No. 05-1128

In The
Supreme Court of the United States

EARL F. ARAKAKI, et al.,

Cross-Petitioners,

v.

LINDA LINGLE, et al.,

Cross-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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REPLY BRIEF

This replies to new points raised in the Brief for the United States in Opposition, particularly the arguments:

That the United States cannot be liable for cross-petitioners' injuries as state taxpayers because the federal laws at issue do not require the State to impose taxes; or for their injuries as trust beneficiaries, because the United States is not now a trustee of the ceded lands trust; and that a decision against the United States would not redress cross-petitioners' alleged injuries as state taxpayers.[1]

Those are "merits" issues inappropriate for adjudication at the threshold "standing" stage and, in any event, the logic is flawed.

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[1] See Brief for U.S. in Opposition at 9, "That contention [that allegations establish standing] is without merit." See also at 10, "But it [Admission Act] does not require the State of Hawaii to impose taxes to support those undertakings." . . . "a decision against the United States would not redress cross-petitioners' alleged injury as state taxpayers" . . . "Cross-petitioners' assertion that they have standing to sue the United States as beneficiaries of a trust is equally without merit."

Commendably, the Solicitor General in the well-written Brief for the United States in Opposition, does not defend the constitutionality of §4 of the Admission Act or the Hawaiian Homes Commission Act ("HHCA"); and does not dispute the merits of the first prong of cross-petitioners' (i.e., plaintiffs') standing: That cross-petitioners incur ongoing monetary injury in fact both as state taxpayers and as beneficiaries of the ceded lands trust. Rather, at page 10, the brief in opposition says, "If cross-petitioners are injured by any improper use of state tax money, that is a matter between them and the State."

Standing rulings should not adjudicate the merits.

Warth v. Seldin, 422 U.S. 490, 500 (1975) "standing in no way depends on the merits of the plaintiffs' contentions."

The 1959 Admission Act, 73 Stat. 4, §4 required the State of Hawaii, as a condition of statehood, to adopt, and still requires it to continue to carry out, a racially discriminatory homestead program.[2]

Cross-Petitioners' (plaintiffs') complaint alleges in ¶58a-d (Cross-Pet. App. 98-101) that as a result of the Hawaiian Homes Commission Act ("HHCA") laws, including Admission Act §4, and the ongoing acts of defendants in implementing and enforcing them, plaintiffs and over one million of Hawaii's other citizens similarly situated, have been and continue to be harmed. Those paragraphs allege in considerable detail specifically how such laws cause them monetary injury both as trust beneficiaries and as state taxpayers.

For purpose of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept those material allegations as true and construe them in favor of plaintiffs. *Graham v. FEMA*, 149 F.3d 997, 1001 (9th Cir. 1998) (quoting *Warth v. Seldin*, *supra*). Moreover, if those detailed allegations are not sufficient to support the claim against the United States, they may still

[2] The Hawaiian Homes Commission Act is for the 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." This Court in *Rice v. Cayetano*, 528 U.S. 495, 516 & 517 (2000) held that definition (and the related "one drop" definition of "Hawaiian") to be racial classifications.

suffice for purposes of a standing determination. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (holding that "At 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' ").

The Solicitor General acknowledges these rules, at page 12, Brief in Opp., points to no evidence to refute the facts alleged but notes that the rules do not extend to a party's legal assertions. Causation, however, is more a question of fact. For example, in jury trials, questions of fact, including the question of causation, are customarily determined by the jury.[3]

Black's Law Dictionary (8th ed. 2004) does not offer a definition of "favorable" construction. It does provide, "Liberal construction expands the meaning of the statute to embrace cases which are clearly within the spirit or reason of the law, or within the evil which it was designed to remedy, provided such an interpretation is not inconsistent with the language used. It resolves all reasonable doubts in favor of the applicability of the statute to the particular case."

Here, accepting their allegations as true and resolving doubts in their favor requires that cross-petitioners have all their claims decided on the merits.

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[3] West's Hawaii Jury Instructions, 1999 Edition, F. Causation, HI R CIV Instr. 7.1: An act or omission is a legal cause of an injury/damage if it was a substantial factor in bringing about the injury/damage. One or more substantial factors such as the conduct of more than one person may operate separately or together to cause an injury or damage. In such a case, each may be a legal cause of the injury/damage.

Conspirator and accomplice liability; Foreseeability of harm.

The Admission Act §4 and the compact requiring the State of Hawaii to adopt and carry out the HHCA, cause the United States to violate the Equal Protection component of the Fifth Amendment and 42 U.S.C. §1985;[4] and cause the State of Hawaii to violate the Equal Protection component of the Fourteenth Amendment, H.R.S. §708-875[5] and also 42 U.S.C. §1985.

Thus the very thing which makes the United States an important party to this case: its mandate that the State discriminate and its retained powers over the corpus and administration of the ceded lands trust; also puts the United States and the State of Hawaii, or their responsible officials, squarely within the definition of conspirators under 42 U.S.C. §1985 and accessories under the model penal code.[6]

One immediate consequence of the compact required by §4 of the Admission Act was to perpetuate the breach of the ceded lands trust by permanently segregating not only the 200,000 acres of "available" lands but also 30% of the revenues from the former sugarcane lands (ceded lands which were leased to sugar farmers and generating rents).

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[4] Conspiracy to interfere with civil rights.

[5] Misapplication of entrusted property.

[6] H.R.S. §**702-222 Liability for conduct of another; complicity.** A person is an accomplice of another person in the commission of an offense if: (1) With the intention of promoting or facilitating the commission of the offense, the person: (a) Solicits the other person to commit it; or (b) Aids or agrees or attempts to aid the other person in planning or committing it; or (c) Having a legal duty to prevent the commission of the offense, fails to make reasonable effort so to do.

Hawaiian Homes Commission Act §213(i). Thus, in 1959, it was reasonably foreseeable that, if the HHCA was to be imposed on the State of Hawaii, the trust beneficiaries not of the favored race would incur continuing future monetary injuries because the share of the trust corpus equitably owned by each of them would continue to be only a fraction of the share owned by each of the favored beneficiaries. (See Cross-Petition at 17.)

In addition, based on the 38 years of operation by the Territory of Hawaii as shown by the Hawaiian Homes Commission's biennial reports to the Territorial Legislature, it was readily apparent that the Hawaiian Homes Commission could not generate internally the funding necessary for roads, water, sewer, irrigation systems and other infrastructure needed to carry out the homestead program; and that appropriations of tax moneys from the Territorial general fund had been required. (See for example, App. 1 *infra,* page 126 from the HHC Report to the 1951 Legislature of the Territory of Hawaii showing Capital Outlays as of December 31, 1950 under "Gen. Fund Appro." $568,225.29 for Buildings, Structures and Improvements, including highways, trails, domestic water systems, sewer systems and other improvements to land. This is an accurate copy of the official record of the Territory of Hawaii, page 126 of the 1951 report of the HHC, obtained from the Hawaii State Library and suitable for judicial notice under Rule 201, Fed. R. Evid.)

Thus, in 1959, it must have been reasonably foreseeable that, if the HHCA was imposed on the State, the burden of some state taxpayers in the future would be increased to support the Hawaiian Homes program from which they are excluded solely because they are not of the favored race.

Not surprisingly, this foreseeable monetary harm did occur and is ongoing. See Cross-Pet. App. 17, the spreadsheet itemizing the cost of HHC/DHHL to the State treasury, of approximately $430,599,594 just during the seven years 7/1/1995 to 6/30/2002. Of that total, $193,199,130 was paid from the General Fund or still owed by the General Fund as of 6/30/2002.

Because of this complicity (intentionally requiring the State of Hawaii to adopt and carry out a racially discriminatory homestead program which would foreseeably injure the pocketbooks of state taxpayers and trust beneficiaries not of the favored race, in contravention of the Constitution and federal and state criminal laws; having a legal duty to prevent the commission of the offense, but failing to make reasonable effort so to do.) the federal courts have jurisdiction, at the minimum, to declare the federal and state laws unconstitutional and enjoin the United States as well as the other defendants from their further implementation and enforcement.

Redressability.

The Brief for the United States in Opposition argues at page 10, that "Because the federal statutes at issue do not mandate the expenditure of state tax dollars, a decision against the United States would not redress cross-petitioners' alleged injury as state taxpayers."

That might be true if this suit was only against the United States. But there are other defendants, who are causing injury to cross-petitioners pursuant to the same federal laws requiring and authorizing them to carry on unlawful programs which cannot operate without tax dollars and which violate the duty of impartiality under

the ceded lands trust. The declaratory and injunctive relief sought against the United States *and* the other defendants would certainly redress cross-petitioners' injuries.

Without the United States, that redress will not be complete. Here are the reasons:

In the absence of the U.S. as a party, the Court cannot enjoin State officials from carrying out the HHCA or the OHA laws without exposing them to a risk of suit by the U.S. for breach of the 1959 compact to adopt the Hawaiian Homes Commission Act. This could be particularly adverse for the 7,350 or more existing homesteaders because, without the U.S. in the case and bound by the Court's judgment, the U.S. would still hold the sword over the heads of State officials. This would discourage and probably prevent State officials, if Plaintiffs prevail, from allowing homesteaders to acquire the fee simple ownership of their lots. (See Cross-Pet. App. 79, Complaint, ¶3, Equitable accommodation, and Cross-Pet. App. 111-112, prayer, ¶B and fn. 1, asking the court to allow STATE/DHHL to permit homesteaders to acquire ownership of their lots.) It is unlikely that a State official would sign the deed knowing he or she might be sued personally by the United States.

The absence of the United States as a party would also be an obstacle to the court's ability to fashion any other equitable accommodation to avoid harsh consequences to the homesteaders. Since the United States has reserved what amounts to a restrictive covenant on the 200,000 acres set aside for the HHCA, the title to that real property might remain encumbered even after a favorable decision for the Plaintiffs.

Thus, the burdens imposed on the Plaintiffs, the existing Hawaiian homesteaders and the citizens of Hawaii by dismissing the claims for declaratory and injunctive relief against the United States, would be significant.

Invalidating HHCA and Admission Act §4 and the other HHCA laws and OHA laws and enjoining their future implementation, would not work any intolerable burden, or any burden at all, on governmental functioning of the United States.

Indeed, such a decree would remove a stain from the first of America's self-evident truths, that all men are created equal. It would follow precisely the advice of two presidents of the United States: President Ronald Reagan in 1986 and President George H.W. Bush in 1992. They both were concerned 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 classification. (Cross-Pet. App. 58-70.)

The extraordinary delays in this case

The Brief for the United States, at page 11, calls "extraordinary" the "proposition that Congress cannot change the terms of a trust that it creates for the benefit of the general public."

But the Republic of Hawaii was the settlor and the United States accepted the ceded lands in trust in 1898.

The United States only held title to the lands[7] *as Trustee*. In 1921, when the United States undeniably held the ceded lands in trust "solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes," Congress injected partiality and race into the previously impartial, race-neutral public land trust. As covered in the Conditional Cross-Petition for a Writ of Certiorari at 16 through 22, trustee powers are held in a fiduciary capacity and returning title to the ceded lands with "strings" attached did not end the United States' role as trustee.

If anything is extraordinary in this timeline, it is that:

- Congress has so casually denied equal protection for so long to so many citizens of Hawaii;

- Even now, 20 years after President Reagan said this "Act employs an express racial classification"; it "raises serious equal protection questions"; "I urge that the Congress amend Section 4" to remove the requirement for "the consent of the United States"; and "give further consideration to the justification for the troubling racial classification" (Cross-Pet. App. 58) the program expands ominously; and

- Now, over four years after these remaining 14 individual citizens came to federal court seeking the just, speedy and inexpensive determination of their action

[7] The ceded lands trust consists of all the ceded 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 assigned for the use of the local government." Annexation Act of 1898, 30 Stat. 750 (Cross-Pet. App. 1).

(Rule 1, F.R.Civ.P.), they are still forced to wait outside the courthouse door.

CONCLUSION

The Court should grant both the petition and conditional cross-petition for writs of certiorari, and put this case on the way to a final adjudication on the merits.

Respectfully submitted,

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May 17, 2006

CROSS-PETITIONERS'
SUPPLEMENTAL APPENDIX

SCHEDULE 3 OF EXHIBIT "A"

HAWAIIAN HOMES COMMISSION
CAPITAL OUTLAYS AS OF DECEMBER 31, 1950

Account	Total Capital Expenditures	Haw'n Home Loan Fund	Haw'n Home Dev. Fund	Haw'n Home Adm. Account	Gen. Fund Appro.	Haw'n Home Oper. Fund	Pipes from U.S. Army to H.H.C.	Molokai	Hawaii	Oahu
BUILDINGS, STRUCTURES AND IMPROVEMENTS										
Buildings	$ 86,513.39	$ 65,797.06	$.....	$.....	$ 20,716.33	$.....	$.....	$ 63,388.11	$ 22,129.84	$ 995.44
Highways, Trails, etc.	159,458.91	102,635.29	13,457.49	.....	43,366.13	.....	.....	65,730.12	57,055.89	36,672.90
Parks, Playgrounds, etc.	15,495.14	6,598.97	.....	900.00	7,996.17	.....	.....	4,299.82	10,084.60	1,110.72
Domestic Water Systems	1,632,359.15	715,568.85	299,682.63	41.06	459,442.02	122,524.59	35,100.00	862,105.38	220,710.74	549,543.03
Irrigation Systems	77,925.08	77,925.08	.....	.....	.....	.....	.....	77,925.08	.....	.....
Sewer Systems	33,744.82	14,961.64	3,821.54	.....	14,961.64	.....	.....	.....	.....	33,744.82
Other Improvements to Land	166,395.90	138,576.78	10.50	4,090.62	21,743.00	1,975.00	.....	126,463.36	6,014.63	33,917.91
Improvements Purchased	cr. 2,982.00	cr. 2,982.00	.....	.....	.....	.....	.....	cr. 3,525.00	.....	543.00
TOTALS	$2,168,910.39	$1,119,081.67	$316,972.16	$ 5,031.68	$568,225.29	$124,499.59	$ 35,100.00	$1,196,386.87	$315,995.70	$656,527.82
EQUIPMENT										
Motor Vehicles	47,128.52	28,495.86	.....	9,912.15	3,654.64	5,065.87	.....	41,754.37	4,238.00	1,136.15
Office Equipment and Furnishings	13,742.26	8,462.28	.....	3,570.29	1,709.69	.....	.....	816.56	669.67	12,256.03
Educational and Recreational Equipment	3,434.29	2,473.03	.....	891.26	70.00	.....	.....	2,192.92	1,241.37	.....
Livestock	14,271.37	9,771.37	.....	4,500.00	.....	.....	.....	14,271.37	.....	.....
Repair Equipment	3,810.38	3,362.62	.....	194.18	253.58	.....	.....	3,810.38	.....	.....
Hospital Equipment	6.13	6.13	.....	.....	.....	.....	.....	.....	6.13	.....
Furniture and Furnishings	3,519.78	2,557.29	.....	941.49	21.00	.....	.....	3,275.21	103.32	141.25
Engineering Equipment	142.90	142.90	.....	.....	.....	.....	.....	134.10	.....	8.80
Other Equipment	34,718.51	19,150.78	.....	8,653.70	5,603.69	1,310.34	.....	34,437.75	90.21	190.55
TOTALS	$ 120,774.14	$ 74,422.26	$.....	$ 28,663.07	$ 11,312.60	$ 6,376.21	.....	$ 100,692.66	$ 6,348.70	$ 13,732.78
TOTAL CAPITAL EXPENDITURES SEPT. 16, 1921 TO DEC. 31, 1950	$2,289,684.53	$1,193,503.93	$316,972.16	$ 33,694.75	$579,537.89	$130,875.80	$ 35,100.00	$1,297,079.53	$322,344.40	$670,260.60
INCREASE OVER TOTALS REPORTED ON DEC. 31, 1948	$ 620,694.56	cr. 3,807.00	$186,331.37	$ 8,504.19	$324,811.45	$104,854.55	$.....	$ 108,656.74	$174,960.30	$337,077.52