

No. 02-15483

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Issues

JOHN CARROLL,
Plaintiff-Appellant

vs.

JAMES NAKATANI, in his capacity)
as Chairperson/Director of the State)
of Hawai'i Dept. of Agriculture, *et al.*,)

Defendants-Appellees)

) Dist. Ct. Civ. No. CV-00-00641
) DAE/KSC
) APPEAL FROM THE UNITED
) STATES DISTRICT COURT FOR
) THE DISTRICT OF HAWAII

PATRICK BARRETT,

Plaintiff

vs.

STATE OF HAWAII, *et al.*,

Defendants

) Dist. Ct. Civ. No. CV-00-00645
) DAE/KSC

REPLY BRIEF OF OFFICE OF HAWAIIAN AFFAIRS DEFENDANTS-
APPELLEES
CERTIFICATE OF SERVICE



Telephone No.: [REDACTED]

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SUMMARY OF ARGUMENT

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ARGUMENT

A. Introduction.

Appellant John Carroll acknowledges at page 11 of his Opening Brief that Article III of the U.S. Constitution requires as “an irreducible minimum” that “the party invoking the court’s authority ‘...show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant[s]’ and that the injury ‘fairly can be traced to the challenge action’ and ‘is likely to be redressed by a favorable decision.’” Opening Brief at 11 (*quoting from Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1982)). In this lawsuit, Mr. Carroll has challenged the constitutionality of Article XII(5) & (6) of the Hawai`i Constitution and Chapter 10 of the Hawai`i Revised Statutes, which create and govern the Office of Hawaiian Affairs (OHA), but his only claimed injury is that, as a Caucasian, he does not “enjoy that certain extra and special consideration provided by OHA” for native Hawaiians and Hawaiians. Opening Brief at 12. He contends that he is injured because no specific State agency is charged with creating a “‘comprehensive master plan’ for those of the Caucasian race” or with “‘hold[ing] title to the real and personal property now or hereafter set aside or

conveyed to it which shall be held in trust for' Caucasians." *Id.* at 13. But he claims no specific or unique personal injury whatsoever, and has "acknowledged that he has never identified any particular OHA program that he would like to participate in, and that he has never applied for any OHA program." *Carroll v. Nakatani*, 188 F.Supp.2d 1233, 1235, 1236 (D.Hawai`i 2002).

Mr. Carroll argues that he is entitled to standing in this case based on an analogy to *Shaw v. Reno*, 509 U.S. 630 (1993), and *United States v. Hays*, 515 U.S. 737 (1995), claiming that these cases support a finding of standing in the absence of any specific personal injury. But his contention is unsupported by governing caselaw, and his invocation of the *Shaw* and *Hays* cases betrays a misunderstanding of the holdings of these cases.

B. Consistent Decisions of the United States Supreme Court Require a Plaintiff to Claim a Specific Personal Injury in Order to Have Standing to Bring an Action in Federal Court.

Mr. Carroll has asserted a classic example of a "generalized grievance" held in common with most of the residents of Hawai`i, and he has not identified any "personal injury suffered by [him] *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464,

485 (1982). In his opinion below, 188 F.Supp.2d at 1236, Chief District Judge David Ezra emphasized that the rule against standing based on generalized grievances applies to equal protection claims by quoting from *United States v. Hays*, 515 U.S. 737, 743-44 (1995), where the Supreme Court said that “the rule against generalized grievances applies with as much force in the equal protection context as in any other.”⁹ Judge Ezra went on to explain that the decision in *Allen v. Wright*, 468 U.S. 737, 755 (1984), “made clear that even 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.’” 188 F.Supp.2d at 1237; *see also Valley Forge Christian College*, 454 U.S. at 489-490 n. 26 (disapproving the proposition that every citizen has “standing to challenge every affirmative-action program on the basis of a personal right to a government that does not deny equal protection of the laws”). Mr. Carroll has failed to allege or demonstrate any personalized impact whatsoever resulting from the governmental programs with which he disagrees, nor has he alleged that the relief he has sought would benefit him personally in any direct way whatsoever.

Mr. Carroll’s claim is simply that the government is not functioning in accordance with his view of what the Constitution requires. The plaintiffs in *Allen*

v. *Wright*, 468 U.S. 737 (1984), had presented a similar ^{type of grievance} ~~claim~~, contending that their children were less likely “to receive a desegregated education” because the Internal Revenue Service was not fulfilling its obligation to deny tax-exempt status to racially discriminatory private schools. *Id.* at 746. But the Court rejected ~~this~~ ^{their} claim, saying that “an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.” *Id.* at 754; *see also Valley Forge Christian College*, 454 U.S. at 482-83 (“This Court has repeatedly rejected claims of standing predicated on ‘the right, possessed by every citizen, to require that the Government be administered according to law....’”). It went on to say that “the stigmatizing injury often caused by racial discrimination” will be sufficient to grant “standing only to ‘those persons who are personally denied equal treatment’ by the challenged discriminatory conduct.” 468 U.S. at 755 (*quoting from Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984)).

C. **The *Shaw* and *Hays* Cases Do Not Support Mr. Carroll’s Contention that an Action Can Be Brought in Federal Court Without a Claim of Specific Personal Injury.**

District Judge Ezra responded carefully and accurately to Mr. Carroll’s contention that the *Shaw* and *Hays* cases somehow grant standing to him, explaining that those decisions have been limited to “the voting context.” 188 F.Supp.2d at 1238 (*quoting from Hays*, 515 U.S. at 744). The conclusion that the

standing granted to the *Shaw* plaintiffs is narrowly circumscribed to the specific facts of that case comes through loud and clear from the refusal to grant standing to the *Hays* plaintiffs, but if any doubt remained regarding this matter, it was cleared up by the Supreme Court's treatment of the challenge raised in *Sinkfield v. Kelley*, 531 U.S. 28 (2000).

In *Hays*, the Court had dismissed the complaint, holding that persons living outside a racially-constructed voting district lacked standing to challenge the construction of the district, and saying explicitly that “[o]nly those citizens able to allege injury ‘as a direct result of having *personally* been denied equal treatment,” *Allen*, 468 U.S., at 755, (emphasis added [in the *Hays* opinion]), may bring such a challenge.” 515 U.S. at 746. The Court went on to say that no authority exists “for the proposition that an equal protection challenge may go forward in federal court absent that showing of individualized harm.” *Id.* at 747.

Despite that clear ruling, a three-judge panel in the Middle District of Alabama allowed white voters to challenge the majority-white district they lived in as racially gerrymandered. *Kelley v. Bennett*, 96 F.Supp.2d 1301 (M.D.Ala. 2000). The Supreme Court quickly and summarily reversed, ruling that the white voters lacked standing because “[l]ike the appellees in *Hays*, they had neither alleged nor produced any evidence that any of them was assigned to his or her district as a direct result of having ‘personally been subjected to a racial classification.’” 531 [^]

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U.S. at 30. The Court explicitly rejected the contention of the white voters that they were “entitled to a presumption of injury-in-fact because the bizarre shapes of their districts reveal that the districts were the products of an unconstitutional racial gerrymander.” *Id.*

in *Smithfield v. Kelley*
This holding likewise requires ~~likewise~~ dismissing Mr. Carroll’s complaint, because his assertions seek likewise to have this Honorable Court rule that there should be “a presumption of injury-in-fact” expressed by that Mr. Carroll ~~experiences~~ based on programs established to aid Native Hawaiians and Hawaiians. The Supreme Court was clear that it would not allow standing based on any such unsubstantiated presumptions, and ~~this~~ ^{its} holding is dispositive of the present case.¹

¹ Mr. Carroll’s attempted reliance upon *Wooden v. Board of Regents of the University System of Georgia*, 247 F.3d 1262 (11th Cir. 2001), is equally unavailing. Mr. Carroll contends that “he has and continues to be treated differently and less favorably because of his race” and analogizes his situation to that of Plaintiff Craig Green in the *Wooden* case. Opening Brief at 16. But as Judge Ezra ~~said~~ in his opinion below, Mr. Carroll’s situation is not similar to that of Plaintiff Green, who had applied for admission to the University of Georgia, and had been excluded through a process that utilized race as a criteria and hence had alleged “direct exposure to unequal treatment.” 247 F.3d at 1280. Instead, Mr. Carroll’s

explained
position is most similar to the two applicants who were denied standing. OHA has not denied him equal protection or the opportunity to compete on equal footing because he has not been personally subjected to any racial classification at this stage. The mere existence of a racial classification system does not personally impact each and every individual who is aware of or has an interest in such classification.

188 F.Supp.2d at 1237.

D. Mr. Carroll Is Not “Able and Ready” to Obtain Any of the Benefits He Alleges He Is Being Denied.

At page 20 of his Opening Brief, Mr. Carroll cites the cases of *International Brotherhood of Teamsters v. United States*, 431 U.S.324 (1977), and *Gifford v. Atchison, Topeka and Santa Fe Railway Co.*, 685 F.2d 1149 (9th Cir. 1982), for the proposition that a person can challenge a program even if the person has not applied for the program, ^{so long as} ~~and that~~ he “stand[s]...ready, willing, and able, for the State...to promote...[his] interests without reference to race.” Judge Ezra addressed this issue in some detail in his earlier opinion, 188 F.Supp.2d 1219, at 1228-29, and explained that in order to demonstrate the requisite injury, [“][o]ne must be ‘able and ready’ to make use of the benefits. Otherwise, under Plaintiff’s broad interpretation, there would be no meaning to the standard. It would apply in every case.” *Id.* at 1228 n.13.

This “able and ready” language comes from the case of *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666 (1993), which holds that plaintiffs must establish that they are “able and ready” ^{realistically} to compete for a governmental program before they can meet the standing requirements to challenge the requirements governing such a program in court. Plaintiffs must thus demonstrate they have suffered a cognizable nonspeculative personal injury by being prevented from being considered for a program that they would otherwise be eligible to be considered

for. They must also show that the race-based standard they are challenging is the cause for their inability to be considered for the program and that the court has the power to provide relief (or “redress”) in the context of the complaint they have filed. ¶ Mr. Carroll meets none of these standards. Although he clearly has a philosophical disagreement with the criteria he is challenging, he has not demonstrated that he is “able and ready” to be considered for (or even that he is interested in pursuing) any OHA program if the Native-Hawaiian-ancestry requirement were eliminated. *See, e.g., Lofton v. Butterworth*, 93 F.Supp.2d 1343 (S.D.Fla. 2000)(ruling that homosexual plaintiffs who had not actually filed an application for adoption did not have standing to challenge Florida’s statute barring adoptions by homosexuals because they had not demonstrated that they actually wanted to adopt a child). In sharp contrast, the employees in the *Teamsters* and *Gifford* cases were “able and ready” to compete for promotions “[j]ust by virtue of being company employees.” 188 F.Supp.2d at 1228. Mr. Carroll is asking the federal courts to issue an advisory opinion, and his complaint must, therefore, be dismissed for lack of standing.

E. The Relief Sought by Mr. Carroll Would Not Provide Redress for His Alleged Injuries.

Even if one could somehow find a legally cognizable injury in Mr. Carroll’s complaint, his claim would have to be dismissed under the redressibility prong of the three-part standing test that Mr. Carroll acknowledges applies here. *See also*,

e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Even if all the programs Mr. Carroll dislikes were to be declared unconstitutional, such a court ruling would not lead to the creation of a master plan for Caucasians or the creation of an organization to hold property in trust for Caucasians. *See* Carroll Opening Brief at 12-13. It would be totally speculative to conclude that such a ruling would lead to any better or different governmental treatment for Mr. Carroll and other Caucasians, and since this Honorable Court is unable to issue a ruling that would improve Mr. Carroll's situation, its ruling would be no more than an advisory opinion, which would run afoul of the case-or-controversy requirement in Article III of the U.S. Constitution.

CONCLUSION

For the reasons stated above, the OHA Defendants respectfully request this Honorable Court to affirm the District Court's ruling dismissing Mr. Carroll's complaint.