NO. 04-15306

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EARL F. ARAKAKI, et al., Plaintiffs – Appellants, v. LINDA LINGLE et al., State Defendants – Appellees, HAUNANI APOLIONA, et al., OHA Defendants – Appellees, MICAH KANE, et al., HHCA/DHHL Defendants – Appellees, THE UNITED STATES OF AMERICA, and JOHN DOES 1 through 10, Defendants – Appellees, STATE COUNCIL OF HAWAIIAN HOMESTEAD ASSOCIATIONS, and ANTHONY SANG, SR., SCHHA Defendants/Intervenors – Appellees, HUI KAKO'O 'AINA HO'OPULAPULA, BLOSSOM FEITEIRA and DUTCH SAFFERY, HUI Defendants/Intervenors – Appellees.	D.C. No. CV-02-00139 SOM/KSC District of Hawaii, Honolulu APPELLANTS' REPLY IN SUPPORT OF MOTION TO EXPEDITE HEARING; CERTIFICATE OF SERVICE H. WILLIAM BURGESS #833 2299-C Round Top Drive Honolulu, Hawai'I 96822 Telephone: (808) 947-3234 Facsimile: (808) 947-5822 Email: hwburgess@hawaii.rr.com Attorney for Plaintiffs-Appellants

APPELLANTS' REPLY
IN SUPPORT OF MOTION TO EXPEDITE HEARING

In this reply, Appellants (sometimes referred to herein as "Taxpayers/Trust Beneficiaries") will address the arguments by the Defendants-Intervenors-Appellees State Council of Hawaiian Homestead Associations and Anthony Sang, Sr. (collectively, "SCHHA") in their memorandum in opposition dated July 23, 2004.

***Oakland Tribune* is inapplicable.** SCHHA cites *Oakland Tribune, Inc. v Chronicle Publishing Co.,* 762 F.2d 1371 (9th Cir. 1985). But the Ninth Circuit in *Oakland Tribune* was reviewing a trial court's order denying a motion for preliminary injunction. As the Court said at 762 F.2d 1376, "Review of a ruling on a motion for a preliminary injunction is "very limited. The decision to grant or deny is within the discretion of the trial court and will only be reversed if that discretion has been abused or if the decision is based on erroneous legal standards or clearly erroneous findings of fact." (Internal citation omitted.) The trial court found that plaintiff, the Oakland Tribune, had not shown irreparable injury caused by the San Francisco Chronicle's purchase of syndicated features such as Doonesbury with an exclusivity feature in that geographic area. The parties conceded such exclusivity provisions are customary in the industry. Plaintiff's claim o injury because it would lose circulation and revenue involved purely

monetary harm measurable in damages. After analyzing the affidavits and reasoning supporting the trial court's findings, the Ninth circuit observed at page 1377, "It is undisputed that the exclusivity provisions which plaintiff seeks to enjoin have been in effect for a number of years. Where no new harm is imminent, and where no compelling reason is apparent, the district court was not required to issue a preliminary injunction against a practice which ahs continued unchallenged for several years."

Here, the type of motion, legal standard and facts are different. Here new harm is imminent, Plaintiffs' injuries cannot be redressed by money damages and there is a compelling reason to expedite the hearing. Circuit Rule 27-12 provides that a motion to expedite hearing will be granted upon a showing of good cause which includes "(3) in the absence of expedited treatment, irreparable harm may occur or the appeal may become moot." Unlike the "very limited" appellate review of a ruling on a motion for preliminary injunction, Rule 27-12 **requires** an expedited hearing where irreparable harm may occur. Taxpayers/Trust Beneficiaries have demonstrated (among other ways, by the itemized compilations in Exhibits 6 and 7 filed with Court June 12, 2004, earlier filed as part of DKT 208 9/18/02 in the trial court) and neither SCHHA or the other Defendants-Appellees have controverted, that DHHL and OHA have cost the State

treasury (including appropriations, loss of revenues, debt incurred and loss of investment earnings) about $1 Billion to date and, at the current expenditure rate, threaten to cost perhaps another $2 Billion over the next ten years unless they are enjoined. It is likely that money will continue to flow out of, or never reach, the State treasury at the average rate of about $6.83 million per month. The resulting losses to the pocketbooks of Appellants and others similarly situated, and the diminished quality of life for all of them, will likely continue unabated. Each year that more bonds are issued to pay the $30 million per year to the Hawaiian Homelands trust fund, the per capita share of the State's debt burden of each Plaintiff increases. In addition there is the ongoing issuance at an accelerated pace of more Homestead leases. Each homestead lease diminishes the value of the pro rata share of the public land trust equitably owned by each Plaintiff. Thus, new harm to each Plaintiff is imminent. None of these losses can be redressed by damages. Under the Eleventh Amendment, the State is immune from suit for damages. (The *Ex Parte young* exception to the Eleventh Amendment is only applicable where prospective relief is sought. *Hoohuli v. Ariyoshi,* 741 F2d 1169, 1174 (9th Cir. 1984.) Unlike the exclusivity provisions the Oakland Tribune sought to enjoin, the conduct at issue here is not "customary in the industry." Hawaii is the only state i n the

nation, so far as Appellants know, that gives homesteads in its public lands and makes distributions of revenues from its public lands, exclusively to one group of persons defined explicitly by race. This conduct is "odious to a free people." Hearing oral argument of this appeal when the Court is in session in Honolulu November 1 – 5, 2004 will not, in itself, eliminate the irreparable harm. But it is likely to advance the date of this Court's decision. If Taxpayers/Trust Beneficiaries prevail, the relief from these invidiously discriminatory programs will likely be advanced.

Plaintiffs' withdrawal of the motion for preliminary injunction in June 2002 in no way suggested lack of irreparable harm. SCHHA, rather than contesting the imminent irreparable harm now faced by Plaintiffs resulting from the ongoing outflow from the State treasury and the accelerated leasing of public lands at $1 per year, argues at page 6 of its opposition that the lack of irreparable harm is shown by Plaintiffs' withdrawal of their motion for preliminary injunction in the trial court two years ago, on June 24, 2002. Defendants-Appellees made the same argument in their oppositions dated April 23, 2004 to Appellants' motion in this Court for an injunction to preserve status quo pending appeal.

As spelled out in the Declaration of counsel filed in this Court with Appellants' reply dated May 4, 2004, the withdrawal in no way suggested

any lack of irreparable harm caused by these discriminatory programs.

> 4. In June 2002 Patrick Hanifin and I, with the approval of our clients, withdrew our then-pending motion for preliminary injunction. We did this despite the fact that our clients, and others similarly situated, were continuing to suffer the adverse effects of the flow of funds from the State treasury for the OHA and Hawaiian Homes programs. It had become clear from the standing orders that the Court would not permit us to even challenge the major outflows and that the preliminary injunction motion would not result in an appealable decision based on the merits. We decided to, instead, move for summary judgment in the hope that we could achieve a decision on the merits more promptly.

At the time, the trail court had upheld Plaintiffs' standing as taxpayers to challenge appropriations of tax dollars for OHA and DHHL. Even with the restrictions the trial court imposed, that standing was sufficient, in counsels' judgment, to obtain a ruling on the constitutional issue on the merits by motion for summary judgment. Since it was clear that the preliminary injunction motion would not result in an appealable decision based on the merits, it was decided to withdraw the preliminary injunction motion and move for summary judgment. Counsel did not dream the trial court would then forbid them from moving for summary judgment on the merits and that status would remain in effect for nineteen months until the trial court in January 2004 dismissed Plaintiffs' remaining claims on political question grounds.

SCHHA does not argue that its homesteaders' interests would be adversely affected by an expedited hearing. Neither SCHHA nor any other Appellee could have any valid reason to make such a claim. It is in every party's interest to have the important issues presented by this case promptly and finally decided. That is particularly so for SCHHA and the homesteaders it represents. If Plaintiffs-Appellants finally and fully prevail, OHA and DHHL will be dismantled and the existing homesteaders will be allowed to acquire the fee simple interest in their homestead lots at well below market value. (See paragraph 3 of the Complaint, Exhibit 1 filed with Plaintiffs-Appellants motion for injunction dated April 12, 2003.) Rather than being "wards", they will own the growing home equity with the same joys, responsibilities and pride as other homeowners. If this case had been adjudicated with reasonable promptness in the trial court and Plaintiffs had prevailed and the about 7,500 existing homesteaders had acquired the fee simple interest in their lots by the summer of 2003, everyone of them would be much richer today because of the remarkable rise in residential real estate values in Hawaii this year.

Conclusion. For the reasons stated above and in Appellants' Motion to Expedite Hearing dated July 17, 2004, Appellants respectfully request that this appeal be heard during this Court's session in Honolulu November 1 –

5, 2004, or as soon thereafter as possible, consistent with the Court's due consideration of the briefs.

DATED: Honolulu, Hawaii July 28, 2004.

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H. WILLIAM BURGESS
Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth below, the foregoing document(s) will be duly served upon the following parties via process server, facsimile, hand delivery, U.S. Mail or certified U.S. Mail, postage prepaid.

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