PLAINTIFFS/APPELLANTS' PETITION FOR PANEL OR *EN BANC* REHEARING

I. RULE 35(b)(1) STATEMENT

A. The dismissal for lack of standing conflicts with decisions of the Supreme Court and this Court by conflating standing and the merits of the claims alleged.

The Panel opinion[1], 2005 WL 2092565 (9th Cir. August 31, 2005) affirms the Trial Court's dismissal, for lack of standing, of Plaintiffs' claims as beneficiaries of Hawaii's public land trust and (except to a limited extent) Plaintiffs' claims as state taxpayers. By doing so, the Panel opinion conflicts with the decisions of the Supreme Court and this Court. Consideration by the full court is therefore necessary to secure and maintain uniformity of this Court's decisions.

1. Standing focuses on the party, not the issues or merits.

"The requirement of standing 'focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.'" *Valley Forge Christian College v. Americans United for Separation of Church and State*, 1982, 102 S.Ct. 752, 765, 454 U.S. 464, 484, 70 L.Ed.2d 700, quoting from *Flast v. Cohen,* 1968, 88 S.Ct. 1942, 1952, 392 U.S. 83, 99, 20 L.Ed.2d 947.

---

1 The Panel properly and correctly upheld Plaintiffs' standing as state taxpayers to challenge appropriation of taxpayer revenue to OHA and reversed the trial court's dismissal on political question grounds. Plaintiffs do not seek rehearing as to those items or any of the Panel's excellent reasoning in Part IV. A.1. The Vitality of *Hoohuli* or Part V. POLITICAL QUESTION. As to the miscellaneous items in Part VI relating to discovery and costs, if this Court grants this petition, they should be reheard as well.

"Although standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, * * * it often turns on the nature and source of the claim asserted. * * * Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as **granting persons in the plaintiff's position a right to judicial relief.**" *Warth v. Seldin*, 1975, 95 S.Ct. 2197, 2206, 422 U.S. 490, 500, 45 L.Ed.2d 343. (Emphasis added.)

Allegation establishes standing. The focus on the party also means that standing is not defeated by failure to prevail on the merits. An allegation of injury establishes standing to win a determination whether the law affords redress for that injury. 13 Fed. Prac. & Proc. Juris.2d §3531 FN2.6 *Wright & Miller*.

2. **This Court has often granted to persons in Plaintiffs' position, as beneficiaries of Hawaii's public land trust, a right to judicial relief.**

In *Price v. Akaka*, 3 F.3d 1220, 1224 -1225 (9th Cir.1993), dealing with the same trust which is the subject of this case, Hawaii's public land trust (sometimes referred to as the "ceded lands trust" or "§5(f) trust"), this Court said,

> "The instant case involves a public trust, and under basic trust law principles, 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. Restatement 2d of the Law of Trusts, § 199."

3. **This Court, in its leading case on taxpayer standing, has also granted to persons in Plaintiffs' position, as State of Hawaii taxpayers burdened by the OHA laws, a right to judicial relief.**

We find that, with some exceptions, plaintiffs have satisfied the

> requirements for standing. Each of the individual plaintiffs have set forth his or her status as a taxpayer. *** Plaintiffs complain that, "[b]y creating the class identified as 'Hawaiians' in the office of Hawaiian Affairs, in addition to the class 'Native Hawaiians,' **taxpayers have been burdened with the necessity to provide more taxes** to support said second class." The pleadings set forth with specificity amounts of money appropriated and spent for allegedly unlawful purposes. This case fits the description of a "good-faith pocketbook action" set forth in *Doremus,* 342 U.S. at 434, 72 S.Ct. at 397. We therefore hold that at least some of the individual plaintiffs have standing as taxpayers. *Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1181 (9th Cir. 1984). (Emphasis added.)

Hoohuli is "the leading case" and "controlling Circuit precedent" on state taxpayer standing. *Cammack*, 932 F.2d at 770 and fn. 9. There were 11 plaintiffs in *Hoohuli*, nine of them were native Hawaiian and two had no Hawaiian ancestry. (*Hoohuli*, 741 F.2d at 1172.) Here there are 14 plaintiffs, three of Hawaiian ancestry and eleven not. The District Court noted several times that the allegations of Plaintiffs' complaint are "virtually identical" to those in *Hoohuli*. Order dated May 8, 2002 (ER at pages 14 and 16).

B. The disposal of almost all issues, under the guise of "standing" orders, while prohibiting Plaintiffs from moving for summary judgment, presents questions of exceptional importance.

The Panel opinion affirming the District Court's use of "standing" orders to slowly over 22 months trim away, bit by bit, almost all issues raised by Plaintiffs while refusing to hear or allow summary judgment motions by Plaintiffs, sets a dangerous precedent. "Standing" could become

the technique of choice to dispose of cases without the fairness entailed by summary judgment procedures or trial on the merits See 13 Fed. Prac. & Proc. Juris.2d § 3531 *Wright & Miller*, citing "Many exasperated courts and commentators … often adding that standing doctrine is no more than a convenient tool to avoid uncomfortable issues or to disguise a surreptitious ruling on the merits. FN19.

The District Court justified postponements by characterizing the harm to each Plaintiff's pocketbook as small. But this case has consequences far beyond the 14 plaintiffs. Hundreds of millions of dollars will be saved for the public *fisc* or drained from it if Plaintiff's prevail or lose. Plaintiffs, if they succeed, will vindicate the rights of hundreds of thousands of others similarly situated. The Supreme Court has relaxed standing requirements when fundamental rights are affected by the government's enforcement of private racial discrimination by restrictive covenants on land,

> Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party … the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained…. relaxation of the rule is called for here. *Barrows v. Jackson* 346 U.S. 249, 255-258, 73 S.Ct. 1031, 1034 - 1036 (1953)

II. PARTICULAR STATEMENT OF EACH POINT OF LAW OR FACT OVERLOOKED OR MISAPREHENDED

The most important point of law overlooked or disregarded by the District Court and the Panel opinion is this:

> "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Graham v. FEMA,* 149 F.3d 997, 1001 (9th Cir.1998) (quoting *Warth v. Seldin,* 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)); *see Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (holding that "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim."); *Tyler v. Cuomo* 236 F.3d 1124, 1131 (Cir.9th 2000)

Each of the following points covers findings or conclusions by the Panel which should not have been addressed in determining "standing", but returned to the District Court for discovery, full briefing and adjudication on motion for summary judgment or trial on the merits.

A. OHA's role and funding.

The Panel seems to misapprehend certain features of OHA's role and funding. For example:

1. Hawaii ceded the lands. The State controls the 1.2 million acres. At 11863, the Panel opinion provides, "OHA thus controls the 1.2 million acres ceded by the United States in the Admission Act."

That is incorrect. The Republic of Hawaii ceded the lands to the United States, not the other way around. See the Treaty of Annexation 1897 and the Annexation Act of 1898, (Excerpts of Record "ER" 2.) In 1959, as part of the Admission Act, the U.S. returned to Hawaii title to those lands which it had held, or should have held, solely for the benefit of the people of Hawaii. Secondly, §10-13.5 HRS provides (in its current reinstated wording) that "Twenty percent of all funds derived from the public land trust shall be expended" by OHA, but the State holds title and, through its other agencies, mainly the Department of Land and Natural Resources, controls the 1.2 million acres. See Executive Order 03-03 (Further Excerpts of Record "FER" 9-2) describing how departments are to transfer funds to OHA.

2. HHLTF is for DHHL. At 11882, the Panel opinion refers to one of the "sources of OHA funding" as "funds received from the Hawaiian home lands trust". But that fund is for the Hawaiian home lands program administered by DHHL, not for OHA. See HHCA, Title 2, § 213.6 **Hawaiian home lands trust fund. "**Moneys of the Hawaiian home lands trust fund shall be expended by the department as provided by law upon approval by the commission and shall be used for capital improvements and other purposes undertaken in furtherance of the Act."

No payments from the Hawaiian home lands trust fund to OHA appear on the financial statements for OHA or DHHL. (ER 17, FER 3D and 3E.)

3. "Settlement" that settled nothing was financed by taxpayers. At 11882 and 11883, the Panel opinion discusses the 1993 appropriation of $136.5 million to OHA "in settlement of OHA's claims from 1980 through 1991." and concludes, "Since the original revenues were not tax-based, Plaintiffs lack standing to challenge these expenditures." This conclusion assumes facts which are not in evidence. First, under the version of §10-13.5 HRS in effect from 1980 – 1990, OHA was not to receive a share of "revenues" but rather, as the Panel notes, "Twenty per cent of all "funds" derived from the public land trust.", a term so ambiguous, the Hawaii Supreme Court "could not resolve the intra-government dispute." Nothing in the record indicates that the State received *any* funds from the public land trust during those years. It is possible that, after paying the trust's capital and maintenance and operational expenses, during those years, no net income remained for distribution to beneficiaries. Second, nothing was "settled" in the usual sense that, in return for payment, claims are released. The Memorandum between the State and OHA April 7 and 8, 1993 (ER 24) shows the payment was "pursuant to Act 304" SLH 1990, the calculation of

the amount, and that the 1993 legislature had authorized the issuance of general obligation bonds to make payment to OHA; but reflects no agreement by OHA to settle or release anything. To the contrary, Section 7, "Excluded Matters", provides that the amount in section 1, which "may increase or decrease based on audit" … "does not include several matters regarding revenue which OHA has asserted is due OHA and which OSP has not accepted and agreed to." The transmission of the $129,584,488.85 check June 4, 1993 is "subject to reimbursement" in paragraph 1 and "subject to audit and reimbursement" in the second paragraph. (ER23). Any "settlement" is contradicted by the fact that, in January 1994, OHA commenced a lawsuit seeking additional amounts for the same period. (See the Complaint, E.R. 1, paragraphs 35 – 44 reciting in some detail the facts relating to these events. As shown earlier, for purposes of ruling on a motion to dismiss, the Court is required to accept those allegations as true.) The key fact is undisputed: the approximately $135 million paid to OHA in 1994 was raised by issuance of general obligation bonds which are repayable by taxpayers. The significance here is that Plaintiffs, as State of Hawaii taxpayers, were and still are being harmed in their pocketbooks by that repayment; and should have their day in federal court to show: the payment to OHA violated the Constitution and increased their tax burden; was caused

by Defendants' implementation of unconstitutional laws; and ask for redress in the form of declaratory judgment and injunctive relief against further implementation of those laws.

B. 1921 – Hawaiian Homes Commission Act Extinguished Trust Obligations?

The Panel opinion: Any trust obligation the United States assumed in the Newlands Resolution [Annexation Act of 1898] for the lands at issue here was extinguished by Congress when it created the DHHL/HHCA and granted it control of defined "available lands." Slip Op. 11868.

(The "available lands" are the approximately 200,000 acres of the ceded lands set aside by Congress in 1921 by the Hawaiian Homes Commission Act (HHCA) for the exclusive benefit of "native Hawaiians" defined as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." The "ceded lands" are the approximately 1.8 million acres of public lands of the Republic of Hawaii ceded to the United States in 1898 on the condition that, except for those used for civil, military or naval purposes of the U.S. or assigned for the use of local government, all revenue or proceeds of the lands "shall be used solely for the benefit of the Inhabitants of the Hawaiian Islands for educational and other public purposes." Annexation Act of 1898 aka Newlands Resolution.)

Since 1898, the Attorney General of the United States, two former Attorneys General of the Territory of Hawaii, the Attorney General of the State of Hawaii, Congress, the Office of Hawaiian Affairs, the Auditor of the State of Hawaii in two reports mandated by the Hawaii Legislature, and the Supreme Court of Hawaii in at least two cases, have all acknowledged that the ceded lands trust, sometimes referred to as the public land trust or the §5(f) trust, was first established by the Annexation Act in 1898 and that, during the years Hawaii was a territory, the United States held the ceded lands in trust for the people of Hawaii. This is covered in pages 39 – 49 Appellants' Reply to Answering Briefs filed with this Court August 31, 2004.

The insistence of the Republic of Hawaii in 1898 that the United States hold the ceded lands solely for the benefit of the inhabitants of Hawaii was based on historic precedent and had significant, long-reaching consequences for the future State of Hawaii. The United States had held a similar trust obligation as to the lands ceded to it by the original thirteen colonies. Once those new states were established, the United State's authority over the lands would cease. Other future states, Nevada for example, did not have such an arrangement. As this court held in *U.S. v. Gardner*, 107 F.3d 1314, 1318 (9th Cir. 1997), the United States still owns

about 80% of the lands in Nevada and may sell or withhold them from sale or administer them any way it chooses.

There can be no genuine dispute that:

- The United States held title to the ceded lands from the date of annexation in 1898 until Hawaii was admitted to the Union as a state in 1959;

- Throughout that period the United States was obligated to hold the revenue and proceeds of the ceded lands (except for those used for military and civil purposes) solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes; and

- The ceding of lands from the Republic of Hawaii to the United States for the use of the inhabitants of Hawaii created a trust relationship under which the United States was the trustee and the inhabitants of Hawaii were the beneficiaries.

C. Trustee powers are held in a fiduciary capacity; duty of impartiality; duty not to comply with illegal trust terms.

The Panel opinion at Slip Op. 11868: Assuming, *arguendo*, that the United States became a trustee, its "status as trustee was expressly subject to future revision. The Resolution specifically provides that 'the United States shall enact special laws for [the] management and disposition' of the public lands."

The Republic of Hawaii's 1898 grant to the United States of broad powers to manage and dispose of the ceded lands *corroborates* that the Newlands Resolution created a trust relationship. Deeds conveying outright ownership of real estate typically contain no such language because it is unnecessary. Trustees almost always, by practical necessity, are given broad powers over the management and disposition of trust assets. But those powers are held in a fiduciary capacity. See, for example, the broad powers given, except as otherwise specifically provided in the trust, to all trustees in all trusts with a situs in Hawaii, whenever established, under the Uniform Trustees' Powers Act adopted in Hawaii as Chapter 554A HRS. In the exercise of the trustee's powers "a trustee has a duty to act with due regard to the trustee's obligation as a fiduciary." §554A-3 HRS. The Restatement of the Law, Trusts 3d §64, comment on subsection (1) Unless otherwise provided by the terms of the trust, a power of termination or modification that runs with the office of trustee is held by the trustee in a fiduciary capacity; and §183 entitled "Duty to Deal Impartially With Beneficiaries," states: When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them. The Restatement of Trusts 2d §166 (1959) entitled "Illegality" provides the trustee is under a duty not to

comply with a term of the trust which is illegal and cites as an example of illegality a provision which would be contrary to public policy.

This is covered in more detail at pages 26 – 30, Appellants' Opening Brief filed in this Court June 7, 2004.

D. 1921 - Congress injected partiality and race into the trust.

In 1921, when Congress enacted the HHCA, the United States as trustee violated its fiduciary duty to the people of Hawaii in two ways: It injected partiality and race into the way it treated the beneficiaries. It set aside 200,000 acres of the ceded lands for the exclusive benefit of native Hawaiian beneficiaries while still allowing those native Hawaiian beneficiaries to share fully in the benefits of the remaining lands. In the sense that each trust beneficiary is the equitable or beneficial owner of a pro-rata share of the trust corpus, the HHCA gives each native Hawaiian beneficiary the equitable ownership of over three times the area of the ceded lands equitably owned by each beneficiary not of the favored race. (Based on OHA's estimate of approximately 80,000 native Hawaiians, their pro rata beneficial ownership of the 200,000 acres of "available lands" would be 2.5 acres each. The native Hawaiians, as part of the 1.2 million total population of Hawaii, per Census 2000, would also continue to share in the beneficial ownership of the other 1.2 million acres, or 1 acre each. Therefore: each

native Hawaiian would be the equitable "owner" of 3.5 acres of ceded lands; every other resident would equitably "own" 1 acre.)

Enacting and implementing the HHCA thus severely violated the duty of impartiality the United States owed to each individual beneficiary. Later, after OHA was born in 1978, the trustee, State of Hawaii, escalated the partiality to native Hawaiians to new heights, transferring 20% of revenues (gross before expenses) from the ceded lands to OHA, leaving the share of the other beneficiaries to pay the expenses of financing capital improvements, generating the revenues and operation of the ceded lands and leaving taxpayers to subsidize the deficit.

Moreover, creating DHHL/HHC and granting it control of the 200,000 acres of "available lands" did not extinguish the trust obligations of the United States, because the United States still retained title to the "available lands" and the other 1.2 million acres of the ceded lands and also overall control over DHHL/HHC and the Territory of Hawaii. (Article IV, Sec. 3 U.S. Const. gives Congress the power to make all needful rules and regulations respecting the territory or other property belonging to the United States. The authority of Congress to provide for the government of Hawaii prior to statehood was derived from this section. *In re Island Airlines,* 44 Haw. 634, 361 P.2d 390 (1961))

E. 1959 – Statehood for Hawaii. United States' Role Eliminated Entirely?

Panel opinion: Any lingering doubt over the United States' role as trustee was eliminated entirely in the Admission Act when the United States "grant[ed] to the State of Hawaii, effective upon its admission in the Union, the United States' title to all the public lands and other public property, and to all lands defined as "available lands" by section 203 of the Hawaiian Homes Commission Act … title to which is held by the United States immediately prior to its admission into the Union. Slip Op. at 11869.

It is true that the United States thus returned title to about 1.4 million acres of the ceded lands[2] to Hawaii, including the 200,000 acres of "available" lands, but the return was not without strings. If the authority of the United States over the 1.4 million acres had ceased then, that might well have ended the role of the United States as trustee. But, unlike its treatment of the original thirteen states[3], when it returned Hawaii's ceded lands, the United States' authority over Hawaii's ceded lands did not cease. Quite to

---

2 Admission Act §5(g) limited the term "public lands and other public property" to "the lands and properties that were ceded to the United States by the Republic of Hawaii under the joint resolution of annexation approved July 7, 1898 …, or that have been acquired in exchange for lands or properties so ceded."

3 *U.S. v. Gardner,* 107 F.3d at 1317 and 1318 (9th Cir. 1997), quoting from the Supreme Court, "Once those new states were established, the United States' authority over the land would cease."

the contrary, as this court said in *Price v. Akaka*, 3 F.3d 1220, 1222 (9th Cir. 1993)

> FN2. Although the § 5(b) lands include the "available lands" under the HHCA, § 4 of the Admission Act "strictly limits the manner in which Hawaii may manage the homelands and the income they produce." *Price v. Akaka,* 928 F.2d 824, 826 n. 1 (9th Cir.1990) ("*Akaka I* "), *cert. denied,* 502 U.S. 967, 112 S.Ct. 436, 116 L.Ed.2d 455 (1991).

These powers reserved by the United States were so important to Congress that §7 of the Admission Act required the provisions "reserving rights or powers to the United States" to be "consented to fully by said state and its people." and spelled out the precise language to be put on the ballot for ratification by the electorate in the 1959 statehood election:

> "All provisions of the Act of Congress approved ……(date of approval of this Act)……. reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Hawaii are consented to fully by said State and its people."

The United States had no authority to impose these restrictions on Hawaii's use of its public lands as a condition of statehood. That would have violated the Equal Footing Doctrine. *Coyle v. Smith*, 221 U.S. 559 (1911). Nor does the United States have such authority by virtue of being the federal government. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States

respectively, or to the people. Art. X, U.S. Const. The only authority of the United States in 1959 to reserve any rights or prescribe any terms or conditions over Hawaii's ceded lands came from the 1898 Annexation Act in which the United States accepted the obligation to hold those lands solely for the benefit of the Inhabitants of the Hawaiian Islands for educational and other public purposes. Thus in 1959 the United States held only trust powers over the ceded lands; and trust powers may be exercised only "with due regard to the trustee's obligation as a fiduciary." Uniform Trustees' Powers Act, Chapter 554A HRS.

F. The Panel's self-contradictory view of Admission Act §4. U.S. delegated duty but kept power. So no one liable for breach.

The Panel opinion concludes that the United States cannot be sued on Plaintiffs' trust beneficiary theory because §4 of the Admission Act does not designate it as a co-trustee and "the United States has only a somewhat tangential supervisory role of the Admission Act, rather than the role of trustee." Slip Op. 11869. Yet, a few paragraphs later at 11870, it says because §4 of the Admission Act "expressly reserves to the United States that no changes in the qualifications of the lessees may be made without its consent" the United States is an indispensable party" and, at page 11871, "Accordingly, the district court properly dismissed the Plaintiffs' trust beneficiary claim against the state defendants."

According to the Panel 's reasoning: Because §4 reserves to the U.S. power and authority over the administration of the trust, including the mandate that the current trustee (the State of Hawaii) continue to carry out the HHCA, the U.S. is an indispensable party to a suit for breach of trust. But under §4, the U.S. is not now a trustee. Therefore, Plaintiffs as trust beneficiaries cannot sue the U.S. for breach of trust. And, since the U.S. is an indispensable party, Plaintiffs, as trust beneficiaries, cannot sue the current trustee (the State of Hawaii) for breach of trust.

The Panel cites no authority or legal precedent for this extraordinary reasoning: A trustee can select a successor trustee, mandate that the successor violate the trust and then resign, and the beneficiaries have no redress against anyone. This Heads-Trustees-Win-Tails-Beneficiaries-Lose reasoning defeats the fundamental reason for a trust, that the trustee will be loyal and use the trust property legally and impartially in the best interests of the beneficiaries. The Panel's reasoning defies the well established line of cases in the Ninth Circuit that beneficiaries of Hawaii's public land trust have standing to assert claims in federal court to enforce the trustee's fiduciary duties. Among them are the two *Price v. Akaka* decisions and the *Keaukaha-Panaewa* decision cited in the Panel opinion at Slip Op. 11869-70.

The Panel would distinguish those cases because they "involved suits to enforce the express terms of the trust, this suit, by contrast, asks the court to prohibit the enforcement of a trust provision." Slip Op. 11870. Such a distinction finds no precedent in the Ninth Circuit or trust law generally. In the earlier *Price v. State*, 921 F.2d 950 (9th Cir. 1990), although declining to expect the State as trustee to segregate trust funds as required of private trustees, this Court said,

> There is no free floating federal common law of trusts, but we have no doubt that we would have the power to formulate a body of law for the purpose of enforcing the Act if that were appropriate under the circumstances. (Internal citations omitted.) No doubt that would not present insuperable difficulties, since the common law of trusts is well developed in this country and speaks with a good deal of uniformity across the length and breadth of the land. Cf. *Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 335-40, 640 P.2d 1161, 1167-69 (1982), where the court had little difficulty in applying fiduciary principles. Indeed, our decisions in *Price v. Akaka*, 915 F.2d at 471-72, and *Keaukaha II*, 739 F.2d at 1471-72, drew upon trust law. No doubt there will come a time when we are required to consider that law further, for at least at the outer limits federal law must act as a barrier beyond which the State cannot go in its administration of the ceded lands pursuant to section 5(f).

The United States has never relinquished the trustee powers it so carefully reserved in 1959 although two presidents have urged it to do so.[4]

---

4 President Ronald Reagan in 1986 and President George H.W. Bush in 1992, expressed concern that the HHCA employs an express racial classification and urged Congress to amend Section 4 of the Admission Act so that the consent of the United States is not required and also to give further consideration to the justification for the troubling racial

Nor has the United States rescinded its mandate that the State of Hawaii, the successor trustee, adopt and continue to carry out the HHCA. That official mandate by the United States still hangs like a sword over the heads of Hawaii State officials commanding them to keep violating the Fourteenth Amendment.

G. Even third-parties are liable if they participate in breach of trust.

Had the United States never been a trustee, Plaintiffs would still have standing to assert claims against it for mandating a breach of trust by the present trustee. See *Bogert's Trusts And Trustees*, updated by the 2004 Pocket Part, Chapter 43. Participation In A Breach Of Trust, § 901. Right That Third Party Shall Not Knowingly Participate In A Breach Of Trust.

> General Rule
>
> Just as every owner of a legal interest has the right that others shall not, without lawful excuse, interfere with his possession or enjoyment of the property or adversely affect its value, so the beneficiary, as equitable owner of the trust res has the right that third persons shall not knowingly join with the trustee in a breach of trust. One acting with a trustee in performing an act that such person knows or should know is a breach of trust becomes a participant in the breach and subject to liability for any damages that result or to restore the trust property traced to such person's possession.

---

classification. See Exhibits E, F, G, H & I to the Declaration of Plaintiff Sandra Puanani Burgess in support of Preliminary and Permanent Injunctive Relief filed March 4, 2002. Docket 4, E.R. 2.

H. Nor is the U.S. an indispensable party for Plaintiffs' trust beneficiary claim against the current trustee.

The Panel opinion at 11870, cites *Carroll v. Nakatani*, 342 F.3d 934 (9th Cir. 2003) as requiring the United States to be an indispensable party here. But *Carroll v. Nakatani* did not mention "indispensable party". Redressability was the issue there. In that case, the Plaintiff, Patrick Barrett, a non-Hawaiian, applied for a Hawaiian Homestead lease, but did not sue the United States, and maintained he was not challenging the Admission Act, or any other federal law. On appeal this Court said,

> His claim, on its own, presented without the United States as a party and never challenging the constitutionality of the Admissions Act renders his claim not redressable.
>
> ….
>
> We also affirm the district court's holding that Barrett's claim challenging the HHC homestead lease program is not redressable because he failed to join the United States or challenge the Admissions Act.

Carroll v. Nakatani 342 F.3d 934, 945 (9th Cir. 2003)

In this case, the Plaintiffs do not seek award of Homestead leases, did bring suit against the federal government, and do challenge the constitutionality of both §4 of the Admission Act and the other HHCA/DHHL laws. (Complaint, ER 1.) The redress Plaintiffs seek is a declaration that the applicable federal and state laws are unconstitutional and a permanent injunction against their further implementation. This remedy is

readily grantable by a federal court and fully satisfies the third prong for standing, redressability.

Neither *Carroll* nor any other decision of the Ninth Circuit, to Appellants' knowledge, has held that the U.S. is an indispensable party to every suit in federal court challenging the validity of an Act of Congress. The Department of Justice itself in this case said in the district court, "To begin with, the United States is not required to be named as a party in every action involving state statutes to which it has given its imprimatur." Reply by Defendant United States to Plaintiffs' Response to the United States' Motion to Dismiss filed in the District Court August 26, 2002. Docket 201. Instead of such a burdensome requirement, Congress and federal court rules provide a notice requirement in civil suits. 28 U.S.C. §2403 requires that,

> **(a)** In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality.

See also, Fed.R.App.P. 44(a) and Fed.R.Civ.P. 24(c).

The Panel opinion that the absence of the U.S. deprives Plaintiffs of standing and this court of jurisdiction to adjudicate the trust claims against the State Defendants, conflicts with this court's decision in *Green v. Dumke*,

480 F.2d 624, 628 (9th Cir. 1973) The Supreme Court has repeatedly found federal jurisdiction for challenges to the activities of state agencies administering federal programs under 42 U.S.C. §1983 combined with 28 U.S.C. §1343. It has not mattered a jurisdictional whit that the agency was enforcing federal statutes, as well as pursuing state ends. At 480 F.2d 629, this court continued, "When the violation is the joint product of the exercise of a State power and a non-State power then the test under the Fourteenth Amendment and §1983 is whether the state or its officials played a 'significant' role in the result.

I. The United States knew, or should have known, its mandate to discriminate would burden state taxpayers.

It can be no surprise to the federal government that State of Hawaii taxpayers carry a heavy burden to subsidize HHC/DHHL. During the 38 years of operation of HHCA under the Territory of Hawaii, the United States had full access to the financial picture, including the costs of operation, providing improvements and infrastructure and the need for taxpayer subsidies. The United States must have known in 1959 that HHC/DHHL was not self-sufficient and that its mandate to the new State of Hawaii would require the expenditure of state taxpayer funds. In the 7 fiscal years from 7/1/1995 – 6/30/2002 the cost of HHC/DHHL to the State Treasury was over $430.6 Million. Of that amount, over $193 Million was appropriated

directly from the general fund for HHC/DHHL and for debt service on general obligation bonds that had been paid earlier for HHC/DHHL. (FER 3-A.)

The Panel opinion provides, at 11871 FN 2, that *Carroll* precludes Plaintiffs from challenging any payments, taxes or otherwise, to HHC/DHHL. As already discussed, *Carroll* did nothing of the sort. It dismissed Barrett's claim because he did not challenge the Admission Act; so the court could not decree that a lease be issued to him. Here, a declaratory judgment that the federal government's mandate, that the State of Hawaii violate the Fourteenth Amendment, is not only redressable, it is required by *Saenz v. Roe*, 526 U.S. 489, 508, 119 S.Ct. 1518, 1528 (1999). "… we have consistently held that Congress may not authorize the States to violate the Fourteenth Amendment.").

J. The unprecedented restrictions on taxpayer standing.

As with the other points discussed above, questions as to the merits or scope of the claims have no place in a standing determination. Rather, those questions should be addressed after discovery and full briefing when all relevant facts are before the court for adjudication on the merits. The Panel opinion allowed standing to challenge appropriation of tax revenue to OHA but denied Plaintiffs standing to challenge "all other spending that

does not originate in tax revenue." (Slip Op. 11892.) Specifically, the Panel opinion denied Plaintiffs standing to challenge the $136.5 million "settlement" paid to OHA in 1993 or the general obligation bonds issued to fund it (Slip Op. 11883); or the issuance of bonds generally (Slip Op. 11892); and spending for HHC/DHHL regardless of the source of the state funds (Slip Op.11871). Plaintiffs claim that these and other unconstitutional activities and misuses of public funds and lands have a detrimental effect on Hawaii's public fisc and increase their state tax burdens.

The Panel 's unprecedented restrictions on state taxpayer standing would elevate form over substance and allow no taxpayer to challenge any misuse of tax money which is labeled by state officials as "trust" or "settlement" or something other than what it is. The restrictions would immunize the misuse of state tax dollars accomplished through the issuance of general obligation bonds or through lease of public lands at below market rental or through other indirect ways no matter how illegal and how painful to taxpayers' pocketbooks.

These restrictions conflict with this Court's *en banc* decision in *Doe v. Madison School District* and its decision in *Cammack v. Waihee*.

In *Doe v. Madison School District*, *en banc*, 177 F.3d 789 (9th Cir. 1999) this Court *en banc* comprehensively reviewed taxpayer standing

noting with approval that state taxpayers may challenge a variety of improper actions which could have a detrimental effect on the public *fisc*: at 177 F.3d 793, to prevent **a misuse of public funds;** at 793-4, "activity is supported by any separate tax or paid for from any particular appropriation **or that it adds any sum whatever to the cost of conducting the school**"; at 796, the challenged activity involves "a measurable appropriation" **or loss of revenue.)** (Emphasis added and internal citations omitted.)

See also *Cammack v. Waihee*, 932 F.2d 765, 770 (9th Cir. 1991), ("municipal taxpayer standing simply requires the "injury" of an allegedly **improper expenditure of municipal funds,** and in this way mirrors our threshold for state taxpayer standing"; municipal taxpayers may challenge city lease of airport terminal space to church where the lease agreement could have **a detrimental impact on the public fisc;** Legislative enactments are not the only government activity which the taxpayer may have standing to challenge, contrasting state taxpayer's ability to challenge executive conduct with federal taxpayer's. (Emphasis added and internal citations omitted.)

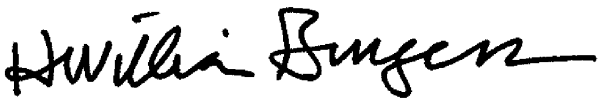
III. CONCLUSION

The Panel opinion repeatedly defies precedents of the Ninth Circuit and the United States Supreme Court in conflating standing and the merits of the claims alleged.

Plaintiffs/Appellants respectfully request that this Court: rehear this case, panel or *en banc*; reverse the Panel opinion, (except to the extent that it upholds Plaintiffs' challenge to the appropriation of tax revenue to OHA and reverses the trial court's dismissal on political question grounds); uphold entirely all Plaintiffs' standing to assert their trust beneficiary claims and state taxpayer claims for declaratory and injunctive relief against all defendants, including the United States; and award Plaintiffs/Appellants their costs, reasonable attorneys fees and such other relief as the Court deems just.

DATED: Honolulu, Hawaii, October 3, 2005.

Respectfully submitted,



H. WILLIAM BURGESS
Attorney for Plaintiffs/Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that the attached petition in Case Number 04-15306 for panel or *en banc* rehearing is proportionately spaced, has a typeface of 14 points and contains 6,259 words.

Plaintiffs/Appellants on September 29, 2005 sent by FedEx for overnight delivery a motion for enlargement of size of petition for panel or *en banc* rehearing to not more than 6,500 words. If that motion is granted, the attached petition will be in compliance with Fed.R.App.P. 32(c)(2) and Circuit Rule 40-1.

DATED: Honolulu, Hawaii, October 3, 2005.

H. WILLIAM BURGESS
Attorney for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth below, one copy of the foregoing Appellants' Petition for Panel or *En Banc* Rehearing were served upon each of the following parties via U.S. Mail, postage prepaid.

MARK J. BENNETT, ESQ.
CHARLEEN M. AINA, ESQ.
GIRARD D. LAU, ESQ.
State of Hawai`i
Attorney General
425 Queen Street
Honolulu, Hawai`i 96813
***Attorneys for State Defendants
and HHCA/DHHL Defendants

ROBERT G. KLEIN, ESQ.
PHILIP W. MIYOSHI, ESQ.
McCorriston Miller Mukai MacKinnon
5 Waterfront Plaza Suite 400
500 Ala Moana Boulevard
Honolulu, Hawai`i 96813
***Attorneys for Defendant-Intervenors
SCHHA and Tony Sang, Sr.

SHERRY P. BRODER, ESQ.
JON VAN DYK, ESQ.
MELODY K. MACKENZIE, ESQ.
841 Bishop Street, Suite 800
Honolulu, Hawai`i 96813
***Attorneys for OHA Defendants

EDWARD H. KUBO, JR., ESQ.
HARRY YEE, ESQ.
United States Attorney
c/o Civil Process Clerk
300 Ala Moana Boulevard, 6th Floor
Honolulu, Hawai`i 96850

AARON P. AVILA, ESQ.
U.S. Department of Justice
Environment & Natural Resources
Division, Appellate Section
P.O. Box 23795
L'Enfant Plaza Station
Washington, D.C. 20026-3795
***Attorneys for Defendant,
United States of America

YUKLIN ALULI, ESQ.
415-C Uluniu Street
Kailua, Hawaii 96734
***Attorney for Defendant-
Intervenors Hui Kako'o Aina
Hopulapula, Blossom Feiteira and
Dutch Saffery

DATED: Honolulu, Hawai`i this 3rd day of October, 2005.

H. WILLIAM BURGESS
Attorney for Plaintiffs-Appellants

APPENDIX