Department of Hawaiian Home Lands (DHHL). *Arakaki v. Cayetano*, 198 F.Supp.2d 1165, 1174-76 (D.Hawaii 2002), Docket 26. In their present Motion, they repeat arguments rejected below that their status as taxpayers entitles them to attack all aspects of every program that receives any tax money, but they are unable to cite to any case, outside the Establishment Clause area,[2] when any federal court has allowed such a broadscale attack by taxpayers. Relying upon *Hoohuli v. Ariyoshi*, 741 F.2d 1169 (9th Cir. 1984); *Cantrell v. City of Long*

[2] Establishment Clause cases are treated differently because of *Flast v. Cohen*, 392 U.S. 83 (1968), which provided a narrow exception to the usual rule disallowing taxpayer standing and allowed taxpayers to challenge expenditures alleged to violate the Establishment Clause of the First Amendment.

Beach, 241 F.3d 674 (9th Cir. 2001); and *Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991), *cert. denied,* 505 U.S. 1219 (1992), the District Court ruled that taxpayers challenging state expenditures "must allege a direct injury caused by the expenditure of tax dollars" and "must set forth the relationship between the taxpayer, tax dollars, and the allegedly illegal government activity." 198 F.Supp.2d at 1174, Docket 26. Based on this test, the District Court concluded that State Taxpayers had standing to challenge direct expenditures from the State of Hawaii from its general fund, but could not challenge any other activities by OHA or DHHL based on any other revenue sources they may have access to. *Id.* at 1175-76; *see also* Order Granting in Part and Denying in Part Motions to Dismiss on Standing Grounds, May 8, 2002, 299 F.Supp.2d 1090 (D.Hawaii 2002), Docket 117. The District Court further ruled that State Taxpayers could not establish that any foreseeable expenditures by OHA or DHHL would impose "irreparable harm" on them or that they had a likelihood of success on the merits of their claim. 198 F.Supp.2d at 1177-78, Docket 26. These rulings are certainly sound and this Honorable Court should reach the same conclusion.

B. State Taxpayers Have Failed to State a Claim for Relief as Beneficiaries of the Public Land Trust, Because They Are Not Seeking to Enforce the Terms of the Trust.

In their original Complaint and in this Motion for an injunction, State

Taxpayers have contended that they also have standing as beneficiaries of the public land trust to maintain their claims. State Taxpayers have relied upon language in the 1898 Newlands Resolution, 350 Stat. 750, to argue that as members of the general public they are beneficiaries of the lands ceded to the United States at the time of the annexation of Hawaii. In its first opinion in this case, the District Court carefully explained that State Taxpayers presented no cognizable cause of action as trust beneficiaries. The Newlands Resolution does not appear to "have actually created the trust alleged by Plaintiffs," *id.* at 1181, and, in any event, any trust that might have been created has been clarified or modified by subsequent Congressional actions in enacting the Hawaiian Homes Commission Act, 1920, 42 Stat. 108 (1921), and the 1959 Admission Act, Pub.L. 86-3, 73 Stat. 4 (1959). 198 F.Supp. at 1182, Docket 26.[3]

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[3] After State Taxpayers had submitted additional briefings, the District Court ruled that State Taxpayers had abandoned their claims based on the 1898 "trust" and relied exclusively on their status as beneficiaries of the trust created by the 1959 Admission Act. Order Granting in Part and Denying in Part Motions to Dismiss on Standing Grounds, May 8, 2002, 299 F.Supp.2d 1090 (D.Hawaii 2002) Docket 117. Despite this apparent change in strategy, the District Court found no greater merit in State Taxpayers' claim, applied the same analysis, and concluded that State Taxpayers were not bringing an action as trust beneficiaries to enforce the terms of a trust. Instead, they were bringing an action as "inhabitants" of Hawaii "demanding that the State ignore an express trust purpose, which Plaintiffs say violates the Equal Protection Clause." *Id.* at 1116-1117. Such a claim is thus "nothing more than a 'generalized grievance'" because "[a]lmost anyone here in Hawaii could conceivably bring these claims" and "[a]llowing such a

State Taxpayers' difficulty, therefore, is that they are not claiming that the trustee of the trust (the State of Hawaii) is failing to manage the trust in accordance with the terms established by Congress when it conveyed the lands in trust assets to the State in 1959, but rather they are claiming that the State's efforts to follow the terms of the Admission Act establishing the trust (which instructs the State to use revenues from these lands "for the betterment of the conditions of native Hawaiians") allegedly violates the Equal Protection Clause. The District Court explained that although decisions of this Honorable Court have concluded that beneficiaries of the Public Land Trust can bring claims to ensure that it is being managed according to the language of the Admission Act, *see, e.g., Price v. State of Hawaii*, 764 F.2d 623 (9th Cir. 1985); *Ulaleo v. Paty,* 902 F.2d 1395 (1990); *Napeahi v. Paty*, 921 F.2d 897 (9th Cir. 1990), *cert. denied*, 502 U.S. 901 (1991); *Price v. Akaka*, 928 F.2d 824 (9th Cir. 1990), *cert. denied*, 502 U.S. 967 (1991); and *Price v. Akaka*, 3 F.3d 1220 (9th Cir. 1993), *cert. denied,* 511 U.S. 1070 (1994), no case has ever held that a trust beneficiary has standing to challenge a trustee from acting in accordance with the terms of the trust on the ground that such action violates the Equal Protection Clause.

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challenge...would make a nullity of standing requirements." *Id.,* slip op. at 27 (*citing Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992), and *United States v. Hays,* 515 U.S. 737, 743 (1995)("the rule against generalized grievances applies with as much force in the equal protection context as in any other")).

A person who suffers an actual injury as a result of such an alleged violation (*i.e.,* a person who had "appl[ied] for benefits, and, if turned down on the basis of race, [could] possibly assert standing on the basis of such a denial," 198 F.Supp.2d at 1180, Docket 26) would in some situations have standing to bring such a claim. But a person who holds only the status of being an alleged beneficiary of the trust cannot demonstrate sufficient injury to be able to state a claim to bring such a challenge. *Id. See also* Order Denying Plaintiffs' Motion for Reconsideration of the Order Dismissing Their Public Land Trust Claims, 299 F. Supp.2d 1107 (D. Hawaii 2002), Docket 160 (relying on RESTATEMENT (SECOND) OF TRUSTS sec. 391 (1959) for the conclusion that absent a "special interest" in the enforcement of a charitable trust, a member of the public may not maintain an action for the enforcement of that trust).

C. The Economic Harm Appellants Allegedly Will Suffer as State Taxpayers Will Not Be "Irreparable."

State Taxpayers are asking this Honorable Court to exercise its equitable power, but they cannot demonstrate that will suffer any "significant threat of irreparable injury" directly or personally as taxpayers or beneficiaries. They assert that some expenditures could, in their judgment, be better spent, State Taxpayers' Memorandum at 26-32, but they make no effort to claim that they would personally

be better off, as taxpayers, as a result of these different expenditures. Their only "harm" is the harm to their political beliefs, and their claim is thus a classic "generalized grievance."

It is impossible for the State Taxpayers to demonstrate that they will suffer "irreparable harm" in their capacity as "taxpayers" or "beneficiaries," which are the only bases upon which they have come to Court, because the only harm taxpayers or beneficiaries can suffer is financial harm, and trivial financial harm at best, and such harm by its nature cannot be "irreparable." It is almost always possible to repair a financial injury, through subsequent reimbursement, and the economic loss State Taxpayers allege can always be recovered should they somehow prevail at trial. State Taxpayers have presented no plausible arguments to support their view that any possible loss they might suffer would be "irreparable."

"[P]urely monetary damages are not normally considered irreparable," and even a claim that a company "will go out of business if a preliminary injunction is denied does not constitute irreparable injury." *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984); *Dollar Rent A Car of Washington, Inc. v. Travelers Indem. Co.,* 774 F.2d 1371, 1375 (9th Cir. 1985)). The Supreme Court has also explained that "temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury." *Sampson v. Murray*, 415 U.S. 61, 90 (1974).

Continuing, the Court clarified that:

> The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Id. (*quoting from Virginia Petroleum Jobbers Assoc. v. Federal Power Comm'n,* 259 F.2d 921, 925 (D.C.Cir. 1958)). *See also Los Angeles Memorial Coliseum Comm'n v. National Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980)(ruling that a preliminary injunction had been improperly granted when the only alleged injuries were "lost revenues due to its failure to acquire an NFL team"); *United States v. Jefferson County,* 720 F.2d 1511 (11th Cir. 1983)(ruling that no showing of irreparable harm had been made because the firefighters had alleged "no injury that could not adequately be compensated through an award of back pay and seniority points along with compelled future promotion"); *Regents of the University of California v. American Broadcasting Companies*, 747 F.2d 511, 519 (9th Cir. 1984)("Now, of course, a party is not entitled to a preliminary injunction unless he or she can demonstrate more than simply damages of a pecuniary nature.").

State Taxpayers are not alleging that they have experienced any personal direct discrimination. They allege only abstract economic harm as taxpayers and

beneficiaries, and have made no showing whatsoever that their alleged injury is personal, direct, or "irreparable."

D. State Taxpayers' Delay in Filing this Lawsuit and Their Failure To Move for a Preliminary Injunction Below Negates a Finding of Irreparable Harm.

State Taxpayers' delay in filing this lawsuit severely undercuts their allegations of irreparable harm. The U.S. Supreme Court delivered its decision in *Rice v. Cayetano,* 528 U.S. 495 (2000), upon which State Taxpayers rely, in February 2000. The fact that State Taxpayers waited for two years after the *Rice* decision to file this action is sharply inconsistent with their allegations that they will suffer "irreparable" injury if this Court does not immediately grant injunctive relief. This Court has previously ruled that delay is a factor to consider in determining whether to issue an injunction. *Lydo Enterprises, Inc. v. City of Las Vegas*, *supra*. *See also Oakland Tribune, Inc. v. The Chronicle Publishing Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985)(upholding the denial of a preliminary injunction, citing in part the plaintiff's delay of several years before seeking the injunction as indicative of a lack of urgency and irreparable harm).

In addition, State Taxpayers' decision on June 24, 2002 to withdraw their Motion for Preliminary Injunction totally defeats their contention of irreparable harm. (Docket 164) Had such a motion been denied, State Taxpayers would have been

entitled to take an immediate appeal to this Court. Instead, they made a strategic decision to litigate in a different manner, demonstrating the lack of urgency of their claims. Moreover, State Taxpayers have made absolutely no showing that they have met the specific conditions required by FRAP Rule 8(a)(2) that moving first in the district court would be impracticable.

E. If the Injunction Sought by State Taxpayers Were to Be Granted, OHA and Its Beneficiaries Would Suffer "Irreparable Harm."

State Taxpayers assert at page 32 of their Memorandum that their injunction seeks only to block the "big ticket" items and that, if the injunction is granted, "both OHA and HHC/DHHL will be able to continue operations with little change." These assertions are false because the State Taxpayers seek to block the State's annual payment to OHA and prevent OHA from utilizing the money now in its own trust fund.[4] OHA would be left with virtually no revenue sources at all, and it certainly could not "continue operations with little change." It would be obliged to stop the numerous programs it has underway designed for the "betterment" of the Native Hawaiian people, pursuant to state and federal laws. The affidavit submitted by OHA Administrator Clyde Namu` o when this case began, Docket 11, explains the

[4] Background on the origins and purposes of the Office of Hawaiian Affairs can be found in *Arakaki v. Cayetano*, 198 F.Supp.2d 1165, 1172-73 (D.Hawaii 2002); *Arakaki v. Lingle,* – F.Supp. –, 2004 WL 102480, at *1 (D.Hawaii 2004); *Rice v. Cayetano*, 528 U.S. 495, 508-10 (2000).

irreparable harm that would be experienced by OHA's beneficiaries. The OHA Administrator describes the many community grants in the area of health and human services, the housing programs, including self-help programs, homesteader loan programs, the number of contracts outstanding, the amounts already encumbered, and the number of employees who work at OHA and whose jobs would be affected.

State Taxpayers seek to dismantle programs that were established by the federal and state governments decades ago, and which have been serving Native Hawaiians and the public constructively during their existence. Interfering with the ability of any government agency to implement laws enacted by democratically-elected legislatures is obviously a substantial harm to the public. *See, e.g., Lydo Enterprises, Inc. v. City of Las Vegas*, *supra* ("An injunction causes harm by preventing the City from enforcing its ordinance."). It is obvious that particularly grave and irreparable harm would occur if an injunction were issued that interfered with the continued functioning of programs established by the federal and state governments pursuant to their trust obligations owed to the Native Hawaiian People.

IV. STATE TAXPAYERS ARE UNABLE TO DEMONSTRATE THAT THEY HAVE A LIKELIHOOD OF SUCCESS ON THE MERITS.

A. State Taxpayers Have Not Met Their Burden of Persuasion Regarding Their "Likelihood of Success."

Because of the carefully-reasoned opinions issued by the District Court leading

to the dismissal of State Taxpayers' Complaint, this Honorable Court must presume that State Taxpayers are unlikely to succeed on the merits of their appeal. District Judge Susan Oki Mollway issued numerous opinions on all aspects of this case during a two-year period, and cautiously justified each of her conclusions. Although Plaintiffs have a right to appeal from these decisions, they certainly have no basis to contend that they are "likely" to prevail on their appeal.

B. The District Court Was Correct in Ruling that State Taxpayers' Claim Presents a Nonjusticiable Political Question.

In its ruling of January 14, 2004, the District Court dismissed the remaining claims brought by State Taxpayers against the OHA Appellees, ruling that they presented a nonjusticiable political question that should be resolved by the political branches of the government. *Arakaki v. Lingle,* – F.Supp.2d – , 2004 WL 102480 (D.Hawaii 2004), Docket 354. Relying in part upon the earlier decision of Judge Alan C. Kay in *Kahawaiolaa v. Norton,* 222 F.Supp.2d 1213, 1219 (D.Hawaii 2002), the Court ruled that:

> Whether Hawaiians should be treated as being recognized by Congress such that the more lenient review standard found in *Morton* [*v. Mancari,* 417 U.S. 535 (1974)] should be applied to Plaintiffs' Equal Protection challenge to programs being administered by OHA is an issue that is a nonjusticiable political question.

2004 WL 102480, at *9. This conclusion was based on the traditional deference that

federal courts have given to the political branches regarding the programs that are enacted for the native peoples living in the United States, as exemplified, for instance, by the decision in *United States v. Sandoval,* 231 U.S. 28 (1913), and more particularly because Congress is currently considering legislation designed to codify the relationship between the United States and Native Hawaiians in greater detail. 2004 WL 102480, at *8-9. The District Court noted that the U.S. Supreme Court had chosen to "stay far off that difficult terrain" regarding the precise status of Native Hawaiians in *Rice v. Cayetano*, 528 U.S. 495, 519 (2000), and concluded that other federal courts should also allow the political branches to decide how best to maneuver through this terrain. 2004 WL 102480, at *10.

C. If This Honorable Court Does Reach the Substantive Issues, It Will Agree that State Taxpayers Have Not Established Their "Likelihood of Success" on the Merits.

State Taxpayers are challenging programs that have been operating for decades and that have withstood previous constitutional challenges.[5] State and federal courts

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[5] The Hawaiian Home Lands program was established in 1921 after Congress debated the constitutional issues and determined that the program was constitutional. U.S. executive-branch officials and members of Congress explicitly recognized that Native Hawaiians had the same rights as other Native Americans in the hearings that led to the passage of the Hawaiian Homes Commission Act in 1921. *See Hearings Before the House Comm. on the Territories on the Rehabilitation and Colonization of Hawaiians and Other Proposed Amendments to the Organic Act of the Territory of Hawaii*, 66th Cong.129-30 (1920)(quoting Secretary of the Interior Franklin D. Lane as saying

have consistently ruled that separate and preferential programs for Native Hawaiians are based on a "political" rather than a "racial" categorization, and thus that they must be evaluated under the "rational-basis" level of judicial review that applies to other native people. The Hawaii Supreme Court reached this conclusion in *Ahuna v. Dept. of Hawaiian Home Lands*, 64 Hawaii 327, 640 P.2d 1161 (1982), where the Court recognized that Native Hawaiians should be governed by the same legal standards that govern other Native Americans. To determine "the extent or nature of the trust obligations" owed to the Native Hawaiians by the Department of Hawaiian Home Lands, the court turned to "well-settled principles enunciated by the federal courts regarding lands set aside by Congress in trust for the benefit of other native Americans, *i.e.*, American Indians, Eskimos, and Alaska natives," 64 Hawaii at 339, 640 P.2d at 1168: "Essentially we are dealing with relationships between the

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that the basis for granting special programs for Native Hawaiians is "an extension of the same idea" that justifies granting such programs for Indians); *id.* at 169 (quoting Representative Curry, the Chair of the Committee, as saying: "[T]he Indians received lands to the exclusion of other citizens. That is certainly in line with this legislation, in harmony with this legislation."); *id*. at 170 (quoting Chair Curry, in response to a question from Representative Dowell about whether Native Hawaiians might be different because "we have no government or tribe or organization to deal with," as saying that "We have the law of the land of Hawaii from ancient times right down to the present where the preferences were given to certain classes of people"). *See also Ahuna v. Dept. of Hawaiian Home Lands*, 640 P.2d 1161, 1167 (Hawaii 1982) (quoting Secretary Lane as referring during these hearings to Native Hawaiians as "our wards ... for whom in a sense we are trustees").

government and aboriginal people. *Reason thus dictates that we draw the analogy between native Hawaiian homesteaders and other native Americans*." *Id.* at 339, 640 P.2d at 1169 (emphasis added). *See also Public Access Shoreline Hawaii v. Hawaii County Planning Commission*, 79 Hawaii 425, 903 P.2d 1246 (recognizing and explaining the traditional and customary rights of Native Hawaiians); *Office of Hawaiian Affairs v. State*, 96 Hawaii 388, 401, 31 P.3d 901, 914 (2001)(reaffirming 'that the State's obligation to native Hawaiians is firmly established in our constitution"); *Ka Pa`Makai O Ka `Aina v. Land Use Commission*, 94 Hawaii 31, 46, 7 P.3d 1068, 1083 (2000)(confirming that, 'to the extent feasible when granting a petition for reclassification of district boundaries," the Land Use Commission must 'protect the reasonable exercise of customarily and traditionally exercised rights of native Hawaiians").

The U.S. District Court in Hawaii has also ruled that separate and preferential programs for Native Hawaiians should be evaluated under 'rational-basis" review. Chief Judge David Ezra reached this conclusion in *Naliielua v. State of Hawaii*, 795 F. Supp. 1009 (D. Haw. 1990), *aff'd,* 940 F.2d 1535 (9th Cir. 1991), which held that the preference for Native Hawaiians given by the Department of Hawaiian Home is constitutional because of its link to self-governance and self-sufficiency. Judge Susan Oki Mollway has referred to the *Naliielua* conclusion in her opinions in the

present case. *Arakaki v. Cayetano*, 198 F.Supp.2d 1165, 1178 (D.Hawaii 2002), Docket 26; *Arakaki v. Lingle*, – F.Supp.2d –, 2004 WL 102480, at * 7 n.8 (D.Hawaii 2004), Docket 354 (explaining also that the political question doctrine would probably not be relevant to a challenge to the Department of Hawaiian Home Lands, that the analysis utilized in *Morton v. Mancari, supra*, would apply to such a challenge, and that it would not matter that native Hawaiians had not been formally recognized under the 1978 Department of the Interior's regulations "as Congress itself appears to have recognized native Hawaiians as needing the United States' protection"). Later in *Pai 'Ohana v. United States,* 875 F. Supp. 680 (D. Haw. 1995), *aff'd,* 76 F.3d 280 (9th Cir. 1996), Judge Ezra quoted from his conclusion in *Naliielua* that '[a]lthough Hawaiians are not identical to the American Indians whose lands are protected by the Bureau of Indian Affairs, the court finds that for purposes of equal protection analysis, the distinction ... is meritless. Native Hawaiians are people indigenous to the State of Hawaii, just as American Indians are indigenous to the mainland United States ..." *Id.* at 697 n. 35. More recently (and after the *Rice* decision), Judge Alan C. Kay has reaffirmed that the rational basis standard announced in *Morton v. Mancari*, 417 U.S. 535 (1974), should apply to benefits and programs established for Native Hawaiians. *Kahawaiolaa v. Norton,* 222 F.Supp.2d 1213, 1223 n. 14 (D.Hawaii 2002).

This Honorable Court has also consistently recognized that the Native Hawaiians are a distinct native people and has upheld and enforced the programs that have been established for them. In a section of its *Rice v. Cayetano* opinion that may be viewed as having survived the reversal by the Supreme Court (because the Supreme Court decided to "stay far off that difficult terrain," 528 U.S. at 519), this Court concluded that the "special treatment" of the Native Hawaiians by the U.S. Congress "is similar to the special treatment of Indians that the Supreme Court approved in *Morton v. Mancari*, 417 U.S. 535 (1974)." 146 F.3d at 1081. *See also Pai ` Ohana v. United States,*75 F.3d 280 (9th Cir. 1996)(recognizing the existence and legitimacy of Native Hawaiian tenant rights created under the Hawaii State Constitution and state statutes); *Napeahi v. Paty,* 921 F.2d 897 (9th Cir. 1990)(concluding that the submerged lands surrounding the Hawaiian islands were included in the public land trust, the proceeds of which should be used for the benefit of Native Hawaiians pursuant to the 1959 Admission Act).

This Court has also repeatedly observed that the ceding of land to the new State of Hawaii in the 1959 Admission Act gave rise to a "trust obligation" between the United States and Native Hawaiians. *See, e.g., Price v. Akaka*, 928 F.2d 824 (9th Cir. 1991), and 3 F.3d 1220 (9th Cir. 1993)(holding that Native Hawaiians had standing to bring claims under 42 U.S.C. sec. 1983 to challenge expenditures of the Trustees

of the Office of Hawaiian Affairs, because of the "trust obligations" established by Congress in section 5(f) of the 1959 Admission Act; *see, e.g.*, 3 F.3d at 1225: "Congress enacted the Admission Act, a federal public trust..."); *Price v. State of Hawaii,* 764 F.2d 623, 627 (9th Cir. 1985)(examining the applicability of the federal court original jurisdiction statute for Indian tribe cases, and observing that "native Hawaiians *in general* may be able to assert a longstanding aboriginal history" sufficient to give rise to standing under the statute, and that the 1959 Admission Act codified "a trust obligation" between the United States and the Native Hawaiian people "that constitutes a 'compact with the United States'"); *Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission,* 588 F.2d 1216 (9th Cir. 1978) and 739 F.2d 1467 (9th Cir. 1984)(finding the same right of action for the same reasons in a claim filed by Native Hawaiians concerning a county's alleged appropriation of trust lands; *see also* 739 F.2d at 1471: "The Admission Act clearly mandates establishment of a trust for the betterment of native Hawaiians.").

State Taxpayers rely primarily for their claimed "likelihood of success," just as they did in their filings below, on their misleading interpretations of *Rice v. Cayetano*, 528 U.S. 495 (2000); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); and *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989). They take language from *Rice* out of context and contend that it leads inexorably to the

conclusion that any and all governmental programs designed to compensate Native Hawaiians for the wrongs done to them and the lands taken from them, or to assist with their rehabilitation in light of the earlier efforts by the U.S. government to destroy their culture and autonomy as a people, now must be deemed to violate the Equal Protection Clause of the Fourteenth Amendment. The *Rice* holding is, however, a narrow one, and does not support State Taxpayers' contentions.

The *Rice* majority held that Hawaii's requirement that only persons of Hawaiian ancestry vote for the Trustees of the Office of Hawaiian Affairs utilized a "proxy for race" that violated the Fifteenth Amendment, because the election for OHA's Trustees was conducted by the State. 528 U.S. at 517. Justice Kennedy emphasized that "[t]he validity of the voting restriction is the only question before us," *id.* at 521, and his opinion rested the *Rice* holding on the narrow ground of the Fifteenth Amendment. The Court explicitly declined to address what programs for Native Hawaiians should be evaluated under the rational-basis level of judicial scrutiny pursuant to *Morton v. Mancari,* 417 U.S. 535 (1974). The Court did not reject this argument, noting that it involved "questions of considerable moment and difficulty" and stating clearly that "[w]e can stay far off that difficult terrain," 528 U.S. at 518-19, because even if *Mancari* applies to Native Hawaiians, under the Fifteenth Amendment "Congress may not authorize a State to create a voting scheme

of this sort." *Id.* at 519. The holding is thus limited to the Fifteenth Amendment. The Court was careful to refrain from commenting on how the Fourteenth Amendment should be interpreted and applied to programs for Native Hawaiians, stating that "we assume the validity of the underlying administrative structure and trusts, without intimating any opinion on that point." *Id.* at 521-22.[6] *See also*

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[6] It should also be noted, even though these background facts are not directly relevant to the present Motion, that State Taxpayers misrepresent the historical facts to this Honorable Court in significant ways. State Taxpayers paint the picture of an egalitarian multicultural polity in the Kingdom prior to the illegal overthrow and annexation in the 1890s on page 9 of their Memorandum, but such a view is far from the reality. Native Hawaiians became the numerical minority in the islands by the end of the nineteenth century because the Western sugar planters brought substantial numbers of contract workers, primarily from Asia, to work under slave-like conditions on a temporary basis on the plantations, but these individuals were expected to return to their homelands and many did so. The contract workers played virtually no role in the political life of the Kingdom, because those immigrants of Asian ancestry were explicitly excluded from being allowed to vote in Hawaii, just as they were also denied the right to become citizens in the United States during that period.

State Taxpayers mislead this Honorable Court on page 9 with their contention that: "In the last half of the 19th century, the government of the Kingdom actively encouraged immigration and offered immigrants easy naturalization and full political rights." In reality, the 1864 Constitution imposed property and income requirements on voters, thus sharply limiting the electorate, and the 1887 "Bayonet" Constitution (imposed upon King Kalakaua by the Western planter elites) allowed persons to vote only if they were of Hawaiian or European heritage and could read either Hawaiian, English, or some other European language, thus explicitly excluding all immigrants of Asian ancestry. Even those Asians who were naturalized as citizens were prohibited from voting under the 1887 Constitution. *See Ahlo v. Smith*, 8 Hawaii 420, 1892 WL 1076, at *2 (1892)(opinion written by Justice Samuel Ballard Dole).

In fact, the Kingdom of Hawaii in the last half of the nineteenth century was

American Federation of Government Employees (AFL-CIO) v. United States, 195 F.Supp.2d 4, 19 (D.D.C. 2002)("*Rice* only dealt with the right to vote, which is a fundamental right evoking strict scrutiny review. Moreover, *Rice* involved neither a Fifth Amendment due process claim nor a Fourteenth Amendment equal protection claim."); *Arakaki v. Lingle,* –F.Supp.–, 2004 WL 102480, at n. 7, Docket 354 (explaining that *Rice* was "distinguishable" from the present case because it involved a race-based challenge to an election "under the Fifteenth Amendment, not preferences and/or benefits being provided to native populations allegedly based on their political, as opposed to racial, status.")

It should also be noted that Justice Kennedy's *Rice* opinion repeatedly acknowledges that Native Hawaiians are indigenous, aboriginal, and native by

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in almost constant turmoil because of the clash of civilizations between the native culture and the efforts of Westerners to dismember that culture and obtain lands and political power. *See, e.g.,* JONATHAN KAY KAMAKAWIWO`OLE OSORIO, DISMEMBERING LAHUI (2002); SYLVESTER K. STEVENS, AMERICAN EXPANSION IN HAWAII 1842-1898 (1945, reissued 1968); TOM COFFMAN, NATION WITHIN: THE STORY OF AMERICA'S ANNEXATION OF THE NATION OF HAWAII (1998). Throughout this period, Native Hawaiians were struggling to maintain their heritage, their culture, and their control over their islands, but they ultimately lost to the Westerners who were better financed and had the military and diplomatic support of the United States. *See, e.g., Rice v. Cayetano,* 528 U.S. 495, 504 (2000)("[T]he United States and European powers made constant efforts to protect their interests and to influence Hawaiian political and economic affairs in general....Tensions intensified between an anti-Western, pro-native bloc in the government on the one hand and Western business interests and property owners on the other.").

referring regularly and without qualification or limitation to "the native Hawaiian people," 528 U.S. at 507, "the native Hawaiian population," *id*., and "the native population." *Id*. at 506. Justice Kennedy also acknowledges that this "people" share a common "culture and way of life," that they have experienced a common "loss" that has had effects that have "extend[ed] down through generations," and that it has been appropriate for the State of Hawaii "to address these realities." *Id*. at 524. The *Rice* majority opinion thus provides the essential underpinning for the conclusion that Native Hawaiians are entitled to the same legal status as other native people within the United States, and State Taxpayers are mistaken in contending that *Rice* holds that all programs for the benefit of Native Hawaiians are racial classifications that are inevitably subject to strict scrutiny analysis.[7]

State Taxpayers also mislead this Honorable Court by ignoring the cases that have been decided after *Adarand* and *Croson*, particularly *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325 (2003), which presents a new and more flexible approach

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[7] State Taxpayers' reference on page 28 of their Memorandum to Justice Breyer's concurring opinion in *Rice* is also misleading. Justice Breyer does note that the 1959 Admission Act says that the revenues from the Public Land Trust should benefit the general public as well as Native Hawaiians, 528 U.S. at 525, and he agrees that the State's conducting of an election for Hawaiians-only violates the Fifteenth Amendment, *id.* at 527, but he also recognizes that special programs for Native Hawaiians may well be appropriate, because "Native Hawaiians, considered as a group, may be analogous to tribes of other Native Americans." *Id.* at 526.

toward classifications linked to race. In her opinion for the majority upholding the University of Michigan Law School admissions policy which used race as a relevant admission factor, Justice O'Connor stressed that "'context matters" even "when reviewing race-based governmental action under the Equal Protection Clause." 123 S.Ct. at 2338.

In the recent decision in *United States v. Lara*, ___ S.Ct. __, 2004 WL 826057 (April 19, 2004), the Supreme Court was clear that the plenary power of Congress to legislate for Native Peoples is "'exceptionally great" (quoting from W. Canby, *American Indian Law* 2 (3d ed. 1998) at *4)." "First, the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as ` plenary and exclusive' . . . . The ` central function of the Indian Commerce Clause,' we have said, ` is to provide Congress with plenary power to legislate in the field of Indian affairs.'" Citations omitted. *Id.* Indeed, the Supreme Court specifically recognized and upheld the authority of Congress to deal with native peoples in many different ways. "Second, Congress, with this Court's approval, has interpreted the Constitution's ` plenary' grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority. From the Nation's beginning Congress' need for such legislative power would have seemed obvious. After all, the Government's Indian policies,

applicable to numerous tribes with diverse cultures, affecting billions of acres of land, of necessity would fluctuate dramatically as the needs of the Nation and those of the tribes changed over time." *Id.* at *6 (citations omitted).

State Taxpayers contend at page 14 of their Memorandum that Hawaii's Constitution and its "expressed public policy" clearly oppose racial discrimination and thus must be seen as opposing programs for Native Hawaiians. But Hawaii's Constitution explicitly recognizes and authorizes the programs for Native Hawaiians attacked by Plaintiffs, *see* Article XII, and Hawaii's Legislature has repeatedly indicated its strong support in favor of self-determination for Native Hawaiians. *See, e.g.,* An Act Relating to Hawaiian Sovereignty, ch. 359, sec. 1(6), 1993 Haw. Sess. Laws 1009, 1010 (recognizing that "Native Hawaiians are a distinct and unique indigenous people" whose lands and sovereignty were illegally taken from them). *See also Office of Hawaiian Affairs v. State,* 96 Hawaii 388, 401, 31 P.3d 901, 914 (2001), where the Hawaii Supreme Court explained that the State of Hawaii's obligation to Native Hawaiians is firmly rooted in the State's Constitution and recognized that "it is incumbent upon the legislature to enact legislation that gives effect to the right of native Hawaiians to benefit from the ceded lands trust."

State Taxpayers' assertion at page 13 of their Memorandum that they "will ultimately prevail on the merits in this case" is, therefore, without foundation.

V. CONCLUSION.

For the reasons presented above, State Taxpayers' Motion for an injunction must be denied as lacking in legal or factual foundation.

DATED: Honolulu, Hawaii, April 23, 2004.

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NO. 04-15306

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EARL F. ARAKAKI, et al.,

Plaintiffs-Appellants,

vs.

LINDA LINGLE, et al.,

Defendants-Appellees.

CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 32-2, the undersigned hereby certifies that the attached Response is proportionately spaced, has a typeface of 14 points contains 7,649 words.

DATED: Honolulu, Hawaii, April 23, 2004.

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