No. 04-15306

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EARL F. ARAKAKI, et al.,
Plaintiffs-Appellants,

and

JOSIAH L. HOOHULI, et al.,
Intervenors,

-v.-

LINDA LINGLE, in her official capacity as Governor of the State of Hawaii,* et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

ANSWERING BRIEF OF DEFENDANT-APPELLEE UNITED STATES

THOMAS L. SANSONETTI
Assistant Attorney General

JEFFREY BOSSERT CLARK
Deputy Assistant Attorney General

ELLEN J. DURKEE
STEVEN MISKINIS
AARON P. AVILA
Attorneys, U.S. Department of Justice
Environment & Natural Resources Div.
P.O. Box 23795 (L'Enfant Station)
Washington, DC 20026
(202) 514-1307

OF COUNSEL:

ROBIN FRIEDMAN
U.S. Department of the Interior
Office of the Solicitor
Division of General Law

BARBARA COEN
U.S. Department of the Interior
Office of the Solicitor
Division of Indian Affairs

* Linda Lingle is substituted for Benjamin J. Cayetano pursuant to Fed. R. App. P. 43(c)(2).

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STATEMENT OF JURISDICTION

Plaintiffs-Appellants invoked the jurisdiction of the United States District Court for the District of Hawaii (Hon. Susan Oki Mollway) pursuant to 28 U.S.C. §§ 1331, 1343(3)-(4), and 2201-2202. Plaintiffs-Appellants' Excerpts of Record ("ER") Tab 1, at 6.[1] As explained *infra*, the district court correctly held that Plaintiffs lack standing to assert their claims against Defendant-Appellee United States of America.

The district court entered a final judgment on January 15, 2004. ER Tab 29. Plaintiffs timely filed a notice of appeal on February 12, 2004. ER Tab 31. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

Sixteen residents of the State of Hawaii filed this lawsuit against the United States and others. Plaintiffs allege that various programs administered by the State of Hawaii discriminate against them on the basis of race by providing benefits exclusively to "Hawaiians" and/or "native Hawaiians."[2] Plaintiffs contend that these programs violate the United States Constitution and constitute a breach of

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[1] ER citations first denote the tab in the ER at which the document cited can be found and, where appropriate, followed by the page number of the document cited.

[2] *See infra* note 5 defining Hawaiians and native Hawaiians.

trust. Plaintiffs base their standing to bring their constitutional claim against the United States *solely* on their status as state taxpayers; they do not allege to have been personally discriminated against. They assert standing to bring their breach of trust claim based on their alleged status as beneficiaries of a public trust supposedly violated by the United States. Their appeal raises the following issues:

1. Whether the district court erred when it dismissed Plaintiffs' constitutional claim against the United States.

2. Whether the district court erred when it dismissed Plaintiffs' breach of trust claim against the United States.

3. Whether the district court erred when it struck Plaintiffs' untimely "counter motion" which impermissibly raised new issues scheduled for briefing at a later date.

4. Whether, in the event of remand, this Court should order that this case be assigned to a new district court judge because of delays perceived by Plaintiffs.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Plaintiffs, sixteen individuals, filed this lawsuit in March 2002. They allege that they are residents and citizens of the State of Hawaii of "Japanese, English, Filipino, Portugese, Hawaiian, Irish, Chinese, Scottish, Polish, Jewish, German,

Spanish, Okinawan, Dutch, French and other ancestries." ER Tab 1, at 7. Various state agencies and state officials as well as the United States are named as defendants. *Id.* at 7-11. No federal agency or federal official is named as a defendant.

The complaint sets out three claims for relief: (i) violation of the Equal Protection clause of the Fourteenth and Fifth Amendment; (ii) violation of the Civil Rights Act, 42 U.S.C. § 1983; and (iii) breach of public land trust. ER Tab 1, at 29-34. The bases for these claims with respect to the United States are ambiguous at best. The complaint states that "[t]he United States of America is named as a party because the constitutionality of two acts of Congress affecting the public interest . . . are drawn into question." *Id.* at 9. Plaintiffs seem to allege that the Hawaii Admission Act, Pub. L. No. 86-3, 73 Stat. 4, which required the State of Hawaii to incorporate the Hawaiian Homes Commission Act, 42 Stat. 108, ch. 42, violates the Equal Protection clause "implicit in the Fifth Amendment" and the "'equal footing doctrine'" (Plaintiffs' "Equal Protection claim"). ER Tab 1, at 9-10, 14. The complaint also appears to assert that the United States breached its fiduciary duty as trustee of a public land trust when Congress enacted the Hawaiian Homes Commission Act and the Hawaii Admission Act. *Id.* at 12-14. Plaintiffs allege standing for the Equal Protection claim based on their state

taxpayer status and standing for the breach of trust claim based on their alleged status as a trust beneficiary. *Id.* at 21-29. Plaintiffs do not allege that they have actually suffered discrimination. There is no allegation that any plaintiff applied for and was denied benefits because he or she was not "Hawaiian" or "native Hawaiian." Nor do Plaintiffs challenge any specific appropriation under a federal statute. The district court properly dismissed all of Plaintiffs' claims against the United States for lack of standing.

II. BACKGROUND

The Supreme Court summarized the history of Hawaii in *Rice v. Cayetano*, 528 U.S. 495, 499-510 (2000), which is helpful here. The Hawaiian Islands were originally settled by Polynesians from the Western Pacific. *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 232 (1984); *see also Rice*, 528 U.S. at 500. In 1778, England's Captain Cook made landfall in Hawaii. *Rice*, 528 U.S. at 500. In 1810, Kamehameha I united the Hawaiian Islands as one kingdom. *Id.* Between 1826 and 1893, the United States recognized the kingdom as a sovereign nation and signed several treaties with it. *Id.* at 504. During that same period, interests aligned with American interests in trade, settlement, economic expansion, and political influence with respect to Hawaii gained political power. *Id.* In 1893, Queen Liliuokalani attempted to promulgate a new constitution to reestablish

native Hawaiian control over governmental affairs. *Id.* at 504-05. Fearing a loss of power, a group representing American commercial interests overthrew the monarchy and established a provisional government. *See id.*; Pub. L. 103-150, 107 Stat. 1510.[3] That government sought annexation by the United States, but President Cleveland denounced the role of American forces in the overthrow and called for restoration of the Hawaiian monarchy. *Rice*, 528 U.S. at 505. The Queen, however, was unable to reclaim her former place and in 1894 the provisional government established the Republic of Hawaii. *Id.* A year later the Queen abdicated her throne. *Id.*

A. The "Newlands Resolution"

In 1898, President McKinley signed a Joint Resolution annexing Hawaii (sometimes referred to as the "Newlands Resolution"). *Id.*; 30 Stat. 750. At the time of the annexation, the provisional government ceded all crown, government, and public lands to the United States. *Rice*, 528 U.S. at 505; 30 Stat. 750; 107 Stat. 1512. The Newlands Resolution provided that "all revenue from or proceeds of the [public lands], except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be

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[3] Pub. L. 103-150, 107 Stat. 1510 is the 1993 Joint Resolution of Congress to acknowledge the 100th anniversary of the overthrow of the Kingdom of Hawaii and to offer an apology to native Hawaiians. That resolution provides relevant history.

assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." 30 Stat. 750.

In 1900, Congress passed the Hawaiian Organic Act, ch. 339, § 91, 31 Stat. 141, 159, which established the Territory of Hawaii and put the lands ceded and transferred to the United States in the Newlands Resolution under the "possession, use, and control of the government of the Territory of Hawaii."

B. The Hawaiian Homes Commission Act

Not long after creating the Territory of Hawaii, Congress, concerned with the condition of native Hawaiians, enacted the Hawaiian Homes Commission Act (the "HHCA"). *Rice*, 528 U.S. at 507; 42 Stat. 108, ch. 42. The HHCA set aside about 200,000 acres of the ceded public lands and created a program of loans and long-term leases for the benefit of native Hawaiians. *Rice*, 528 U.S. at 507. The HHCA defined "native Hawaiian[s]" to mean "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." 42 Stat. 108, § 201(7).

C. The Admission Act

In 1959, Hawaii was admitted into the Union. Upon admission, and in accordance with the Hawaii Admission Act (the "Admission Act"), Pub. L. No.

86-3, 73 Stat. 4, the new State of Hawaii (the "State" or "Hawaii") agreed to adopt the HHCA as part of its constitution. *See* § 4, 73 Stat. 5; Haw. Const. Art. XII, §§ 1-3.[4] The Admission Act granted Hawaii title to all public lands and public property within the State's boundary, except those which the federal government retained for its own use. § 5(b)-(d), 73 Stat. 5; *Rice*, 528 U.S. at 507. This grant included the approximate 200,000 acres that had been set aside under the HHCA as well as almost 1.2 million additional acres of land. *Rice*, 528 U.S. at 507.

The Admission Act provides that the lands granted to Hawaii and the proceeds as well as income from those lands were to be held by Hawaii "as a public trust" to be "managed and disposed of for one or more of" the following purposes:

- for the support of the public schools and other public educational institutions;
- for the betterment of the conditions of native Hawaiians (as defined in the HHCA, as amended);
- for the development of farm and home ownership on as widespread a basis as possible;
- for the making of public improvements; and

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[4] After the HHCA was adopted as part of Hawaii's constitution pursuant to the Admission Act, the HHCA was "deleted from the United States Code, although it was not formally repealed." *Keaukaha-Panaewa Cmty. Ass'n v. Haw. Homes Comm'n*, 588 F.2d 1216, 1219 (9th Cir. 1979).

- for the provision of lands for public use.

§ 5(f), 73 Stat. 6. The Admission Act provides that the use of the proceeds and income from the lands "for any other object shall constitute a breach of trust for which suit may be brought by the United States." *Id.*

D. Hawaii's Administration of the Public Lands Trust

In the first decades following its admission, Hawaii continued to administer the HHCA lands for the benefit of native Hawaiians. The income from the remainder of the public lands largely flowed to Hawaii's Department of Education. *Rice*, 528 U.S. at 508.

In 1978, Hawaii amended its constitution and created the Office of Hawaiian Affairs ("OHA"). Haw. Const., Art. XII, § 5. OHA's purposes include:

- the betterment of conditions of native Hawaiians and Hawaiians;[5]
- serving as the principal state agency responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians;

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[5] The State statute defines a native Hawaiian as "any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the [HHCA], as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii." Haw. Rev. Stat. § 10-2. A Hawaiian is defined as "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." *Id.*

- assessing the policies and practices of other agencies impacting native Hawaiians and Hawaiians, and conducting advocacy efforts for native Hawaiians and Hawaiians;

- applying for, receiving, and disbursing, grants and donations from all sources for native Hawaiian and Hawaiian programs and services; and

- serving as a receptacle for reparations.

Haw. Rev. Stat. § 10-3. OHA is charged with administering and managing some of the funds from the public lands trust. *See id.* § 10-13.5; Haw. Const. Art. XII, §§ 5-6; *Price v. Akaka*, 3 F.3d 1220, 1222 (9th Cir. 1993). The 200,000 acres set aside under the HHCA is administered by a separate state agency, the Department of Hawaiian Home Lands ("DHHL"), which is headed by an executive board known as the Hawaiian Homes Commission ("HHC"). *See* Haw. Rev. Stat. §§ 10-3(3) & 26-17.

III. THE DISTRICT COURT PROCEEDINGS

Through a series of orders, the district court dismissed all of Plaintiffs' claims against all Defendants, culminating in the entry of a final judgment on January 15, 2004. The orders relevant to the Plaintiffs' arguments on appeal with respect to the United States are discussed below.

A. March 18, 2002 Order

The first relevant district court order denied Plaintiffs' motion for a temporary restraining order ("TRO"). *Arakaki v. Cayetano*, 198 F. Supp. 2d 1165 (D. Haw. 2002). The court noted that Plaintiffs rested their standing to assert their Equal Protection claims solely on their alleged injury as state taxpayers, not on any allegation that they had suffered from actual discrimination. *Id.* at 1174. The court recognized that "the pleadings of a valid taxpayer suit must set forth the relationship between the taxpayer, tax dollars, and the allegedly illegal government activity." *Id.* The court found that Plaintiffs' complaint alleged that Plaintiffs pay Hawaii taxes, that tax revenues are appropriated to OHA and DHHL, and that these funds are being spent in violation of the Equal Protection clause. *Id.* at 1175. According to the court, "[t]hese allegations sufficiently set forth the relationship between the taxpayer, tax dollars, and the allegedly illegal government activity such that Plaintiffs demonstrate taxpayer standing" to sue the State and challenge its expenditure of tax revenue on HHC, DHHL, and OHA.[6] *Id.* The court found, however, that Plaintiffs lacked standing for their Equal

[6] The court nonetheless declined to issue a TRO because Plaintiffs failed to establish irreparable harm or a sufficient likelihood of success on the merits. *Arakaki*, 198 F. Supp. 2d at 1176-78.

Protection claims that did not challenge the State's expenditure of state tax funds. *Id.* at 1175-76.

The district court then addressed Plaintiffs' breach of trust claims. Plaintiffs had argued that they are beneficiaries of a public land trust created by the Newlands Resolution and that the HHCA and the Admission Act set forth uses for those lands that impermissibly departed from the terms of the alleged Newlands Resolution trust. *Id.* at 1179. The court found that Plaintiffs lacked standing to bring that claim against the United States because Plaintiffs "d[id] not show that their injury [wa]s likely to be redressed by a favorable decision." *Id.* The court expressed skepticism as to whether the public trust Plaintiffs alleged even existed, and if it did, whether it had been violated. *Id.* at 1181. The court also declined to issue a TRO based on the breach of trust claims because the balance of hardships was in Defendants' favor. *Id.* at 1181-82.

B. May 8, 2002 Order

The State Defendants then moved to dismiss this case in its entirety claiming that Plaintiffs lacked standing and the case involved a non-justiciable political question. Supplemental Excerpts of Record of Defendant-Appellee United States ("SER") at 1-2.[7] The court again concluded that Plaintiffs' state

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[7] The copy of this document in Plaintiffs' ER is incomplete (ER Tab 5), (continued...)

taxpayer standing supported only some of their Equal Protection claims. The court found that "Plaintiffs only have taxpayer standing to challenge direct expenditures of tax money by the legislature. Plaintiffs do not have standing to challenge disbursement of money from Hawaii's General Fund when the money does not come from state taxes." SER at 17. Thus, the court found that Plaintiffs did not have state taxpayer standing to challenge OHA's receipt of revenue from "Ceded Land rentals" that are first paid into Hawaii's General Fund and thereafter paid to OHA. *Id.* The court stated that "such an administrative 'pass-through' does not transform rent revenues into tax revenues." *Id.* The court also rejected "Plaintiffs' argument that their taxes have been indirectly raised because, if the rent revenue from Ceded Lands were used for other purposes, Plaintiffs would be taxed less for other purposes." SER at 18. The court found this alleged injury was speculative and not a direct injury sufficient for standing. *Id.* The court therefore ordered that, "[e]xcept for Plaintiffs' claims based on state taxpayer standing that challenge direct expenditures of tax funds, Plaintiffs' Equal Protection claims are dismissed." SER at 34.

The district court also dismissed all of Plaintiffs' claims premised on their standing as alleged trust beneficiaries. SER at 20-28. The court first noted that

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[7](...continued)
so we have included the document in our SER.

Plaintiffs' characterization of these claims had shifted since the TRO motion. SER at 20-21. In their new form, Plaintiffs alleged that they are beneficiaries of a public trust created by § 5(f) of the Admission Act (*not* the Newlands Resolution). SER at 22-23. As beneficiaries, they sought to enjoin the enforcement of the trust's explicit purpose of bettering the conditions of native Hawaiians, which Plaintiffs asserted was an unconstitutional purpose. *Id.* The court recognized, however, that because Plaintiffs' claims did not involve any claim that a trustee had deviated from the terms of the § 5(f) trust, trust-beneficiary status had no bearing on Plaintiffs' claim. SER at 26-27. "Instead, as 'inhabitants' of Hawaii, Plaintiffs [we]re demanding that the State ignore an express trust purpose, which Plaintiffs say violates the Equal Protection Clause." *Id.* As such, Plaintiffs' breach of the public trust claims were nothing more than a generalized grievance for which they lacked standing. SER at 27-28. The court dismissed those claims as to all Defendants.

C. September 3, 2002 Order

In light of the district court's rulings on Plaintiffs' limited standing, the United States moved to dismiss the remainder of Plaintiffs' claims that pertained to the United States. The court granted the motion in an order filed September 3, 2002. ER Tab 8. The court reiterated that the sole basis of Plaintiffs' standing for

their Equal Protection claim was their status as state taxpayers. ER Tab 8, at 2. The court found that the Plaintiffs "misunderst[oo]d the scope of their taxpayer standing" and that they "only ha[d] standing to challenge the expenditure of state tax money" on the programs Plaintiffs' alleged violated the Equal Protection clause. *Id.* at 3-4. Because of the limited nature of Plaintiffs' alleged injury and standing, "[n]one of Plaintiffs' remaining claims affect[ed] any interest held by the United States [and] Plaintiffs' remaining claims d[id] not demonstrate any injury caused by the United States that c[ould] be redressed" by the court. *Id.* at 4-5. At this point, all claims against the United States were dismissed, though claims against State Defendants remained to be litigated.

D. November 21, 2003 Order

On September 2, 2003, while proceedings on Plaintiffs' remaining claims continued in the district court, this Court decided *Carroll v. Nakatani*, 342 F.3d 934 (9th Cir. 2003). In light of that decision, the district court in this case *sua sponte* reconsidered and vacated its dismissal of the United States as a party, without prejudice to the filing of a new motion. ER Tab 12. On October 14, 2003, the United States renewed its motion to dismiss for lack of standing, which motion was granted on November 21, 2003. ER Tab 14. The district court concluded that the *Carroll* decision did not change its conclusion that Plaintiffs lacked standing

for their claims against the United States. *Id.* at 15-21. All claims against the United States were therefore again dismissed and the United States was no longer a defendant.

E. December 16, 2003 Order

On December 3, 2003, in compliance with the district court's schedule for summary judgment briefing, *see* ER Tab 14, at 31; SER at 39-41, Defendant OHA filed a motion to dismiss Plaintiffs' remaining Equal Protection claim on the ground that it presented a non-justiciable political question. On December 15, 2003, Plaintiffs filed what they styled as a "counter motion" raising nineteen issues, including whether "Hawaiian" and "native Hawaiian" are racial classifications and whether the "*Mancari* defense" applies to this case.[8] In a December 16, 2003 order, the district court struck Plaintiffs' counter motion because, among other reasons, it was beyond the scope of the issues raised in OHA's motion, raised issues to be addressed in subsequent rounds of summary judgment briefing, and was untimely. ER Tab 26, at 1-4. On January 14, 2004,

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[8] The "*Mancari* defense" refers to *Morton v. Mancari*, 417 U.S. 535 (1974), in which the Supreme Court applied the rational basis level of scrutiny and held that a statute according an employment preference for qualified Indians in the Bureau of Indian Affairs did not constitute invidious racial discrimination in violation of the Fifth Amendment's Due Process clause. Thus, what Plaintiffs mean by the "*Mancari* defense" is the application of the rational basis level of scrutiny rather than strict scrutiny.

the district court granted OHA's motion to dismiss, concluding that Plaintiffs' remaining Equal Protection claim raised a non-justiciable political question. ER Tab 28. A final judgment was then entered. ER Tab 29.

STANDARD OF REVIEW

This Court reviews de novo the legal conclusion that a party lacks standing. *See Hong Kong Supermarket v. Kizer*, 830 F.2d 1078, 1080 (9th Cir. 1987); *Bruce v. United States*, 759 F.2d 755, 758 (9th Cir. 1985). Issues pertaining to the district court's case management are reviewed for an abuse of discretion. *See Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087-88 (9th Cir. 2002).

SUMMARY OF ARGUMENT

Plaintiffs' status as state taxpayers does not provide them standing to bring their Equal Protection claim against the United States for a number of reasons. First, Plaintiffs fail to show that their injury as state taxpayers is fairly traceable to any conduct by the United States. Second, Plaintiffs fail to establish that a judgment against the United States would redress their state taxpayer injury. Finally, federal, not state, taxpayer standing is needed to sue the United States and challenge the constitutionality of a federal statute. That is plainly lacking here.

Plaintiffs also lack standing to assert their breach of trust claim against the United States. The trust that Plaintiffs assert has been breached is less than clear,

and they fail to establish that a judgment against the United States would redress their alleged harm. In addition, Plaintiffs' allegations amount to no more than a generalized grievance that cannot support standing. Plaintiffs also erroneously contend that standing to bring a § 1983 action against state trustees equates to standing to bring a § 1983 claim against the United States. Finally, the United States can only be sued to the extent it has waived its sovereign immunity, and Plaintiffs identify no applicable waiver for their breach of trust claim.

Plaintiffs also fail to establish that the district court erred when it struck their untimely "counter motion" that did not otherwise comply with the court's order for summary judgment briefing. If Plaintiffs establish that the district court erred, this Court should remand to the district court for it to consider the motion in the first instance.

Finally, Plaintiffs' extraordinary request that, in the event of a remand, this Court order that a new district court judge be assigned this case should be rejected. The delays Plaintiffs perceive reflect nothing more than the district court's proper management of a complex case.

The district court's judgment should be affirmed.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFFS' EQUAL PROTECTION CLAIM AGAINST THE UNITED STATES FOR LACK OF STANDING

Plaintiffs' Equal Protection claim against the United States is unclear. Plaintiffs seem to allege that the Admission Act violates the Equal Protection clause in providing that (i) one of the public trust's purposes be bettering the conditions of native Hawaiians and (ii) the HHCA be incorporated into the State's constitution. ER Tab 1, at 10-11, 14. Plaintiffs allege that "[i]f and to the extent [the HHCA and the Admission Act] are defended, implemented or authorized by any acts, customs or usages of the United States or its officials, they deny and continue to deny Plaintiffs the equal protection of the laws and are ongoing violations of the Fifth Amendment." *Id.* at 4, 31. Plaintiffs seek a permanent injunction against "implementing and enforcing" the HHCA and the Admission Act. *Id.* at 4, 20. On appeal, Plaintiffs maintain that the district court erred in dismissing this claim against the United States because their status as state taxpayers gives them standing against the United States to challenge the Admission Act and the HHCA on Equal Protection grounds. Appellants' Opening Brief ("Br.") at 40-46. Plaintiffs' argument lacks merit.

A. The Law of Standing

The jurisdiction of federal courts is limited to "cases" and "controversies." U.S. Const., Art. III, § 2. No case or controversy exists where a plaintiff lacks standing to make the claims asserted. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). At a minimum, to establish standing a plaintiff must show:

- an "injury in fact" -- an invasion of a legally protected interest which is concrete and particularized and actual or imminent (not conjectural or hypothetical);
- a causal connection between the injury and the conduct complained of -- the injury must be fairly traceable to the action of the defendant and not the result of some action of a third party; and
- that it is likely the injury will be redressed by a favorable decision.

Id. at 560-61.[9] "In light of these principles, [the Supreme Court] ha[s] repeatedly refused to recognize a generalized grievance against allegedly illegal governmental conduct as sufficient for standing to invoke the federal judicial power." *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." *Id.*

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[9] In addition to these "immutable requirements of Article III," the federal courts have imposed prudential requirements that bear on the question of standing. *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quotation marks and citation omitted).

B. The United States is Not the Cause of Plaintiffs' Alleged Injury

Plaintiffs base their standing for their Equal Protection claim against the United States solely on their status as *state*, not federal, taxpayers. In Plaintiffs words, they filed this lawsuit "to protect their pocketbooks as state taxpayers." Br. at 9; *see also id.* at 40-46. Plaintiffs lack standing to sue the United States because they fail to show that their alleged state taxpayer injury is fairly traceable to an action of the United States and not some third party.

"'[T]axpayer standing,' by its nature, requires an injury resulting from a government's expenditure of tax revenues." *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 793 (9th Cir. 1999) (en banc); *see also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 478 (1982) (in suit premised on taxpayer standing, "taxpayer alleges injury only by virtue of his liability for taxes"). In part because a federal taxpayer's interest in the federal treasury is shared with many and the effect on future taxation of any payment out of federal tax funds is remote and uncertain, only in the narrowest of circumstances has the Supreme Court recognized that federal taxpayer status will establish one's standing. *Massachusetts v. Mellon*, 262 U.S. 447, 487 (1923); *Flast v. Cohen*, 392 U.S. 83, 102 (1968). Thus, a federal taxpayer can only challenge the constitutionality of a congressional enactment

under the Constitution's taxing and spending clause and must show that the challenged enactment exceeds specific constitutional limitations upon the exercise of the taxing and spending power. *Flast*, 392 U.S. 102-03; *id.* at 106 (federal taxpayer status does not satisfy standing where a plaintiff "seeks to employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System"). Here, however, Plaintiffs assert only that they have *state* taxpayer standing and seek to sue the United States and challenge the constitutionality of a federal statute on that basis. To satisfy the requirements for state taxpayer standing, a plaintiff's action must be "a good-faith pocketbook action," *Doremus v. Board of Education*, 342 U.S. 429, 433-34 (1952), and "set forth the relationship between taxpayer, tax dollars, and the allegedly illegal government activity." *Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1178 (9th Cir. 1984). To establish the sort of direct injury required for state taxpayer standing, a plaintiff must show that "the challenged statute involves the expenditure of state tax revenues." *Cammack v. Waihee*, 932 F.2d 765, 769 (9th Cir. 1991). A plaintiff cannot have state taxpayer standing where he or she "has failed to allege that the government spent tax dollars solely on the challenged conduct." *Doe*, 177 F.3d at 794.[10]

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[10] *Cf. Flast*, 392 U.S. at 102 ("[A federal] taxpayer will be a proper party (continued...)

By asserting state taxpayer standing, Plaintiffs allege an injury deriving from their payment of state taxes. *E.g.* Br. at 9, 30-31. That injury, however, is not fairly traceable to the United States and therefore Plaintiffs lack standing against the United States. The federal statutes that Plaintiffs challenge do not require that the State impose any specific tax on its citizens nor incur any particular expenditure of State tax revenue. *Supra* at 21. As discussed *supra* at 6-8, the Admission Act requires that Hawaii hold the lands granted to it with its admission to the Union, along with the proceeds and income from those lands, as a public trust managed in accordance with the Admission Act's direction. § 5(b)-(d), 73 Stat. 5. The Admission Act also requires that Hawaii adopt the HHCA and use proceeds from lands reserved under the HHCA for HHCA mandated programs. § 4, 73 Stat. 5. Tellingly, nowhere in this litigation have Plaintiffs demonstrated that their state taxpayer injury is caused by the United States. Plaintiffs do not argue, nor could they, that the HHCA or the Admission Act requires the State to tax Plaintiffs or expend State tax money. If Plaintiffs are

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[10](...continued)
to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. *This requirement is consistent with the limitation imposed upon state-taxpayer standing in federal courts in Doremus v. Board of Education.*" (Emphasis added; citation omitted)).

injured by any improper use of their State tax money, that is a matter solely between them and the State.

In an attempt to overcome the fact that Plaintiffs' alleged injury is not fairly traceable to the United States, Plaintiffs seem to argue that the State's use of non-tax funds for federally-mandated programs can support a finding of state taxpayer standing, as well as standing against the United States. *See, e.g.*, Br. at 32-35, 40. Plaintiffs' reasoning seems to be as follows: they have alleged that federally-mandated programs use non-tax funds (such as rent revenues from ceded lands) that could be appropriated to the State's General Fund and be used to reduce state taxes.[11] Plaintiffs maintain that this allegation is legally sufficient to show that the United States is the cause of their state taxpayer injury. Reduced to its essence, Plaintiffs' argument is that any state taxpayer has standing to sue the United States and challenge any federal statute because that federal statute may impact the amount of state taxes he or she pays. This argument fails for a number of reasons.

First and foremost, Ninth Circuit case law is clear: only the expenditure of state *tax* money, not non-tax funds, establishes state taxpayer standing. *Cantrell v. City of Long Beach*, 241 F.3d 674, 683 (9th Cir. 2001) ("To establish standing in a

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[11] Whether the funds could or would be used in a way to reduce state taxes is, of course, entirely speculative.

state or municipal taxpayer suit under Article III, a plaintiff must allege a direct injury caused by expenditure of tax dollars . . . ."); *Doe*, 177 F.3d at 793 ("[T]axpayer standing, by its nature, requires an injury resulting from a government's expenditure of tax revenues." (Internal quotation marks omitted)); *id.* at 794 ("[W]hen a plaintiff has failed to allege that the government spent tax dollars solely on the challenged conduct, we have denied standing."); *Cammack*, 932 F.2d at 769 ("The direct injury required [to show state taxpayer standing] is established when the taxpayer brings a 'good-faith pocketbook action'; that is, when the challenged statute involves the expenditure of state tax revenues."); *Hoohuli*, 741 F.2d at 1178 (state taxpayer standing is established only where plaintiffs "set forth the relationship between taxpayer, tax dollars, and the allegedly illegal government activity"). Indeed, Plaintiffs' argument that a state's expenditure of non-tax revenue is sufficient to support state taxpayer standing because, through a series of speculative and contingent events, spending of non-tax funds may impact a taxpayer's burden, is just the sort of hypothetical and conjectural injury that cannot support standing. *See Massachusetts v. Mellon*, 262 U.S. at 487-89; *Doremus*, 342 U.S. at 433-34; *Valley Forge*, 454 U.S. at 477 (Supreme Court has denied taxpayer standing where "[a]ny tangible effect of the challenged statute on the plaintiff's tax burden was remote, fluctuating and

uncertain" (internal quotation marks and citation omitted)); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 614 (1989) ("[I]t is pure speculation whether the lawsuit would result in any actual tax relief for [plaintiffs]. . . . The possibility that taxpayers will receive any direct pecuniary relief from this lawsuit is remote, fluctuating, and uncertain . . . ." (Quotation marks omitted)) (Kennedy, J., writing for himself and three other Justices); *Lujan*, 504 U.S. at 560-61.

Second, in *Western Mining Council v. Watt*, 643 F.2d 618 (9th Cir. 1981), this Court rejected a state taxpayer standing argument similar to Plaintiffs'. In *Western Mining*, the plaintiffs claimed that their state taxpayer status provided them standing to sue the Secretary of the Interior and challenge the constitutionality of two federal statutes. *Id.* at 630-32. They claimed that the federal statutes' policy of retaining public lands with the United States injured them as state taxpayers "because it restrict[ed] California's tax base, causing an increase in the amount of taxes which plaintiffs ha[d] to pay." *Id.* at 630. This Court disagreed and concluded that the plaintiffs lacked standing against the Secretary. *Id.* at 631-32. *Western Mining* held that in the "context of a state taxpayer challenge to federal statutes, the policies of the standing doctrine demand that plaintiffs allege some injury which is more definite and individual than the higher state taxes allegedly suffered here." *Id.* at 632. The *Western Mining*

plaintiffs therefore could not use state taxpayer standing to challenge the federal statutes because "the increase in state taxes allegedly suffered by plaintiffs [wa]s at best a highly generalized injury" on which standing could not be based. *Id.* The same holds true with respect to Plaintiffs' argument here that they are injured by the state's expenditure of non-tax revenue on federally-mandated programs because that non-tax money might otherwise be appropriated to the State's General Fund, leading the State legislature to reduce state taxes.

Quite simply, this Court has found that a state taxpayer can establish standing to challenge a state's expenditure of tax funds. Such standing, however, is insufficient to challenge the expenditure of non-tax funds based merely on the speculation that the state taxpayer would be taxed less by the state if the non-tax revenue were no longer used for a challenged purpose.

Plaintiffs nonetheless maintain that this Court has held that state taxpayer standing can be based on, and can challenge, any matter that affects any aspect of a state government's finances. Plaintiffs' argument is unconvincing. Plaintiffs first note that this Court recognized in *Cammack* that "[l]egislative enactments are not the only government activity which the taxpayer may have standing to challenge." Br. at 32. While true, this Court found state taxpayer standing in *Cammack* because the "[a]ppellants ha[d] asserted the *necessary injury -- actual*

expenditure of tax dollars -- and that a successful challenge would remedy the injury." 932 F.2d at 772 (emphasis added). The Court did not recognize that taxpayer standing exists to challenge all things affecting a state government's finances, as would be necessary for Plaintiffs to have standing to sue the United States here.

To support their argument based on *Cammack*, Plaintiffs cite the Sixth Circuit's decision in *Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985). Br. at 33. That case, however, does not help Plaintiffs. The *Hawley* plaintiffs alleged taxpayer standing on two grounds: (i) the rents received by the city's general fund from airport leases and (ii) the fees paid by airlines to sustain the airport's operations. *Id.* at 740-42. The court denied standing on the latter ground. *Id.* at 740. The city airport in *Hawley* was funded by fees paid by airlines, and thus it did not rely on city tax dollars. *Id.* at 737. Nevertheless, fees paid to the airport were public moneys and "in the highly unlikely event of a simultaneous default by all airlines . . . the City [could] be required to devote tax revenues to airport expenses." *Id.* Because of this indirect relation, the plaintiffs claimed taxpayer standing to challenge the airport's activities. The *Hawley* court rejected the argument, noting that "[t]he effect of the airport's finances on the City's fisc is . . . limited" and "federal courts do not sit to resolve such speculative

controversies." *Id.* at 737, 740. *Hawley* made clear, in its rejection of that alternative basis for taxpayer standing, that municipal taxpayers did not have standing to challenge any and all municipal government actions involving public money.

For the same reason that *Hawley* denied taxpayer standing -- because the public funds supporting the airport were only remotely and contingently related to taxpayer revenues -- Plaintiffs here lack standing to challenge the disposition of trust funds supporting implementation of the HHCA and benefits for native Hawaiians pursuant to the Admission Act. Such funds may, as the district court noted, "pass-through" the State's General Fund, but they are not tax dollars nor are they available, like tax dollars, for general appropriations. Thus, like the airport fees in *Hawley* that sustained the city airport, the trust funds here derive from sources independent of tax revenues, are earmarked to support a number of specific purposes, and are not available to contribute to the General Fund. They may be said to impact the General Fund or Plaintiffs' state tax burden only by constructing an impermissible chain of speculative contingencies that *Hawley* soundly rejected.

Plaintiffs' reliance on *Hoohuli* is similarly misplaced. Br. at 33. To be sure, *Hoohuli* recognized that the record in that case suggested programs implemented

by OHA "are supported in part by funds from a trust which are required to be spent exclusively for 'native Hawaiians,'" 741 F.2d at 1181. Nowhere, however, did the Court suggest that that fact established state taxpayer standing. Rather, the Court found taxpayer standing in *Hoohuli* because the plaintiffs' "challenge [wa]s to the 'appropriating, transferring, and spending . . . . of *taxpayers' money* from the General Fund of the State Treasury . . . .'" *Id.* at 1180 (emphasis added); *see also id.* at 1172 ("[Plaintiffs] complained that their tax dollars were being spent on a program which disbursed benefits based on impermissible racial classifications."). This Court did not conclude that state taxpayer standing can be used to challenge all things that may affect a state's finances. Nor did *Hoohuli* address whether that state taxpayer had standing to sue the United States, who was not a defendant in *Hoohuli*.

Plaintiffs also refer to this Court's *Doe* decision and its citation to two decisions from other circuits (*Fuller v. Volk*, 351 F.2d 323 (3d Cir. 1965) and *Schneider v. Colegio de Abogados*, 917 F.2d 620 (1st Cir. 1990)) to support their novel conception of state taxpayer standing. Br. at 33-34. But *Doe* utilized those out-of-circuit decisions to hold that the plaintiffs *lacked* taxpayer standing because they failed to allege an injury resulting from the government's expenditure of tax revenues and to illustrate that *Doe*'s holding "[wa]s in the mainstream." 177 F.3d

at 794-95. Those out-of-circuit cases, and *Doe*'s reliance on them, do not support the broad notion of state taxpayer standing that Plaintiffs assert.[12]

Plaintiffs also misplace reliance on the Sixth Circuit's decision in *Johnson v. Economic Dev. Corp.*, 241 F.3d 501 (6th Cir. 2001). In *Johnson*, the Sixth Circuit held that state government actions causing a loss of tax revenues can cause an injury supporting state taxpayer standing. *Id.* at 508 (finding state taxpayer standing where plaintiffs alleged they were taxpayers and that "Michigan treasury will lose approximately $68,400 in revenue because of the tax-exemption accorded the interest on the revenue bonds"). The case does not stand for -- and did not address -- the proposition that state taxpayers have standing to challenge any state government use of funds, regardless of the source, or anything that may affect the state's fisc.

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[12] Plaintiffs cite *Fuller* for the proposition that taxpayer standing need only be premised upon a showing of a misuse of "public funds." Br. at 33-34. However, subsequent Third Circuit case law makes clear that the "public funds" contemplated in *Fuller* are those derived from tax revenues. *ACLU-NJ v. Township of Wall*, 246 F.3d 258, 264 (3d Cir. 2001) (denying taxpayer standing where plaintiffs have not "carried their burden of proving an expenditure of revenues to which they contribute that would make their suit 'a good-faith pocketbook action'"). Similarly, the brief discussion denying state taxpayer standing in *Schneider* does not suggest that a plaintiff may premise standing on anything other than the appropriation or loss of tax revenues. Indeed, the requirement of a direct dollars-and-cents injury to a plaintiff as enunciated in *Schneider* implies that a plaintiff's tax funds were involved in the challenged government activity. 917 F.2d at 639.

In sum, Plaintiffs' status as state taxpayers provides no basis to sue the State of Hawaii for the State's expenditure of non-tax funds. Thus, Plaintiffs' further assertion that their state taxpayer status is sufficient to establish standing against the United States based on the State's expenditure of non-tax funds is even more tangential and unsupported. Plaintiffs fail to articulate, as they must, any non-speculative (i.e., not conjectural or hypothetical) connection between the funds they pay in state taxes and any action by the United States.[13] *Lujan*, 504 U.S. at 560-61. The district court properly dismissed Plaintiffs' Equal Protection claim against the United States for lack of standing.

C. Plaintiffs Fail to Show That a Judgment Against the United States Will Redress Their Alleged Injury

Besides failing to show that the United States is the cause of their alleged state taxpayer injury, Plaintiffs also fail to establish the "redressability" element of standing. Plaintiffs fail to show how a favorable decision against the United States would redress their alleged injury as a state taxpayer. In a taxpayer standing suit, "a taxpayer alleges injury only by virtue of his liability for taxes." *Valley Forge*, 454 U.S. at 478. It is completely speculative to assume that a judgment

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[13] Besides not being supported by precedent, Plaintiffs' argument eviscerates standing requirements and completely negates the constitutional requirement that a plaintiff show he or she has suffered an "injury in fact" to a legally protected interest that is "concrete and particularized" and "actual and imminent," as opposed to "conjectural" or "hypothetical."

against the United States would affect the State's use of its tax revenues or Plaintiffs' state tax liability. A judgment against the United States therefore will not redress any pocketbook injury that might be experienced by Plaintiffs as taxpayers. *See Steel Co. v. Citizens for a Better Envt.*, 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a [party] into federal court; that is the very essence of the redressability requirement.").

D. Federal, not State, Taxpayer Standing is Needed to Sue the United States and Challenge a Federal Statute

Plaintiffs' argument also fails because *state* taxpayer standing is insufficient to bring a lawsuit against the United States to challenge a *federal* statute. Federal, not state, taxpayer standing is needed. State taxpayer standing allows a plaintiff to challenge the expenditure of state taxes under state law; it does not, by itself, permit standing to sue the United States and challenge a federal law. *See Doremus*, 342 U.S. at 434; *Cammack*, 932 F.2d at 769; *Western Mining*, 643 F.2d at 631-32. As the Second Circuit has noted, "It is well settled that whether a plaintiff has standing in his capacity as a taxpayer turns largely on the sovereign whose act he challenges." *Bd. of Educ. v. New York State Teachers Retirement System*, 60 F.3d 106, 110 (2d Cir. 1995); *cf. Flast*, 392 U.S. at 102 ("[T]axpayer must establish a logical link between [status as taxpayer] and the type of legislative enactment attacked."). This is so because taxpayer standing

requirements differ depending on the taxpayer's relationship with the government unit whose action is being challenged. *See Massachusetts v. Mellon*, 262 U.S. at 487 (recognizing that municipal taxpayer standing requirements are laxer than those for federal taxpayer standing "based upon the peculiar relation of the corporate taxpayer to the [municipal] corporation.").

In a situation closely analogous to this case, the Second Circuit held that a plaintiff cannot use its *municipal* taxpayer status to challenge an action by the *state* government. *State Teachers*, 60 F.3d at 110-11. The plaintiffs in *State Teachers* challenged the constitutionality of a state statute that required municipalities to increase their contributions to the pension of public employees who had previous public service records. *Id.* at 108. They claimed an injury as municipal taxpayers as standing to challenge the state statute that required the additional expenditure. The Second Circuit rejected the contention, noting that "one of the central premises of municipal taxpayer standing is that the taxpayer's suit be brought against the *municipality*." *Id.* at 111. The Second Circuit found that taxpayer standing must be premised on "the governmental unit whose act is challenged," and it cannot depend "simply on the governmental unit whose funds were affected by the challenged action." *Id.* That reasoning applies equally here;

Plaintiffs assertion that they have *state* taxpayer standing is sufficient only to challenge *state* actions.

Indeed, Plaintiffs' theory, contrary to *State Teachers*, would permit a state taxpayer to avoid the limitations recognized by the Supreme Court on taxpayer challenges to federal statutes. Only in the narrowest of circumstances has the Supreme Court held that a federal taxpayer can challenge a federal statute. In *Flast*:

> the [Supreme] Court held that "a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution." Second, the Court required the taxpayer to "show that the challenged enactment exceeds specific constitutional limitations upon the exercise of the taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8."

Valley Forge, 454 U.S. at 478-79 (citing and quoting *Flast*, 392 U.S. at 102-03). Under Plaintiffs' theory, they would be able to avoid that burden, a burden they cannot satisfy,[14] by simply alleging that they are state taxpayers and that the federal statute they challenge impacts the State's fisc. Plaintiffs cite no authority for such an expansive proposition.

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[14] There is no question that Plaintiffs are unable to meet this burden as neither the Admission Act nor the HHCA is an exercise of Congress's power under the Constitution's taxing and spending clause (Plaintiffs have never contended otherwise).

In their brief, Plaintiffs do not challenge the reasoning of *State Teachers*. Rather, they inexplicably assert that the Second Circuit's conclusion that one cannot use municipal taxpayer standing to challenge a state action is dicta or, alternatively, that the Second Circuit actually denied standing because plaintiffs alleged only a "general grievance" (even though that term does not appear in *State Teachers*). Br. at 41-42. As the above discussion of *State Teachers* makes clear, Plaintiffs' arguments reflect a misreading of *State Teachers*.

Plaintiffs also erroneously contend that two other decisions support the proposition that state taxpayer standing is sufficient to bring a lawsuit against the United States challenging a federal statute. *Id.* at 42-44. Plaintiffs first misplace reliance on the Sixth Circuit's decision in *Gwinn Area Community Schools v. Michigan*, 741 F.2d 840 (6th Cir. 1984). In *Gwinn*, a school district, a taxpayer of the school district, and a student in the school district sued the State of Michigan, the Michigan State Board of Education, and the United States Department of Education and its Secretary. *Id.* at 841-42. They complained that the State of Michigan was reducing inappropriately the amount it paid to the district based on the federal aid the district received. They alleged that the "federal defendants ha[d] breached congressionally imposed obligations by allowing the State of Michigan to deduct from plaintiff district," the very benefit the district is supposed

to receive from the federal aid. *Id.* at 842-43. The district court dismissed the claims against the federal defendants for failure to exhaust administrative remedies. The Sixth Circuit agreed. *Id.* at 843-44. With respect to the claims for one year of the district's funding, however, the administrative remedies were in progress. The Sixth Circuit therefore directed that the claim as to that year be dismissed without prejudice. *Id.* at 844.

Plaintiffs here contend that if the taxpayer plaintiffs in *Gwinn* lacked standing to sue the federal defendants, there would have been no reason to dismiss without prejudice. Br. at 43-44 ("If the municipal taxpayers [in *Gwinn*] had 'lacked' standing to challenge federal laws . . . the court would have dismissed the federal defendants outright . . . whether administrative remedies had been exhausted."). Of course, nowhere in the opinion did the Sixth Circuit reach or address the question of whether (much less hold that) the state taxpayers would have standing the sue the federal defendants there based on state taxpayer standing if they exhausted their administrative remedies. *Gwinn* simply does not stand for the proposition that state taxpayer standing is sufficient to challenge a federal statute. Moreover, once administrative remedies were exhausted, it appears that the plaintiff in *Gwinn* who would have a claim against the federal defendants was the school district, not the taxpayer. In dismissing the claim, the district court

(cited with approval by the Sixth Circuit) stated, "plaintiff Gwinn Area [(the school district)] failed to exhaust the established remedies contained in the applicable regulations. . . . With respect to the upcoming school year, I find that *the plaintiff school district*[is] now involved in the administrative review process by the Secretary of Education and must obtain a 'final decision' before challenging the Secretary's actions in federal court." *Gwinn Area Cmty. Sch. v. Michigan*, 574 F. Supp. 736, 747-48 (W.D. Mich. 1983) (emphasis added).[15] The inference that Plaintiffs ask this Court to make -- that the Sixth Circuit concluded that the taxpayer had standing to challenge the federal action in *Gwinn* -- simply cannot be made.[16]

Plaintiffs next assert that the district court's decision in *City of New York v. U.S. Dep't of Commerce*, 822 F. Supp. 906 (E.D.N.Y. 1993) (challenge to methodology for conducting 1990 census and alleging disproportionate undercount of minorities), supports their novel theory that state taxpayer standing alone is sufficient for a suit against the United States challenging a federal law.

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[15] It is also noteworthy that in *Gwinn*, the plaintiffs did not challenge the constitutionality of an act of Congress as Plaintiffs do here. Also, the *Gwinn* plaintiffs named as defendants the U.S. Department of Education and its Secretary, not simply the United States as Plaintiffs do here.

[16] To the extent *Gwinn* found that municipal taxpayer standing is sufficient to challenge a state law, *State Teachers* explains why this holding is erroneous. *State Teachers*, 60 F.3d at 111.

Br. at 44-45. The portion of the *City of New York* district court opinion cited by Plaintiffs says absolutely nothing about taxpayer standing. *Id.* at 44 (quoting 822 F. Supp. at 911-12). In fact, in an earlier opinion in the *City of New York* case, that district court found that the individual plaintiffs established standing based on the "dilution of their votes," not their state taxpayer status. *City of New York v. U.S. Dep't of Commerce*, 713 F. Supp. 48, 50 (E.D.N.Y. 1989).

In short, the cases on which Plaintiffs rely do not establish that state, as opposed to federal, taxpayer standing has ever been found sufficient to sue the United States and challenge the constitutionality of a federal statute. The district court's dismissal of Plaintiffs' Equal Protection claim against the United States was proper for this reason as well.

E. Plaintiffs' Remaining Arguments are Irrelevant and do Not Establish Standing

Plaintiffs contend that "the HHCA, as imposed on the State of Hawaii by the Admission Act, is a stark example of an act which is beyond the power of Congress, i.e., to authorize, indeed to require, a state to violate the Fourteenth Amendment." Br. at 45. Plaintiffs then cite the Supreme Court's decision in *Saenz v. Roe*, 526 U.S. 489 (1999), for the proposition that Congress cannot authorize a state to violate the Fourteenth Amendment. Br. at 45. While that proposition is undoubtedly true, Plaintiffs still must establish their standing to

bring a claim against the United States; they must provide a connection between an act of the United States and their alleged injury. *Saenz* did not alter the well-established standing requirements of Article III and does not help Plaintiffs establish their standing to sue the United States here.[17]

Plaintiffs also cite this Court's decision in *Green v. Dumke*, 480 F.2d 624 (9th Cir. 1973), for the proposition that there is federal court jurisdiction "'for challenges to the activities of state agencies administering federal programs'" and that "'[i]t has not mattered a jurisdictional whit that the agency was enforcing federal statutes, as well as pursuing state ends.'" Br. at 46 (quoting *Green*, 480 F.2d at 628). *Green* is completely irrelevant to the question of whether Plaintiffs have standing to sue the United States based on their alleged state taxpayer injury. The question in *Green* was whether the state agencies were acting under color of state or federal law. 480 F.2d at 628. As even the portion of *Green* quoted by Plaintiffs makes clear, the *Green* plaintiffs were challenging the activities of state agencies, and the United States was not a defendant in *Green*. Br. at 45-46; *see also Green*, 480 F.2d at 626-27. *Green* is simply irrelevant to the question of whether Plaintiffs have standing to sue the United States.

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[17] Notably, the United States was not a defendant in *Saenz*. 526 U.S. at 496.

II. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFFS' BREACH OF TRUST CLAIM AGAINST THE UNITED STATES

On appeal, Plaintiffs allege that they are "trust beneficiaries" and that both the United States and the State have breached that trust. Br. at 22-28. At times, Plaintiffs seem to base their claim on an alleged public lands trust created by the Newlands Resolution. *E.g.*, *id.* at 22-23. At other times, Plaintiffs seem to base their claim on an alleged public trust embodied in the Admission Act. *E.g.*, *id.* at 24-28. Both arguments fail.

A. Plaintiffs' Breach of Trust Claim Based on the Newlands Resolution is Meritless

Plaintiffs first contend that the 1898 Newlands Resolution established a public land trust that the United States has violated. *Id.* at 21-22. Plaintiffs seem to believe that the Newlands Resolution requires that land ceded to the United States in 1898 be used for time in memoriam "solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes" and that the "inhabitants" who are the beneficiaries of the Newlands Resolution include Plaintiffs. *Id.* at 23. Plaintiffs then argue that the United States breached that trust when Congress enacted the 1920 HHCA and when Congress required in the 1959 Admission Act that Hawaii adopt the HHCA and hold a public trust that

includes as one of its purposes betterment of native Hawaiians. *Id.* at 22, 28. Plaintiffs' argument fails for a number of reasons.

First, Plaintiffs lack standing to assert this claim against the United States because their alleged injury will not be redressed by a favorable judgment. Any breach of the alleged Newlands Resolution trust occurred in 1959, at the latest. In the Admission Act, the United States granted Hawaii title to all public lands and public property within the State's boundary (including the land set aside under the HHCA), except for those which the federal government retained for its own use. § 5(b)-(d), 73 Stat. 5. As the district court succinctly put it:

> Since [1959], the federal government has not imposed or enforced any trust requirements, has not implemented any trust programs, and has not administered any trust assets or services. The court has some difficulty understanding how, [today], a court can hold the federal government to account for allegedly illegal laws it enacted decades ago from which it has long since divorced itself. What remedy could this court order against the federal government when it is now the State, not the federal government, that controls the programs and assets about which Plaintiffs complain? It appears to the court that, if Plaintiffs have any remedy for the alleged wrongdoing by the federal government, that remedy lies with another branch of government.

Arakaki, 198 F. Supp. 2d at 1180. Nowhere in their brief do Plaintiffs refute this sensible analysis and establish a claim redressable by a judgment against the United States.

Second, and as the district court noted, Plaintiffs fail to show that the Newlands Resolution created a trust to which they are a beneficiary and which the United States violated. Plaintiffs' theory appears to be that the Newlands Resolution created a trust that allows the lands ceded to the United States in 1898 to be used only "for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." Plaintiffs ignore that the Newlands Resolution provides:

> The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; *but the Congress of the United States shall enact special laws for their management and disposition*: *Provided*, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.

30 Stat. 750 (emphasis added). The Newlands Resolution therefore, at most, put restrictions on revenues and proceeds from the public lands. The United States Attorney General's opinion on which Plaintiffs rely, Br. at 23, says no more than that. The Attorney General did not conclude that a public land trust governing management and disposal of the ceded lands was created or that Congress could

not modify any trust terms. The Attorney General described the effect of the portion of the Newlands Resolution quoted above as follows:

> The effect of this clause is to subject the public lands in Hawaii to a special trust, limiting the revenue from or proceeds of the same to the uses of the inhabitants of the Hawaiian Islands for educational or other public purposes. *This merely restricted the uses to which the proceeds of such lands could be put, but did not in anywise [sic] affect the previous provisions of this clause, which conferred upon Congress the sole and absolute authority to provide for the management and disposition of these lands. The effect of the language quoted is to vest in Congress the exclusive right, by special enactment, to provide for the disposition of public lands in Hawaii.*

Attorney General Opinion at 576 (1899) (emphasis added). To the extent Plaintiffs argue that Congress violated the alleged Newlands Resolution trust by enacting the HHCA and the Admission Act, which permit proceeds from the public lands to be used for various purposes including the benefit of native Hawaiians, their contention has no merit. First, it is not at all clear that using the proceeds for the benefit of native Hawaiians is in any way inconsistent with the Newlands Resolution's terms. Second, even if it were inconsistent with the Newlands Resolution, Congress created the Newlands Resolution by statute and Congress can alter or amend its terms by statute (such as the HHCA and

Admission Act).[18] Plaintiffs cite no authority for the extraordinary proposition that Congress cannot change the terms of a trust that it creates.[19]

Plaintiffs fail to establish that the Newlands Resolution created the public trust they allege or that Congress acted inconsistent with, or somehow violated, the Newlands Resolution when it enacted the HHCA or the Admission Act.

B. Plaintiffs' Breach of Trust Claim Based on the Admission Act is Meritless

Plaintiffs also make a breach of trust argument based on the Admission Act. Br. at 24-28. Plaintiffs maintain that a term of the trust (namely, the portion of Admission Act § 5(f) that pertains to the betterment of the conditions of native Hawaiians), violates the Constitution and therefore is illegal and unenforceable. Br. at 26-27. They claim that, as beneficiaries of the Admission Act's § 5(f) trust, they can sue to prevent enforcement of the illegal term. Again, Plaintiffs lack standing to bring this claim against the United States.

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[18] Of course, Congress is limited in what it can enact by the Constitution. But as discussed above, *supra* Part I, Plaintiffs lack standing to bring their Equal Protection claim.

[19] This is not a situation where Plaintiffs allege that the Executive branch has failed to comply with a trust created by Act of Congress.

To make their argument, Plaintiffs rely on a line of cases recognizing that beneficiaries of the § 5(f) trust have standing to bring a § 1983 action[20] against state trustees for violations of § 5(f)'s purposes. For instance, in *Price v. Akaka*, 3 F.3d 1220, 1224-25 (9th Cir. 1993), native Hawaiians brought a § 1983 suit against OHA's board of trustees claiming that the trustees had violated the § 5(f) trust by failing to expend trust funds in accordance with the Admission Act, in particular, for the benefit of native Hawaiians. This Court found that the native Hawaiian plaintiffs had standing to bring the § 1983 claim because they were "among the class of § 5(f) beneficiaries whose welfare is the object of the action at issue." *Id.* at 1224. This Court recognized that trust beneficiaries "have the right to maintain a suit (a) to compel the trustee to perform his duties as trustee; (b) to enjoin the trustee from committing a breach of trust; and (c) to compel the trustee to redress a breach of trust." *Id.* (internal quotation marks, alterations, and citations omitted). Thus, this Court permitted native Hawaiians to maintain a

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[20] 42 U.S.C. § 1983 provides, "Every person who, *under color of any* statute, ordinance, regulation, custom, or usage, *of any State* or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." (Emphasis added).

§ 1983 claim against the OHA trustees (people acting under color of state law) to enforce § 5(f) of the Admission Act (a federal statutory right). *See also Keaukaha-Panaewa Cmty. Ass'n v. Haw. Homes Comm'n*, 588 F.2d 1216, 1219 (9th Cir. 1979) (recognizing § 1983 suit by native Hawaiians to challenge HHC's agreement to convey lands for flood control project as inconsistent with § 5(f)); *Price v. State of Hawaii*, 764 F.2d 623, 629-30 (9th Cir. 1985) (recognizing standing of native Hawaiians to bring § 1983 claim against Hawaii governor by failing to expend § 5(f) funds "'for the betterment of the conditions of native Hawaiians'"); *Price v. Akaka*, 928 F.2d 824, 826-27 (9th Cir. 1991) (native Hawaiians had standing to assert § 1983 claims alleging that trustees of OHA contravened § 5(f) by commingling of trust funds, not expending trust funds for benefit of native Hawaiians, and utilizing trust funds for purposes not listed in § 5(f)); *Price v. State of Hawaii*, 939 F.2d 702, 706 (9th Cir. 1991) (finding native Hawaiians had standing to assert § 1983 claim against state officials whose inaction allegedly led to improper diversion of revenue that should have been used for § 5(f) purposes). Plaintiffs' reliance on these cases to assert a breach of trust claim against the United States is misplaced.

First, § 1983 provides a cause of action only against those acting under color of state law; it does not provide a claim against the federal government and

its actors. *Morse v. N. Coast Opportunities, Inc.*, 118 F.3d 1338, 1343 (9th Cir. 1997) ("[B]y its very terms, § 1983 precludes liability in federal government actors."); *cf. Price*, 939 F.2d at 707-09 (claims for trust violations brought against private parties properly dismissed because they were not acting under color of state law). In none of the cases cited by Plaintiffs did this Court allow a § 1983 suit against the United States.

Second, the line of cases on which Plaintiffs rely involve claimed deviations from the terms of § 5(f) of the Admission Act. Plaintiffs here do not allege any deviation from the terms of § 5(f). Rather, Plaintiffs maintain that one of § 5(f)'s five purposes is unconstitutional and therefore the trustee must refrain from complying with that illegal term. *See* Br. at 26-27. Even though it is the State who holds and administers the lands granted under the Admission Act,[21] Plaintiffs' brief seems to argue that the United States is involved in "continuing breaches" of the § 5(f) trust because Admission Act § 4 requires the United States' consent

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[21] *See, e.g., Carroll v. Nakatani*, 342 F.3d 934, 943 (9th Cir. 2003) ("The United States granted Hawaii title to all public lands and public property within the boundaries of the State . . . . Even though the United States granted Hawaii title to the HHCA lands, it reserved to itself a right of consent to any changes in the homestead lease qualifications."); *Han v. U.S. Dep't of Justice*, 45 F.3d 333, 337 (9th Cir. 1995) ("The Admission Act transferred ownership of the home lands to the State of Hawaii and provided that the state, not the United States, was to act as trustee. The United States retained only a limited role--*i.e.*, a right to bring an action for breach of trust."); *Price*, 3 F.3d at 1222 ("Hawaii holds these § 5(b) lands as a public trust for five purposes . . . .").

before the State can amend or repeal the HHCA or change the qualifications for HHCA lessees, and authorizes the United States to sue for breach of the § 5(f) trust. *Id.* at 28.

The district court properly recognized that Plaintiffs do not have standing to assert this generalized grievance. Plaintiffs are not proceeding on the basis of any direct injury to them. Plaintiffs have not alleged that they have personally been denied equal treatment; they have not alleged that they applied for and were denied benefits because they are not native Hawaiians.[22] (Their claim is that they have a right to have Hawaii and the United States act in accordance with their conception of the Constitution.) This is nothing more than a generalized grievance which the Supreme Court has repeatedly held federal courts do not resolve. *See United States v. Hays*, 515 U.S. 737, 743 (1995) (and cases cited therein); *Allen v. Wright*, 468 U.S. 737, 754 (1984) ("[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to

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[22] As the district court noted, SER at 26, trust beneficiary status has nothing to do with Plaintiffs' claim. They are "beneficiaries" only in the same sense as every individual in Hawaii benefits from generally applicable public trust purposes, such as "making public improvements," in the Admission Act. Moreover, Plaintiffs are seeking to have the State ignore a trust term and Plaintiffs have not shown that they would otherwise be entitled to any particular benefits. Thus, Plaintiffs are unlike those in the *Price* line of cases where the party brought a § 1983 action to enforce a particular term of the trust and was "among the class of § 5(f) beneficiaries whose welfare is the object of the action at issue." *Price*, 3 F.3d at 1224.

confer jurisdiction on a federal court."). "[E]ven if a governmental actor is discriminating on the basis of race, the resulting injury accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct." *Hays*, 515 U.S. at 743-44 (internal quotation marks and citations omitted).

This Court applied these same principles in *Carroll v. Nakatani*, 342 F.3d 934, 947 (9th Cir. 2003), when it found that an individual did not have standing to bring a claim that OHA's provision of benefits to native Hawaiians and Hawaiians violated the Equal Protection clause because he asserted only a generalized grievance. In *Carroll*, this Court noted that the plaintiff "d[id] not provide any evidence of an injury from the OHA programs other than the classification itself. He offer[ed] no evidence that he is able and ready to compete for, or receive, an OHA benefit." *Id.* (internal quotation marks and citations omitted). This Court therefore concluded that the plaintiff "lack[ed] standing because he fail[ed] to show an injury from the allocation of benefits to native Hawaiians and Hawaiians. He present[ed] only a generalized grievance." *Id.* The same is true here: Plaintiffs fail to show any injury.

Finally, Plaintiffs fail to show how the United States is the cause of their injury or that a judgment against the United States would redress their injury. It is

the State that holds and administers the § 5(f) public trust. Plaintiffs fail to show how the fact that the United States must consent to any change by the State in the HHCA or HHCA lessee qualification, Br. at 33, injures them given that Plaintiffs have not alleged that they applied for and were denied HHCA benefits.

The district court properly dismissed this claim against the United States.

C. Plaintiffs Fail to Identify a Waiver of Sovereign Immunity for Their Breach of Trust Claim Against the United States

Plaintiffs' breach of trust claim against the United States must also be dismissed because Plaintiffs fail to identify any applicable waiver of the United States' sovereign immunity. The United States can only be sued to the extent it has waived its sovereign immunity. *United States v. Sherwood*, 312 U.S. 584, 586 (1941); *Tucson Airport Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 644 (9th Cir. 1998) (suits against the United States start from the "assumption that no relief is available"). "[T]he [Supreme] Court has recognized the general principle that the United States, as sovereign, is immune from suit save as it consents to be sued and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981) (internal quotation marks, citations, and alterations omitted). Waivers of sovereign immunity must be unequivocally expressed in the statutory text and are strictly construed in favor of the sovereign. *See, e.g.*, *Lane v. Pena*, 518 U.S. 187, 192

(1996); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983). The burden is on the "plaintiff in a lawsuit against the United States [to] point to an unequivocal waiver of sovereign immunity." *Blue v. Widnall*, 162 F.3d 541, 544 (9th Cir. 1998). Plaintiffs fail to identify a statutory waiver of the United States' sovereign immunity applicable to their breach of trust claim.

First, Plaintiffs have not and cannot invoke the waiver of sovereign immunity in the Administrative Procedure Act (the "APA") because they fail to identify any federal official or agency,[23] nor any action taken or unlawfully withheld by the same, that is the subject of their lawsuit. 5 U.S.C. § 702. Second, Plaintiffs cannot rely on the Tucker Act. The Tucker Act confers jurisdiction upon the Court of Federal Claims over certain claims against the United States, and "[i]f a claim falls within the terms of the Tucker Act, the United States has presumptively consented to suit."[24] *United States v. Mitchell*, 463 U.S. 206, 216 (1983) ("*Mitchell II*"); 28 U.S.C. § 1491(a)(1). For a claim to fall within the Tucker Act, it "must be one for money damages against the United States" and the

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[23] To the extent Plaintiffs perceive Congress as the "wrongdoer" because of its enactments, Congress is not an "agency" for purposes of the APA. 5 U.S.C. § 701(b)(1)(A).

[24] The "Little Tucker Act" gives district courts concurrent jurisdiction with the Court of Federal Claims only as to those claims not exceeding $10,000. 28 U.S.C. § 1346 (a)(2).

plaintiff must rely upon a source of substantive law that can fairly be interpreted as mandating compensation by the federal government for the damages sustained. *Mitchell II*, 463 U.S. at 216-27; *United States v. Navajo Nation*, 537 U.S. 488, 503 (2003); *United States v. Testan*, 424 U.S. 392, 400 (1976). Because Plaintiffs do not seek compensatory money damages, they cannot avail themselves of the Tucker Act's waiver of sovereign immunity. ER Tab 1, at 34-36.

Nor can Plaintiffs use the line of Supreme Court cases finding that the United States waived its sovereign immunity to suit under the Tucker Act where federal treaties, statutes, and regulations provided for "elaborate control" or "supervision" of land and resources held in trust for federally recognized tribes.[25] *See Mitchell II*, 463 U.S. at 211-12, 225. Plaintiffs' allegations of a general trust relationship is insufficient to satisfy this requirement. For instance, the Supreme Court has held that the mere holding of fee title by the United States in trust for American Indians did not provide a sufficient basis for a breach of trust action. *United States v. Mitchell*, 445 U.S. 535, 546 (1980) ("*Mitchell I*") (act providing the United States will hold title to land in trust for American Indians "does not impose any [fiduciary] duty upon the Government"). The public trust created by

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[25] These cases involve both the Tucker Act and the so-called "Indian Tucker Act." The Indian Tucker Act provides tribal claimants with the same access to the Court of Federal Claims provided to individuals under the Tucker Act.

Admission Act § 5(f) does not exhibit the requisite comprehensive control by the United States as established in *Mitchell II*. In this case, the role of the United States is far from exerting comprehensive control over the public trust created by the Admission Act. In fact, the Admission Act does not even present the beneficial title-type control by the United States that *Mitchell I* rejected as the basis for a breach of trust action. *See Mitchell I*, 445 U.S. at 546; *Mitchell II*, 463 U.S. at 225 ("fiduciary relationship" arises "when the Government assumes . . . elaborate control over forests and property belonging to Indians").

Plaintiffs fail to identify any waiver of sovereign immunity for their breach of trust claim. This failure provides an additional and independent basis for affirming the district court's dismissal of this claim against the United States.

IV. THE DISTRICT COURT DID NOT ERR IN STRIKING PLAINTIFFS' COUNTER MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs maintain that the district court erred when it struck Plaintiffs' purported "counter motion" for partial summary judgment "as to certain key issues relating to the *Mancari* defense raised by OHA." Br. at 47; *see also supra* note 8 (describing "*Mancari* defense"). Plaintiffs ask this Court to "direct, on remand, that *Mancari* is inapplicable to this case" and that strict scrutiny applies. Br. at 55. To the extent Plaintiffs may be directing this argument against the United States,

we address it. *Compare id.* at 48 (discussing "Defendants") *with id.* at 51-52 (discussing "State Defendants").

District courts enjoy broad discretion in the management of cases and the scheduling of motions. *See, e.g.*, Fed. R. Civ. P. 16(c); *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087-88 (9th Cir. 2002); *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607 (9th Cir. 1992). The district court properly struck Plaintiffs' "counter motion" because, by introducing issues different from those raised in OHA's initial motion, it was not a proper counter motion. In addition, the court properly determined that Plaintiffs' counter motion raised issues that the court had scheduled for briefing in a subsequent round of motions,[26] and even if the counter motion did properly raise issues germane to the briefing, it was an untimely motion. ER Tab 26, at 1-4. Plaintiffs fail to show that the district court erred, much less abused its discretion, when it struck Plaintiffs' purported counter motion.

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[26] Recognizing "the complexity, breadth, and nature of this action," the district court determined that it should "consider motions in a designated order." SER at 39. It therefore entered an order setting three rounds of summary judgment motions -- the first dealing with issues that had to be decided before the end of the case but that did not turn on whether strict scrutiny or some other level of scrutiny applied; the second addressing the level of scrutiny applicable to Plaintiffs' claims; and the third regarding the application of facts to the level of scrutiny decided upon in the second round of motions. By filing their "counter motion," Plaintiffs inappropriately tried to raise the *Mancari* issue and argue for strict scrutiny in the first round of motions.

Even if the district court erred when it struck Plaintiffs' motion, the proper remedy is for this Court to remand for the district court to consider the motion in the first instance, not direct an outcome that Plaintiffs ask for based on alleged issue preclusion and undisputed facts. Br. at 55. Plaintiffs assert that issue preclusion "bars the Defendants from re-litigating issues already adjudicated against them" in *Rice v. Cayetano*, 528 U.S. 495 (2000), and what Plaintiffs call "*Arakaki I.*"[27] Br. at 48. The United States, however, was not a party, or in privity with any party, to *Rice* or *Arakaki I* and therefore collateral estoppel cannot be applied against the United States.[28] *Rice*, 528 U.S. at 507, 510 (United States filed amicus brief and not named as defendant); ER Tab 25, at Exh. 1. With respect to the supposed undisputed facts, Plaintiffs point to nothing that suggests that the facts are undisputed by the United States. Br. at 53-55. Moreover, even if the issues and facts identified by Plaintiffs were taken as controlling (which we do not concede), they do not establish that *Mancari* is inapplicable and that strict scrutiny applies to Plaintiffs' claims.[29]

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[27] What Plaintiffs call *Arakaki I*, appears to be the district court's decision in *Arakaki v. Hawaii*, No. 00-00514 (D. Haw.). ER Tab 25, at Exh. 1.

[28] Plaintiffs admit as much. *See* Br. at 48 & 51-52.

[29] For example, the Supreme Court's decision in *Rice* only declined to extend *Mancari* to the election of OHA's trustees, elections to which the

(continued...)

The district court did not err in striking Plaintiffs' purported "counter motion." Even if the district court did err, Plaintiffs fail to show, particularly with respect to the United States, that they are entitled to an order from this Court directing that *Mancari* is inapplicable and that strict scrutiny applies. If there was error, the proper remedy would be for this Court to remand for the district court to consider these issues in the first instance.

V. IN THE EVENT OF A REMAND, THE DISTRICT COURT JUDGE SHOULD NOT BE REPLACED

Plaintiffs complain about what they perceive to be twenty-two months of delay by the district court judge in, what Plaintiffs call, a "straightforward" case involving an "uncomplicated legal challenge." Br. at 56. Plaintiffs make the extraordinary request that, in the event of a remand, this Court order the case

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[29](...continued)
Fifteenth Amendment applies. *Rice*, 528 U.S. at 521-22. The Supreme Court in *Rice* assumed the validity of the underlying administrative structure and trusts, and expressed no opinion on that point. *Id.* *Rice* does not overrule *Mancari*, nor compel a conclusion that strict scrutiny applies here. *Rice* holds only that even if native Hawaiians resemble an Indian tribe and thus qualify as a nonracial and therefore non-suspect group for purposes of Equal Protection analysis involving other benefits, the group was a racial group under the Fifteenth Amendment when they compose the exclusive electorate for public officials serving on a state agency. Critical to *Rice*'s holding is that it involved the right to vote in a statewide election, and the holding was grounded in the Fifteenth Amendment, not on Equal Protection principles under the Fourteenth Amendment.

assigned to a new district court judge or issue some other order to prevent further such delays. *Id.* at 66. Plaintiffs' request should be denied.

Much of the alleged delay that Plaintiffs complain about was not incurred when the United States was a party and not as a result of any motion or conduct involving the United States. *Id.* at 56-63. We therefore think it sufficient to note that, as discussed *supra* at 54, district court judges enjoy wide discretion in managing cases, and the district court judge in this case acted well within her discretion. For example, despite Plaintiffs' assertions to the contrary, Br. at 56-57, it makes perfect sense for the district court to have delayed summary judgment motions until motions regarding Plaintiffs' standing were heard. Moreover, notwithstanding Plaintiffs' belief that this is a straightforward and uncomplicated case, their complaint is thirty-seven pages long, includes three claims for relief (with nine items in the prayer for relief) against numerous state agencies and state officials as well as the United States. The lawsuit alleges violations of the United States Constitution. The district court judge's handling of this case reflects the case's complexity and the seriousness of Plaintiffs' allegations. In the event of remand, neither replacement of the district court judge nor any other order by this Court is warranted to remedy any perceived delay.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

THOMAS L. SANSONETTI
Assistant Attorney General

JEFFREY BOSSERT CLARK
Deputy Assistant Attorney General

ELLEN J. DURKEE
STEVEN MISKINIS
AARON P. AVILA
Attorneys, U.S. Department of Justice
Environment & Natural Resources Div.
P.O. Box 23795 (L'Enfant Station)
Washington, DC 20026
(202) 514-1307

OF COUNSEL:

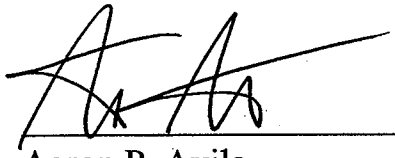
ROBIN FRIEDMAN
U.S. Department of the Interior
Office of the Solicitor
Division of General Law

BARBARA COEN
U.S. Department of the Interior
Office of the Solicitor
Division of Indian Affairs

90-6-25-00891
August 3, 2004

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel is unaware of any related cases pending in this Court.

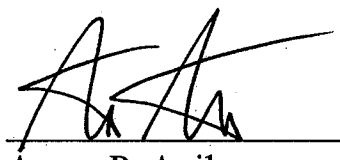


Aaron P. Avila
U.S. Department of Justice
Environment and Natural Resources Division
P.O. Box 23795 (L'Enfant Plaza Station)
Washington, D.C. 20026
(202) 514-1307

August 3, 2004

CERTIFICATE PURSUANT TO CIRCUIT RULE 32-1

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the foregoing brief is proportionally spaced, has a typeface of 14 points or more and contains 13,784 words.



Aaron P. Avila
U.S. Department of Justice
Environment and Natural Resources Division
P.O. Box 23795 (L'Enfant Plaza Station)
Washington, D.C. 20026
(202) 514-1307

August 3, 2004

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing have been served upon each of the following counsel on this 3rd day of August, 2004 by dispatching same by United States Mail:

H. William Burgess
2299-C Round Top Drive
Honolulu, HI 96822

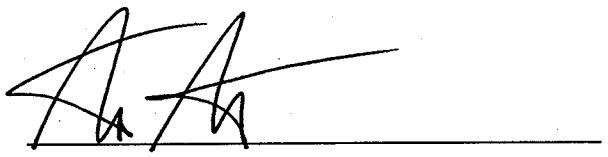
Emmett E. Lee Loy
758 Kapahulu Ave. #429
Honolulu, HI 96816

Philip W. Miyoshi
McCorriston Miller Mukai MacKinnon LLP
Five Waterfront Plaza, Suite 400
500 Ala Moana Boulevard
Honolulu, HI 96813

Yuklin Aluli
Law Office of Yukin Aluli
415-C Uluniu Street
Kailua, HI 96734

Charleen M. Aina
Girard D. Lau
Office of the Hawaii Attorney General
425 Queen St.
Honolulu, HI 96813

Jon Van Dyke, Esq.
2515 Dole Street
Honolulu, HI 96822



Aaron P. Avila
Environment & Natural Resources Div.
United States Department of Justice
P.O. Box 23795 (L'Enfant Station)
Washington, DC 20026
(202) 514-1307