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IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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T.A. NO. 07-0086
JOHN M. CORBOY and STEPHEN GARO AGHJAYAN,
Plaintiffs-Appellants

vs.

DAVID M. LOUIE,[1] in his official capacity as Acting Attorney General, State of Hawaiʻi; the COUNTY OF MAUI, and the COUNTY OF KAUAI, Defendants-Appellees

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T.A. NO. 07-0099
GARRY P. SMITH and EARL F. ARAKAKI, Plaintiffs-Appellants

vs.

DAVID M. LOUIE, in his official capacity as Acting Attorney General, State of Hawaiʻi; and the CITY AND COUNTY OF HONOLULU, Defendants-Appellees

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T.A. NO. 07-0102
J. WILLIAM SANBORN, Plaintiff-Appellant

vs.

DAVID M. LOUIE, in his official capacity as Acting Attorney General, State of Hawaiʻi; and the COUNTY OF HAWAIʻI, Defendants-Appellees

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[1] Pursuant to Hawaiʻi Rules of Appellate Procedure Rule 43(c)(1), David M. Louie, the current acting Attorney General of the State of Hawaiʻi, has been substituted for Mark J. Bennett, the Attorney General at the time this case was decided by the Tax Appeal Court.

T.A. NO. 08-0039
In the Matter of the Tax Appeal of
STEPHEN GARO AGHJAYAN, Appellant-Appellant

and

STATE OF HAWAIʻI, Intervenor-Appellee

T.A. NO. 08-0040
In the Matter of the Tax Appeal of
JOHN M. CORBOY, Appellant-Appellant

and

STATE OF HAWAIʻI, Intervenor-Appellee

T.A. NO. 08-0041
In the Matter of the Tax Appeal of
GARRY P. SMITH, Appellant-Appellant

and

STATE OF HAWAIʻI, Intervenor-Appellee

T.A. NO. 08-0042
In the Matter of the Tax Appeal of
WILLIAM J. SANBORN, Appellant-Appellant

and

STATE OF HAWAIʻI, Intervenor-Appellee

T.A. NO. 08-0043
In the Matter of the Tax Appeal of
EARL F. ARAKAKI, Appellant-Appellant

and

STATE OF HAWAIʻI, Intervenor-Appellee

NO. 30049

APPEAL FROM THE TAX APPEAL COURT
(Tax Appeal Case No. 07-0086 (Consolidated
Nos. 07-0086, 07-0099, 07-0120, 08-0039,
08-0040, 08-0041, 08-0042, 08-0043))

APRIL 27, 2011

CONCURRING OPINION BY ACOBA, J.

I believe that Plaintiffs-Appellants John M. Corboy, Stephen Garo Aghjayan, Garry P. Smith, Earl F. Arakaki, and J. William Sanborn (Taxpayers), have standing as taxpayers to challenge the tax exemption set forth under the Hawaiian Homes Commission Act (HHCA) and adopted in article XII of the Hawaiʻi Constitution.[2] Accordingly, I disagree with the majority as to standing inasmuch as I would hold that Taxpayers have standing in this case.

However, because Section 4 of the Admission Act provides that the provisions of the HHCA are "subject to amendment or repeal only with the consent of the United States," the United States must be made a party to this action. Having failed to name the United States as a party to the instant action, Taxpayers cannot pursue their claims. For that reason, I join the result reached by the majority.

[2] Section 4 of the Hawaiʻi Admission Act of 1969 (Admission Act), Pub. L. No. 86-3, 73 Stat. 4 (1959), reprinted in 1 Hawaiʻi Revised Statutes (HRS) 135 (2009 Repl.), which made Hawaiʻi a state of the union, required as a condition of admission, that Hawaiʻi adopt the HHCA "as a provision of [its] Constitution."

I.

Taxpayers are all homeowners and real property taxpayers in various counties of the State of Hawaiʻi. They paid their real property taxes, as assessed by their respective counties, under protest, on the ground that the assessment of real property taxes against them violated their right to equal protection under the Fifth and Fourteenth Amendments to the United States Constitution and federal civil rights laws. Taxpayers filed their Amended Complaint for Refund of Real Property Taxes Paid Under Protest Pursuant to HRS § 40-35 and for Declaratory and Injunctive Relief (Amended Complaint) on January 22, 2008, raising the same claims.[3] Defendant-Appellee State of Hawaiʻi (the State) concedes that Taxpayers "have standing to challenge the tax exemption in general--i.e., to challenge the fact that homesteaders receive the tax exemption, while non-homesteaders do not." In view of the foregoing, Taxpayers' challenge in this case does not amount to a challenge to the qualifications for a Hawaiian homestead lessee under the HHCA, as the majority characterizes it, but rather, is a challenge to the tax exemption under the HHCA as adopted and extended by the counties.

[3] HRS § 40-35(a) (2009 Repl.) allows one to pay under protest "[a]ny disputed portion of moneys representing a claim in favor of the State[.]" "The protest [must] be in writing, signed by the person making the payment, or by the person's agent, and shall set forth the grounds of protest." Id. "Any action to recover payment of taxes under protest shall be commenced in the tax appeal court" "within thirty days from the date of payment." HRS § 40-35(b). No one questions whether HRS § 40-35 allows one to pay his or her real property taxes under protest.

II.

In Iuli v. Fasi, 62 Haw. 180, 184, 613 P.2d 653, 656 (1980), this court outlined specific requirements which must be met before standing to taxpayers [may be] granted." It was explained that under Munoz v. Ashford, 40 Haw. 675 (1955), taxpayer standing requires: (1) the act complained of must be more than a "mere irregularity[,]" and "[i]n addition to an illegal act, the act must be such as to imperil the public interest or work public injury[,]" (2) the plaintiff must "allege loss in revenues resulting in an increase in plaintiff's tax burdens or to taxpayers in general[,]" and (3) "in the absence of a statute governing such suits, demand upon the proper public officer to take appropriate action is a condition precedent to maintenance of a taxpayer's action unless facts alleged sufficiently show that demand to bring suit would be useless." Fasi, 62 Haw. at 183-84, 613 P.2d 656.

With respect to the first requirement under Fasi, Taxpayers argue that the assessment of property taxes against them is illegal because they are not afforded the same tax exemption as homestead lessees of Hawaiian ancestry, which Taxpayers maintain illegally discriminates against all non-Hawaiians on the basis of race. Taxpayers allege that the tax exemption "imperil[s] the public interest or work[s] public injury[,]" because "[r]acial distinctions are especially 'odious to a free people.'" (Quoting Rice v. Cayetano, 528 U.S. 495, 517 (2000).)

Rice involved a challenge to the voting restriction for the nine trustees which made up the Office of Hawaiian Affairs, or OHA, which required voters to be Hawaiian. Rice, 528 U.S. at 499-500, 509. According to Rice, "[t]he ancestral inquiry mandated by the State implicates the same grave concerns as a classification specifying a particular race by name." Id. at 496. Because, as discussed infra, the tax exemption is inextricably tied to an ancestral requirement, the illegal act alleged by Taxpayers, i.e., providing a tax exemption on the basis of ancestry, could "imperil the public interest or work public injury." Fasi, 62 Haw. at 183, 613 P.2d 656.

With respect to the second requirement, Taxpayers allege a loss in revenues resulting in an increase in their tax burdens, or to taxpayers in general. For example, Taxpayers maintain that in the 2009-2010 year, the City and County of Honolulu projected that it would receive approximately $1,817 per residential parcel, with a total of 253,185 residential parcels on Oahu. However, according to Taxpayers, each of the 3,933 Hawaiian homestead parcels on Oahu were charged only $100 per year for their residential parcels. Thus, Taxpayers assert that the exemption afforded Hawaiian homestead lessees, but denied them, increased the amount of taxes they were required to pay. This would appear sufficient to "allege loss in revenues resulting in an increase in plaintiff's tax burdens or to taxpayers in general." Id. at 184, 613 P.2d at 656; see also Murray v. Comptroller of Treasury, 216 A.2d 897, 901-02 (Md. 1966) (holding that because the tax exemption resulted in "over

$78 million dollars of real estate [being] exempted from taxation" and "the property owners who pay real estate taxes to the state . . . would pay less taxes to the state if the exempted property were taxed[,]" plaintiffs showed a pecuniary loss and increase in their taxes sufficient to confer standing).

As previously discussed, Taxpayers filed their real property taxes under protest, asserting that the payment of their taxes deprived them of equal protection under the Fourteenth Amendment of the United States Constitution. Thus, a demand upon the proper public officer to take appropriate action was made in the instant case. Based on the foregoing, Taxpayers have established that they have standing to challenge the tax exemption under Fasi.[4]

III.

The Supreme Court has held that plaintiffs who allege an injury that arises solely out of their status as federal taxpayers generally do not have standing under Article III of the

[4] In Hawaii's Thousand Friends v. Anderson, 70 Haw. 276, 277, 768 P.2d 1293, 1295 (1989), this court set forth a somewhat similar test for taxpayer standing: "(1) plaintiff must be a taxpayer who contributes to the particular fund from which the illegal expenditures are allegedly made; and (2) plaintiff must suffer a pecuniary loss, which, in cases of fraud, are presumed." Accord Mottl v. Miyahira, 95 Hawaiʻi 381, 391, 23 P.3d 716, 726 (2001). Anderson involved a challenge to the expenditure of tax dollars. See 70 Haw. at 279-80, 768 P.2d at 1296-97. Anderson did not preclude the application of taxpayer standing to challenges to tax exemptions. An illegal tax exemption may amount to an illegal expenditure. Cf. Freedom From Religion Found., Inc. v. Geithner, 715 F. Supp. 2d 1051, 1059 (E.D. Cal. 2010) (rejecting the argument that "tax exemptions and deductions are not 'expenditures'" because "tax policies such as tax credits, exemptions, and deductions can have 'an economic effect comparable to that of aid given directly' to religious organizations" (quoting Mueller v. Allen, 463 U.S. 388, 399 (1983))). With respect to the second requirement under Anderson, Taxpayers have alleged that they have suffered a pecuniary loss. As recounted, Taxpayers allege that the tax exemptions resulted in non-homestead homeowners paying an additional $1,717 in property taxes for the 2009-2010 tax year, above the property taxes paid by Hawaiian homestead lessees.

United States Constitution.[5] See Massachusetts v. Mellon, 262 U.S. 447, 487 (1923) (holding that taxpayers do not have standing to challenge federal expenditures because "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 payment out of the funds, so remote, fluctuating and uncertain"); see also DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342-44 (2006) (stating that federal taxpayers do not have standing to challenge tax credits because (1) an injury "based on the asserted effect of [an] allegedly illegal [tax credit] on public revenues" is "not concrete and particularized, but instead a grievance the taxpayer suffers in some indefinite way in common with people generally[,]" (2) such injury is "not 'actual or imminent,' but instead 'conjectural or hypothetical'" because "it is unclear that tax breaks . . . do in fact deplete the treasury[,]" and (3) "establishing redressability requires speculating that abolishing the challenged credit will redound to the benefit of the taxpayer

[5] "Article III of the [United States] Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies.'" Allen v. Wright, 468 U.S. 737, 750 (1984). "Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). The Supreme Court "ha[s] established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact'--an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical[.]" Id. (internal quotation marks and citations omitted). "Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." Id. (internal quotation marks, brackets, ellipses and citations omitted). Finally, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Id. (internal quotation marks and citation omitted.)

because legislators will pass along the supposed increased revenue in the form of tax reductions" (quoting Lujan, 504 U.S. at 560)).

Preliminarily, it may be noted that, unlike a federal taxpayer's interest in the moneys of the federal treasury, a municipal taxpayer's interest is not "shared with millions of [people generally]." Mellon, 262 U.S. at 487. In any event, here, Taxpayers do not allege an injury that arises solely out of their status as municipal taxpayers. Taxpayers are not merely alleging that the exemption to Hawaiian homestead lessees depletes the amount of real property tax collected by the counties, thereby increasing their property taxes. Nor do they assert that by virtue of their contributions as real property taxpayers, they have an interest in the moneys collected by counties and, therefore, have standing to challenge the manner in which such moneys are used.

Rather, Taxpayers also allege that the denial of an exemption equal to that afforded Hawaiian homestead lessees denies them equal protection under the law. Such injury would seem sufficient for purposes of standing. See Hooper v. Bernalillo Cnty. Assessor, 472 U.S. 612, 614, 624 (1985) (reaching the merits of property owners' challenge to "a New Mexico statute that grant[ed] a tax exemption limited to those Vietnam veterans who resided in the State before May 8, 1976" on the ground that the exemption violated the Equal Protection Clause and the Fourteenth Amendment); Califano v. Webster, 430 U.S. 313 (1977) (reaching the merits of a retired male wage

earner's equal protection challenge to the Social Security Act which granted higher monthly old-age benefits to retired female wage earners); Kahn v. Shevin, 416 U.S. 351, 352 (1974) (reaching the merits of a widower's equal protection challenge to a Florida statute that provided for a property tax exemption for widows only).

IV.

Taxpayers' claim requires this court to determine whether the classification for the tax exemption is constitutional. That classification is set forth under the HHCA, the provisions of which have been adopted in article XII of the Hawaiʻi Constitution. Taxpayers' claim could be construed as a challenge to the tax exemptions under each of the Taxpayers' respective county codes as opposed to a challenge to the tax exemption under the HHCA. Taxpayers in fact state that "the injunction [sought in this case] is directed against the counties . . . and would require the counties to refrain from directly or indirectly depriving any real property taxpayer of [an] exemption equivalent to that provided to Hawaiian homestead lessees." However, the counties grant a tax exemption to Hawaiian homestead lessees because they are mandated to do so under the Hawaiʻi Constitution. It is the HHCA that provides that the Hawaiian homestead "lessee[s] shall pay all taxes assessed upon the tract and improvements thereon[,]" "provided that an original lessee shall be exempt from all taxes for the first seven years after commencement of the term of the lease." HHCA §§ 208(7) & (8). Section 4 of the Hawaiʻi Admission Act, which made Hawaiʻi a state

of the Union, required Hawaiʻi to adopt the HHCA "as a provision of [its] Constitution[.]"[6]

Carroll v. Nakatani, 342 F.3d 934 (9th Cir. 2003) [hereinafter, "Carroll II"], affirming Carroll v. Nakatani, 188 F. Supp. 2d 1219 (D. Haw. 2001) [hereinafter, "Carroll I"], is instructive. There, the Ninth Circuit held that "[a]rticle XII of the Hawaiian Constitution cannot be declared unconstitutional without holding [Section 4] of the Admission[] Act unconstitutional." Carroll II, 342 F.3d at 944. As indicated previously, Section 4 of the Admission Act expressly provides that the provisions of the HHCA cannot be repealed or amended without the consent of the United States. Because the counties are required by the Hawaiʻi Constitution and federal legislation to grant real property tax exemptions to Hawaiian homestead lessees, any change in the classification for the exemption requires the participation of the United States. See id. (stating that because the "native Hawaiian classification is both a state and a federal requirement[,] . . . any change in the qualification requires the participation of . . . the United States").

Inasmuch as the United States is required to be a party to any lawsuit challenging the constitutionality of the HHCA, it

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[6] Section 4 of the Admission Act provides in relevant part:

> As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the [HHCA], 1920, as amended, shall be adopted as a provision of the Constitution of said State, as provided in section 7, subsection (b) of this Act, subject to amendment or repeal only with the consent of the United States[.]"

(Emphases added.)

must be made a party to this suit. Cf. Arakaki v. Lingle, 477 F.3d 1048, 1052 (9th Cir. 2007) (stating that the "United States is an indispensable party to any lawsuit challenging the [Hawaiian homestead] leases," and the "failure to sue the United States [would mean] that [the] injury [would] not [be] redressable").[7] Because the United States was not named a party to this suit, the case should be remanded to the Tax Appeal Court for dismissal.[8] Cf. Island Ins. Co., Ltd. v. Perry, 94 Hawaiʻi

[7] Although Taxpayers note that the counties have "adopt[ed] and expan[ded] the HHCA's special exemption for Hawaiian homestead lessees," Taxpayers have made no discernible argument that could be construed as a specific challenge to the counties' expansion of the HHCA's tax exemption requirement. Hence, the argument is not addressed.

[8] As indicated supra, the State argues that the tax exemption is subject to rational basis review because "the tax exemptions do not involve a potentially suspect racial classification, inasmuch as the tax exemptions are not based upon whether the taxpayer is native Hawaiian or not, but rather[,] whether the taxpayer is a lessee of the HHCA homesteads." Section 208 of the HHCA does provide that "an original lessee shall be exempt from all taxes for the first seven years after commencement of the term of the lease." However, the very same section of the HHCA provides that "[t]he original lessee shall be a native Hawaiian." Id. at § 208(1). It would appear that the qualification for the tax exemption is inextricably tied to ancestry. "'Distinctions between citizens solely because of their ancestry . . . [can] cause[] the same injuries, as laws or statutes that use race by name." Rice, 528 U.S. at 517. Based on Rice, the classification here, akin to a race-based classification, would appear to be subject to strict scrutiny review. See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 758 (2007) ("[S]trict scrutiny applies to every racial classification[.]" (Citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)).) "Under 'strict scrutiny' analysis, laws are presumed to be unconstitutional unless the state shows a compelling interest to justify such classifications, and the statute must be tailored to avoid unnecessary abridgements of constitutional rights." State v. Guidry, 105 Hawaiʻi 222, 239, 96 P.3d 242, 259 (2004).

The primary purpose of the HHCA is the rehabilitation of the Hawaiian people. See Ahuna v. Dep't of Hawaiian Home Lands, 64 Haw. 327, 336, 640 P.2d 1161, 1167 (1982) ("Senator John H. Wise, a member of the 'Legislative Commission of the Territory (of Hawaii),' and one of the authors of the HHCA, described the law as a plan for the rehabilitation of the Hawaiian people."); see also In re Ainoa, 60 Haw. 487, 488, 591 P.2d 607, 608 (1979) ("The purpose of the Act is to rehabilitate native Hawaiians on lands given the status of Hawaiian home lands under section 204 of the Act. Thus, native Hawaiians are special objects of solicitude under the Act."). In its Answering Brief, the State also noted that land leased to homestead lessees cannot be freely alienated by the lessee inasmuch as HHCA § 209 limits who may succeed to a homestead lease upon the lessee's death and any successor must be at lease one-quarter Hawaiian. The State additionally notes that nearly seventy percent of Hawaiian homestead lessees have "incomes below [eighty] percent of their county median[.]" In my view, there are compelling state interests justifying the classification. Additionally, the tax exemption is (continued...)

498, 502, 17 P.3d 847, 851 (App. 2000) ("remand[ing] for the entry of an order dismissing this case" because a necessary and indispensable party was not made a party to the action).

V.

A.

According to the majority, "Taxpayers' challenge to the tax exemption is, in essence, a challenge to the HHCA's native Hawaiian qualification for homestead lessees." Majority opinion at 31-32. The majority reasons that because the record does not establish that Taxpayers have applied for a lease or are interested in the homestead lease program, Taxpayers have failed to establish an injury-in-fact and, therefore, lack standing to pursue their challenge to the tax exemption. Id. at 4.

The majority attempts to characterize the instant case as one involving standing for purposes of a challenge to the Hawaiian homestead lease criteria. However, that is directly contrary to what Taxpayers claim they are challenging. The majority in fact notes that Taxpayers "assert[] that 'none of the Taxpayers . . . ask for an award of a homestead lease.'" Majority opinion at 39 (brackets omitted). Contrary to the majority's characterization of the instant suit, Taxpayers specifically challenge the tax exemption.

B.

As indicated, the majority holds that Taxpayers lack standing in this case because they have failed to apply for or

[8](...continued)
tailored to avoid unnecessary abridgements of constitutional rights because it limits the exemption to a specific period from the commencement of the term of the homestead lease.

establish a desire to obtain a homestead lease. However, to reiterate, Taxpayers are not challenging the Hawaiian homestead lease qualifications, but the real property tax exemption provided for such lessees. Even assuming, arguendo, Taxpayers' challenge in this case could be construed as a challenge to the Hawaiian homestead lease qualifications, Taxpayers correctly assert that "[t]o seek equal treatment in taxation of their real property, [they] are not required to first make futile applications." It is abundantly apparent that it "would have been futile [for Taxpayers] to have made prior applications [for a lease] given the racial criteria, even if [they] indeed had a genuine and sincere desire for a homestead lease." Carroll I, 188 F. Supp. 2d at 1230. Consequently, even under the majority's reasoning, Taxpayers would seem to have established "the requisite injury by not being able to compete on equal footing for a Hawaiian homestead lease." Id.[9]

C.

The majority contends that it need not address taxpayer standing inasmuch as Taxpayers do not expressly claim general

[9] While I believe taxpayer standing applies in this case, Taxpayers would also appear to have standing under the test set forth by the majority. In order to determine whether a plaintiff has established the requisite personal stake in the outcome of the litigation, this court asks the following questions: "'(1) has the plaintiff suffered an actual or threatened injury as a result of the defendant's wrongful conduct; (2) is the injury fairly traceable to the defendant's actions; and (3) would a favorable decision likely provide relief for plaintiff's injury.'" State v. Kahoʻohanohano, 114 Hawaiʻi 302, 318, 162 P.3d 696, 712 (2007) (quoting Akinaka v. Disciplinary Bd. of the Hawaiʻi Supreme Court, 91 Hawaiʻi 51, 55, 979 P.2d 1077, 1081 (1999). As discussed infra, Taxpayers allege they have suffered a pecuniary loss based on their actual payment of real property taxes. Additionally, Taxpayers allege that the unconstitutional exemption results in an increase in the amount of taxes assessed against them. The foregoing injuries are fairly traceable to the alleged unconstitutional exemption. Finally, a favorable decision would likely provide Taxpayers relief by providing them with a refund. Moreover, the counties would be obliged to eliminate the exemption for Hawaiian homestead lessees or provide Taxpayers an equal exemption.

taxpayer standing. See majority opinion at 40 n.32. However, on appeal, the State argued only that Taxpayers "have no standing to [challenge the] homestead qualification because they affirmatively deny wanting a homestead." (Emphasis added.) But, as stated, Taxpayers are not challenging the homestead qualification, but rather, the tax exemption under the HHCA. With respect to that challenge, the State emphasized that it was "not arguing that Taxpayers do not have standing to challenge the tax exemption in general -- i.e. to challenge the fact that homesteaders receive the tax exemption, while non-homesteaders do not." (Emphasis in original.) Hence, Taxpayers did not expressly assert taxpayer standing inasmuch as it was never challenged in this case. In light of the agreement by the parties that Taxpayers have taxpayer standing to challenge the tax exemption, it is unclear why the majority has declined to address it.

D.

The majority also asserts that this court may not take notice of Taxpayers' argument that the lack of an exemption equal to that afforded Hawaiian homestead lessees costs non-homestead real property owners an average of $1,717 per year, because this assertion was not made on the respective motions for summary judgment. See majority opinion at 40 n.32. However, in Taxpayers' Memorandum in Opposition to State's Motion for Summary Judgment, Taxpayers argued that if they were afforded an exemption equal to that given to homestead lessees, each taxpayer would pay "no more than $100 per year." Thus, each taxpayer

alleged that he paid an increased amount of taxes on account of the allegedly discriminatory tax exemption.

VI.

For the foregoing reasons, I disagree with the standing analysis of the majority and would conclude taxpayer standing existed. However, because the instant case must be dismissed inasmuch as Taxpayers failed to include the United States as a party to this suit, I concur in the result.

/s/ Simeon R. Acoba, Jr.