

## **QUESTION PRESENTED**

Whether state taxpayers have standing to challenge the actions of state government (or an agency receiving funds from the state government) that expend, or involve the use of, state taxpayer dollars, simply because they pay taxes to the state?

## PARTIES TO THE PROCEEDINGS

The caption of this petition contains the names of all the parties to the proceedings in the United States Court of Appeals for the Ninth Circuit. The fourteen plaintiffs will be referred to in the remainder of this petition as "Plaintiffs." Petitioners Linda C. Lingle, in her official capacity as Governor of the State of Hawaii, the various State of Hawaii department directors [excluding the DHHL director??? *see below bracketed point*], and the Commissioners of the Hawaiian Homes Commission [*perhaps exclude HHC commissioners, and DHHL director, as petitioners as they are out of the case? but then they'll be deemed "respondents"*], will be referred to collectively in the remainder of this petition as "Petitioners" or "State Defendants."

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## TABLE OF AUTHORITIES

## OPINIONS AND ORDERS BELOW

The Ninth Circuit's opinion (App. 1?) is reported at 423 F.3d 954.

The District Court's opinions are reported at 198 F.Supp.2d 1165 (App. ??), 299 F.Supp.2d 1090 (App. ??), 299 F.Supp.2d 1107 (App. ??), 299 F.Supp.2d 1114 (App. ??), 299 F.Supp.2d 1129 (App. ??), and 305 F.Supp.2d 1161 (App. ??).<sup>1</sup>

The Ninth Circuit's order denying *plaintiffs'* petition for panel rehearing or rehearing en banc is reprinted at App. ?. The Ninth Circuit's order granting Petitioner State Defendants' motion for a stay of mandate pending the filing of a petition for writ of certiorari is reprinted at App. ?.

## JURISDICTION

(i) The opinion of the United States Court of Appeals for the Ninth Circuit (along with the formal "Judgment"), which this petition seeks to have reviewed, was entered on August 31, 2005. See 423 F.3d 954 (9th Cir. 2005) (App. 1?)]. This opinion and judgment will hereinafter be referred to as "Ninth Circuit's decision."

ii) The Order of the Ninth Circuit denying Plaintiffs' (who are *Respondents* in this Court) petition for panel rehearing and petition for

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<sup>1</sup> The District Court issued numerous unpublished procedural orders that are not relevant or helpful to this Court's consideration of this petition, and thus are not listed herein.

rehearing en banc was filed November 4, 2005. No extension of time to file this petition for a writ of certiorari was sought.

iii) This is *not* a conditional cross-petition.

iv) This Court has jurisdiction to review on a writ of certiorari the Ninth Circuit's decision pursuant to 28 U.S.C. § 1254(1).

v) Because the United States and officials of the State of Hawaii are parties to this case, no notification under Supreme Court Rule 29.4(b) or (c) was required or made.

### **CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED**

The *constitutional* provisions involved in this case are 1) U.S. Constitution: Article III, Section 2 {Judicial Power extends to "Cases" or "Controversies"} (App. ???); Amendment XIV, Section 1 {"Equal Protection Clause"} (App. ???), and 2) Constitution of the State of Hawaii: Article XII, Sections 4 through 6 (App. ???).<sup>2</sup>

The *statutory* provisions involved in this case are the following: 1) The Admission Act, Sections 5(b) and 5(f) {73 Stat. 4} (App. ???),<sup>3</sup> 2) the

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<sup>2</sup> Sections 1 through 3 of Article XII -- relating to the Hawaiian Homes Commission Act (HHCA) -- although originally relevant to the case, are no longer directly relevant given that the portions of Plaintiffs' suit involving the HHCA have been dismissed. See footnote 9?, *infra*.

<sup>3</sup> Section 4 of the Admission Act -- relating to the Hawaiian Homes Commission Act -- is no longer directly relevant. See footnote 2, *supra*.

definition of "[n]ative Hawaiian" provided in the Hawaiian Homes Commission Act, § 201 (App. ???),<sup>4</sup> and 2) Hawaii Revised Statutes (HRS) Sections 10-1, 10-2, 10-3, 10-4, 10-5, 10-6, 10-7, 10-10, 10-13, 10-13.5, 10-16 (App. ???-???).

It should be noted that most of the above provisions are relevant principally, if not exclusively, to the *underlying merits of the Equal Protection challenge*, and *not* to the issues of justiciability -- involving the validity of state taxpayer standing -- upon which certiorari review is sought in this petition. However, the provisions are nevertheless reproduced here to assist this Court in understanding the context in which the state taxpayer standing issue arises.

### STATEMENT OF THE CASE

1. Plaintiffs filed their lawsuit in the United States District Court for the District of Hawaii on March 4, 2002, seeking declaratory and injunctive relief to stop longstanding programs provided by the State of Hawaii designed to better the conditions of indigenous Native Hawaiians and/or

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<sup>4</sup> The remainder of the Hawaiian Homes Commission Act -- originally a federal law, 42 Stat. 108; but now a law of the State of Hawaii; see Haw. Const. Art. XII, Sections 1-3; Admission Act Section 4 -- is no longer directly relevant. See footnote 2, *supra*.

native Hawaiians,<sup>5</sup> including the 1921 Hawaiian Homes Commission Act ("HHCA"), 42 Stat. 108 (1921), and programs of the Office of Hawaiian Affairs ("OHA"), HRS Chapter 10, which office was established in 1978. See Hawaii Constitution Article XII, Sections 1-6.

2. In order to rehabilitate the Native Hawaiian population of Hawaii that had been suffering severe social and economic decline, and drastic reductions in their native population -- due to cultural displacement, political disempowerment, foreign diseases, and other external influences -- Congress in 1921 enacted the HHCA. It provided that a portion of the ceded lands -- lands formerly belonging to the Kingdom of Hawaii, but ceded to the United States upon the overthrow of the Kingdom and its subsequent annexation -- be used to provide homesteads (at a nominal lease rent) for native Hawaiians; i.e., Hawaiians with 50% or more Native Hawaiian blood. See HHCA §§ 201, 203, 204, 207, 208. The Department of Hawaiian Home

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<sup>5</sup> Unless the context suggests otherwise, this brief uses the terms "**Hawaiian**" or "**Native Hawaiian**" to refer to all descendants, regardless of blood quantum, of the indigenous people who inhabited the Hawaiian Islands prior to 1778. The term "**native Hawaiian**" (with lower case "n") refers to the subset of Native Hawaiians with 50% or more Hawaiian blood quantum. See HHCA § 201. The Department of Hawaiian Home lands, which carries out the HHCA, will be abbreviated "**DHHL**."

Lands ("DHHL") is the Hawaii state agency that administers the HHCA. See HHCA §§ 202, 204.<sup>6</sup>

3. In 1959, Congress admitted Hawaii as a state, gave title to the ceded lands to the State of Hawaii, and directed that the ceded lands (and the income and proceeds from them) be held by the State as a public trust for five purposes, including "the betterment of the condition of native Hawaiians" (with "native Hawaiians" having the definition given the term in the HHCA, i.e., persons of 50% or more Hawaiian blood quantum; see footnote 5, supra). Admission Act § 5(f) (App. ???).

In 1978 the people of Hawaii amended the Hawaii Constitution to create an Office of Hawaiian Affairs (OHA), whose mission was to better the condition of Native Hawaiians and native Hawaiians. OHA is financed primarily through a portion of the revenues generated on the ceded lands. State taxpayer dollars provide a proportionately much smaller contribution to OHA's operations. OHA assists Hawaiians principally by making grants and giving other assistance to organizations that provide a variety of social and educational services, and also by issuing small business loans and related assistance.

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<sup>6</sup> See footnote 2, supra.

4. Plaintiffs seek declaratory and injunctive relief against the above HHCA and OHA programs on the theory that the programs' qualifications limiting participation to Native Hawaiians or native Hawaiians<sup>7</sup> violate the Equal Protection Clause of the United States Constitution by discriminating against non-Hawaiians.

*Plaintiffs, however, did not allege that any of them applied for, otherwise sought, or were even interested in, participation in those programs. Plaintiffs instead based their Article III standing on the mere fact that they paid state taxes to the State of Hawaii, and on their claim that these programs were financed, at least in part, by state taxpayer monies.*<sup>8</sup> State Defendants (Petitioners herein), citing to Justice Kennedy's opinion in ASARCO, Inc. v. Kadish, 490 U.S. 605, 613-14 (1989) (plurality), contended below that Plaintiffs' entire suit should be dismissed because plaintiffs' status as state taxpayers was insufficient to satisfy the standing requirements of Article III.

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<sup>7</sup> Not all of the programs, however, restrict participation to Native or native Hawaiians.

<sup>8</sup> Plaintiffs also urged an alternative theory of standing based upon their alleged trust beneficiary status. However, this theory was properly rejected by the Ninth Circuit Court of Appeals (as well as the District Court). See Arakaki, 423 F.3d at 963-65, 972-73 (App. ??-??), and is not the subject of this petition.

5. State Defendants also urged, in the alternative, that even if plaintiffs' mere status as state taxpayers were sufficient under Article III, *prudential* standing concerns precluded federal court jurisdiction over a case in which the asserted harm is a generalized grievance shared in substantially equal measure by all or a large class of citizens.

6. Both the District Court and the Ninth Circuit, however, granted plaintiffs standing for some of their claims based upon plaintiffs' mere state taxpayer status. The Ninth Circuit three-judge panel, however, rejected State Defendants' no-standing argument only because it felt bound by a prior Ninth Circuit decision, Hoohuli v. Ariyoshi, 741 F.2d 1169 (1984), which the court, *not sitting en banc*, believed it could not overturn. See Arakaki, 423 F.2d at 967-69 (App. ??).<sup>9</sup> Hoohuli had granted the plaintiffs in that

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<sup>9</sup> Both the Ninth Circuit and the District court nevertheless threw out the *non-taxpayer-dollars* portion of plaintiffs' suit; i.e., that portion seeking to enjoin the State's providing to OHA those funds (and/or to enjoin OHA's use of those funds for Hawaiian programs) *that did not come from state taxpayer dollars, but from revenues generated on the ceded lands*, or revenue from settlements or bond issues. See 423 F.3d at 970-72 (App. ???-??); 299 F.Supp.2d at 1100-01 (App. ???-??).

The Ninth Circuit and the District Court also dismissed the *entire* suit as to the *HHCA*, throwing out not just the attack on DHHL operations to the extent financed by non-taxpayer land revenues, but also the attack on DHHL operations actually financed by state taxpayer dollars. See 423 F.3d at 965-67 (App. ???-??); 299 F. Supp.2d at 1125-27(2003) (App. ???-??). Both courts did so relying upon an intricate no-standing/U.S.-indispensable-party theory, involving the earlier Ninth Circuit decision of Carroll v. Nakatani,

case standing to challenge the constitutionality of the Hawaii state government's appropriating and expending state taxpayer money (from the state's general fund) for the benefit of Hawaiians, based simply on the fact that plaintiffs paid taxes to the state. See Hoohuli, 741 F.2d at 1180-81.

7. The *District* court, despite authorizing state taxpayer standing to challenge the State's funding of OHA (and OHA's use of those funds) to the extent those funds came directly from state taxpayer monies, had ultimately dismissed those claims under the political question doctrine. See 305 F.Supp.2d at 1164-74 (D. Haw. 2004) (App. ???). The Ninth Circuit, however, reversed the political question ruling<sup>10</sup> and remanded to the District Court to proceed with the suit regarding the State's funding of OHA's activities with state taxpayer monies (and OHA's use of those monies in turn for Hawaiians). See 423 F.3d at 973-76 (App. ???).

8. State defendants assert that the state taxpayer standing basis for the claims remaining in this suit is improper, and contrary to numerous federal courts of appeals decisions, Justice Kennedy's ASARCO opinion (joined by Justices Stevens, Scalia and the late Chief Justice Rehnquist), and

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342 F. 3d 934 (9th Cir. 2003). This dismissal of the entire suit as to the HHCA is, of course, *not* challenged by, nor the subject of, this petition.

<sup>10</sup> This petition does *not* challenge the Ninth Circuit's rejection of the political question doctrine's applicability.

Justice Breyer's Nike opinion<sup>11</sup> (joined by Justice O'Connor). And because a favorable ruling by the Supreme Court to that effect would terminate the entire lawsuit and avoid unnecessary and costly proceedings in the district court, avoid disruption of OHA programs that help the State fulfill its special relationship with Native Hawaiians, and prevent interference with fundamental federalism and separation of powers concerns, State defendants moved the Ninth Circuit to stay the issuance of its mandate pending the filing of a writ of certiorari. The Ninth Circuit, which will not grant a stay unless the certiorari petition "would present a *substantial question* and that there is good cause for a stay," FRAP 41(d)(2)(A), granted the motion, staying the mandate until final disposition of the petition by the Supreme Court. (App. ??).

9. Plaintiffs predicated their jurisdiction in the District court on 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1343(3) & (4) (civil rights), and 28 U.S.C. § 2201 & 2202 (declaratory judgment).

### **REASONS FOR GRANTING THE PETITION**

The Ninth Circuit's ruling, which simply followed its prior Hooehuli state taxpayer standing decision, meets two *separate* and *independent* bases for certiorari review. First, as explained in detail in subsection I below, it

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<sup>11</sup> See Nike, Inc. v. Kasky, 539 U.S. 654, 669 (2003).

raises "an important question of federal law that has not been, but should be, settled by [the United States Supreme] Court," Sup. Ct. R. 10(c). However, although not settled by a single majority opinion of this Court, a majority of this Court's *justices* have taken a position contrary to the Ninth Circuit's state taxpayer doctrine, and thus it could be said, in the alternative, that the Ninth Circuit's ruling below "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). See discussion *infra* at ???. In short, this case satisfies at least one of the alternative criteria in Sup. Ct. R. 10(c) for certiorari.

Second, the Ninth Circuit's ruling constitutes "a decision in *conflict* with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a). Indeed, the ruling conflicts with decisions of at least five (5) other circuits. See subsection II, *infra*. And we are unable to find a single other circuit that follows the Ninth Circuit's broad state taxpayer standing doctrine adopted in Hoohuli, and reaffirmed in the case at bar.

- I. **The issue of whether state taxpayers having standing to challenge the actions of state government simply because they pay taxes to the state presents an important question of federal law that has not been, but should be, settled by the United States Supreme Court.**

The question of whether state taxpayers can challenge in federal court

the actions of state government (or an agency receiving funds from the state government) simply because they pay taxes to the state, is surely an *important* federal issue as it goes to the heart of Article III's case or controversy requirement, governing the fundamental authority of federal courts to decide cases. Allowing every single state taxpayer to challenge state laws in federal court, when that taxpayer is not directly or uniquely injured by those laws -- as is the case here, where plaintiffs do *not* allege that they even desire, much less seek, any of the OHA benefits limited to Native Hawaiians or native Hawaiians-- violates Article III's limited grant of jurisdiction to the federal courts to decide only *real* cases and controversies. Because, as explained further below, the state taxpayers in cases such as this one are not affected in any meaningful way by the state laws they challenge, federal court jurisdiction over such suits violates the well-accepted doctrine that federal courts not decide abstract questions of law. As stated by this Court in City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983):

Plaintiffs must demonstrate a "personal stake in the outcome" in order to "assure that concrete adverseness which sharpens the presentation of issues" necessary for the proper resolution of constitutional questions. . . . Abstract injury is not enough. The plaintiff must show that he "has sustained or is immediately in danger of sustaining some direct injury" as the result of the challenged official conduct and the injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical."

The state taxpayer injury in cases like the one at bar does not exist *at all*, or is certainly not "real" or "immediate," but rather at best "abstract," and "conjectural," for as Justice Kennedy explained in his ASARCO opinion for himself, Justices Stevens and Scalia, and the late Chief Justice Rehnquist:

[S]uits premised on federal taxpayer status are not cognizable in the federal courts because a taxpayer's "interest in the moneys of the Treasury . . . is shared with millions of others, is comparatively minute and indeterminable; and the effect upon future taxation, of any payments out of the funds, so remote, fluctuating and uncertain that no basis is afforded for [judicial intervention]." Frothingham v. Mellon, 262 U.S. 447, 487 (1923). . . . [W]e have likened *state* taxpayers to *federal* taxpayers, and thus we have refused to confer standing upon a state taxpayer absent a showing of "direct injury," pecuniary or otherwise. Doremus.

ASARCO, Inc. v. Kadish, 490 U.S. 605, 613-14 (1989) (Kennedy, J., opinion).

And, as further explained in ASARCO, 490 U.S. at 614:

Even if [the suit would yield money for the school trust fund], it is pure speculation whether the lawsuit would result in any actual tax relief for respondents. If they were to prevail, it is conceivable that more money might be devoted to education [rather than taxes being cut]. . . . The possibility that taxpayers will receive any direct pecuniary relief from this lawsuit is "remote, fluctuating and uncertain."

For these reasons, therefore, plaintiffs' claim to standing based solely upon their alleged state taxpayer status (a status they share with virtually the state's entire adult population), even though they have demonstrated no personal interest in receiving the benefits offered by the challenged Native

Hawaiian or native Hawaiian programs, does not provide them Article III standing in this case.

State taxpayer suits also severely distort the balance of power between the federal government and the states (i.e., federalism), and intrude upon separation of powers concerns. Federal court exercise of jurisdiction in state taxpayer suits like this one would violate federalism principles because a *federal* court would be interfering with the enforcement of *state* laws even though no plaintiff has been directly and uniquely injured by the challenged law. See Tarsney v. O'Keefe, 225 F.3d 929, 938 (8th Cir. 2000) ("Allowing state taxpayers to litigate claims of unconstitutional expenditures without having to show a direct injury would 'seriously undermine . . . federalism.'"); Colorado Taxpayers Union v. Romer, 963 F.2d 1394, 1402-03 (10th Cir. 1992) (denying state taxpayer standing "comports with notions of federalism"); Taub v. Commonwealth of Kentucky, 842 F.2d 912, 919 (6th Cir. 1988) (rejecting state taxpayer standing in part because of "[c]onsiderations of federalism").

Similarly, state taxpayer suits violate **separation of powers** concerns because a *judicial* branch would be unnecessarily interfering with state *legislative* and state *constitutional* enactments, even though no one has been truly injured, and where the political branches can step in instead. See

United States v. Richardson, 418 U.S. 166, 189 (1974) (Powell, J., concurring) ("taxpayer or citizen advocacy, given its potentially broad base, is precisely the type of leverage that in a democracy ought to be employed against the branches that were intended to be responsive to public attitudes about the appropriate operation of government."); cf. Taub, 842 F.2d at 919 ("restrictions on . . . taxpayer standing prevent unwarranted intrusions by the courts into matters entrusted to the legislative and executive branches"); Colorado Taxpayers, 963 F.2d at 1402 (same).

On a practical level, the permissibility of state taxpayer suits affects whether hundreds of cases brought in federal court each year may proceed or must be dismissed; disallowing them will thus save substantial federal judicial resources, and prevent needless interference with the operations of state government and the administration of state laws. Rejection of state taxpayer standing will also ensure that those litigating important constitutional (or other) legal issues have a direct, unique, and "personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 804 (1985) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

The importance of the issue of state taxpayer standing is confirmed by

the fact that this very Supreme Court just recently *sua sponte* asked that the parties in a case granted certiorari on a Commerce Clause issue also address the question of standing in a case in which many of the plaintiffs are mere state taxpayers. See DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 36 (2005) ("In addition to the questions presented by the petitions, the parties are directed to brief and argue the following question: Whether respondents have standing to challenge Ohio's investment tax credit"); Wilkins v. Cuno, 126 S. Ct. 26 (2005) (same).<sup>12</sup>

Finally, the question of state taxpayer standing has *not* been settled by the United States Supreme Court. As the Ninth Circuit panel in this case noted:

Whether Justice Kennedy's opinion is dictum or not, that portion of his opinion on state taxpayer standing is not the opinion of the Supreme Court. It may carry persuasive value to a court that has not previously ruled on state taxpayer standing, but an opinion from an evenly divided Court is not a precedentially binding intervening opinion of the Court. We therefore may not hold our prior opinion in Hooihuli overruled by an opinion of four Justices, even if we thought it persuasive, without obtaining en banc review.

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<sup>12</sup> That this Court may ultimately address the issue of state taxpayer standing in a case already pending before it, of course, makes it *more* appropriate that certiorari be granted in the case at bar as well. For if this Court in the Cuno case ultimately decides to follow Justice Kennedy's ASARCO position, or otherwise rejects or limits state taxpayer standing, this Court could simply grant certiorari in the case at bar, vacate the judgment below, and remand for reconsideration in light of the Cuno ruling.

Arakaki, 423 F.3d at 968-69 (citations omitted). Therefore, the criterion of Sup. Ct. R. 10(c) -- that the important question of federal law has "not been, but should be, settled by" the Supreme Court -- is easily satisfied.

Moreover, the unsettled nature of the issue itself creates its own set of problems.<sup>13</sup>

Alternatively, one can view Justice Kennedy's 4-justice ASARCO opinion nevertheless as a "relevant decision[] of [the Supreme] Court," Sup. Ct. R. 10(c), especially given that the other 4-justice opinion by Justice *Brennan* concurring in the judgment took issue more with Justice Kennedy's *other* standing ruling (regarding the teachers' association's standing), rather than his *state taxpayer* standing ruling. 490 U.S. at 633. Therefore, in the alternative, the Ninth Circuit's decision, by conflicting with Justice Kennedy's opinion, does "conflict[] with [a] relevant decision[] of this Court." Sup. Ct. R. 10(c).

Moreover, a *majority* of the current Justices disagree with the Ninth Circuit's state taxpayer standing doctrine. For in addition to current Justices Kennedy, Stevens, and Scalia (writing or joining Justice Kennedy's opinion

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<sup>13</sup> See Staudt, "Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine," 52 Emory L. J. 771, 836-37 (2003) (lack of guidance on state taxpayer standing issue has led to general confusion among, and within, the circuits, leading to disparate results, and unequal treatment, as well as a waste of private and judicial resources, and disrespect for federal judges as unprincipled decisionmakers).

in ASARCO), Justice Breyer, joined by Justice O'Connor, also expressed the view that "state taxpayers . . . ordinarily lack federal standing." Nike, Inc. v. Kasky, 539 U.S. 654, 669 (2003) (mem.). Given that a *majority* of this Court has thus expressed written disagreement with the doctrine propounded by the Ninth Circuit, it is even more reasonable to claim that the Ninth Circuit's decision "conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Either way, however, the criteria of Sup. Ct. R. 10(c) are satisfied, whether the panel decided an issue that has not been, but should be, decided by the Supreme Court, or decided the issue in a way that conflicts with a decision of the Supreme Court.

**II. The Panel ruling conflicts with the decisions of at least five (5) other circuits.**

The other separate and independent criterion for certiorari -- that "a United States court of appeals has entered a decision in *conflict* with the decision of another United States court of appeals on the same important matter," Sup. Ct. R. 10(a) -- is also easily satisfied here. Indeed, the panel's decision conflicts with the decisions of at least *five (5)* other circuits, which have rejected the broad state taxpayer standing doctrine the Ninth Circuit applied below. These other circuits, in direct contradiction to the Ninth, do not allow plaintiffs to challenge state actions (expending taxpayer monies) simply because they pay taxes to the state, where the state actions do not

otherwise impact the plaintiffs.

These five circuits, by adopting instead the position espoused in Justice Kennedy's ASARCO position (either explicitly, or in effect), have repudiated general state taxpayer standing, and thus directly conflict with the Ninth Circuit's ruling in this case reaffirming Hoohuli's broad state taxpayer standing doctrine. See Bd. of Educ. v. New York State Teachers, 60 F.3d 106, 110-111 (2nd Cir. 1995) (citing Justice Kennedy's opinion in ASARCO, rejecting Hoohuli approach, and holding that "[s]tate taxpayers, like federal taxpayers, do not have standing to challenge the actions of state government simply because they pay taxes to the state"); Henderson v. Stalder, 287 F.3d 374, 379-80 (5th Cir. 2002) (citing Justice Kennedy's ASARCO opinion as controlling, and stating that "the state taxpayer plaintiffs have not alleged that the amount they pay to the State in the form of income taxes will increase because of the enactment" and thus their suit "at most, constitutes a generalized grievance common to all tax payers in the state"); Taub v. Commonwealth of Kentucky, 842 F.2d 912, 918-19 (6th Cir. 1988) (rejecting Hoohuli and holding that "requirements for federal taxpayer standing . . . control the issue of state taxpayer standing, at least in those cases where violation of the Establishment Clause is not alleged" and requiring a state taxpayer to "allege direct and palpable injury"); Tarsney v.

O'Keefe, 225 F.3d 929, 936-38 (8th Cir. 2000) (rejecting state taxpayer Free Exercise challenge to state spending offensive to taxpayer's religious beliefs because a "taxpayer who was not" "direct[ly] injur[ed]" "by the allegedly unconstitutional expenditure would not have taxpayer standing to challenge the expenditure"); Colorado Taxpayers v. Romer, 963 F.3d 1394, 1401-03 (10th Cir. 1992) (rejecting Hoohuli, following Justice Kennedy's ASARCO opinion likening state taxpayers to federal taxpayers, and requiring that, outside the Establishment Clause area, a state taxpayer show "he has suffered a monetary loss due to the allegedly unlawful activity's effect on his tax liability").<sup>14</sup>

Accordingly, the Ninth Circuit's position has been flatly rejected by at least *five* other circuits, and thus the ruling below easily satisfies the Rule 10(a) certiorari criterion of conflict with another circuit court's ruling on an important matter.<sup>15</sup>

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<sup>14</sup> Furthermore, an additional circuit, in dicta, has cited Justice Kennedy's opinion in ASARCO, and stated that "*state taxpayers lack a sufficiently personal interest to challenge laws of general applicability, since their injury is not significantly different from that suffered by taxpayers in general.*" Women's Emergency Network v. Bush, 323 F.3d 937, 943 (11th Cir. 2003).

<sup>15</sup> The importance of the issue, of course, was already discussed supra at 11-16?

**III. Even if state taxpayers could satisfy the requirements of Article III, *prudential* concerns dictate dismissal of state taxpayer suits, because the asserted harm is a "generalized grievance" shared in substantially equal measure by all or a large class of citizens.**

In addition, even if state taxpayer suits were somehow deemed sufficient to meet Article III's constitutional requirements, *prudential* standing concerns should bar federal court jurisdiction over state taxpayer lawsuits. As stated in Warth v. Seldin, 422 U.S. 490, 499 (1975):

Apart from [the Article III] minimum constitutional mandate, this Court has recognized other [prudential] limits on the class of persons who may invoke the courts' decisional and remedial powers. First, the Court has held that when the asserted harm is a '*generalized grievance*' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction.

Plaintiffs' claims in this case fall squarely within Warth's language, as the state taxpayer base -- literally hundreds of thousands, and constituting virtually the entire adult population -- surely constitutes a "large class of citizens." And the taxpayer harm, assuming generously that it exists at all,<sup>16</sup> is surely a "'generalized grievance' shared in substantially equal measure" by that large class of citizens. Indeed, it would seem that *all* pure state taxpayer suits would run afoul of Warth.

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<sup>16</sup> See ASARCO, 490 U.S. at 613-14 (Kennedy, J., opinion) (taxpayer's interest in the treasury is shared with millions of others, is comparatively minute and indeterminable, and the effect upon future taxation, of any payments out of the treasury is remote, fluctuating and uncertain).

Moreover, denying standing to these particular taxpayer plaintiffs would *not* mean that no one would have standing to challenge OHA's Hawaiian ancestry requirements. Persons who would otherwise qualify for OHA benefits (but for their non-Hawaiian status) and who actually desire them and take steps to obtain them could challenge any Hawaiian ancestry prerequisite for those benefits. There is simply no reason to allow these particular plaintiffs, who don't even seek the benefits, and whose taxpayer injury, if any, is shared by virtually all adult citizens of Hawaii, to bring this generalized grievance, when others who are directly and particularly injured can do so.

Accordingly, the Ninth Circuit's ruling could be reversed on this alternative *prudential* standing ground as well.<sup>17</sup> Indeed, the same concerns supporting rejection of *Article III* state taxpayer standing -- including avoiding federal court resolution of abstract questions involving parties with no real interest at stake, and preventing unnecessary interference with state governmental operations and administration of laws, preserving federalism and separation of powers, and conserving scarce judicial resources, etc., see *supra* at 11?-15? -- apply equally to rejecting state taxpayer standing on this *prudential* ground, too. By upholding state taxpayer standing, and implicitly

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<sup>17</sup> State Defendants raised this prudential ground both in the District Court and in the Ninth Circuit.

rejecting this prudential ground for dismissal as well, the Ninth Circuit's implicit prudential ruling raises these same important issues, and together with its *Article III* ruling, yields a direct conflict with the five other circuits rejecting general state taxpayer standing.

## CONCLUSION

For the foregoing reasons, State defendants respectfully ask that certiorari be granted in this case to resolve the very important and fundamental state taxpayer standing questions presented by this petition, and to eliminate the direct conflict between the Ninth Circuit and at least five other circuits.

At the very least, given that this Court's eventual ruling in the DaimlerChrysler Corp. v. Cuno/Wilkins v. Cuno cases could very well adopt our position with regard to state taxpayer standing, this Court should, respectfully, at minimum *hold* this petition pending this Court's ruling in the Cuno cases. See Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* (7th Ed. 1993) at 249 ("In most [GVR] situations, the certiorari papers are *held* by the Court pending its plenary ruling, following which the summary reconsideration order is entered."). In the event this Court in the Cuno cases does indeed adopt our position, or otherwise contradicts or narrows the broad state taxpayer standing doctrine adopted by the Ninth

Circuit, this Court could then simply grant this certiorari petition, vacate the Ninth Circuit's judgment (to the extent it granted plaintiffs state taxpayer standing to pursue some of their claims), and remand to the Ninth Circuit for reconsideration in light of the ruling in the Cuno cases.<sup>18</sup>

Dated: February 2, 2006.

Respectfully submitted,

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<sup>18</sup> Of course, if this Court in the Cuno cases were somehow able to avoid addressing the issue of state taxpayer standing (say, because another plaintiff in the case had a sufficient non-taxpayer basis for standing), then, for all the reasons provided in this petition, this Court should grant certiorari in *this* case, and conduct a *plenary* review.