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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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RICHARD NELSON III, KALIKO CHUN, JAMES AKIONA, SR.,
SHERILYN ADAMS, KELII IOANE, JR., and CHARLES AIPIA,
Plaintiffs-Appellees-Cross-Appellants,

vs.

HAWAIIAN HOMES COMMISSION, THE DEPARTMENT OF HAWAIIAN HOME LANDS,
JOBIE MASAGATANI, in her official capacity as Chair of the
Hawaiian Homes Commission, WILLIAM K. RICHARDSON, MICHAEL P.
KAHIKINA, DOREEN NAPUA GOMES, GENE ROSS DAVIS, WALLACE A.
ISHIBASHI, DAVID B. KAAPU, and WREN WESCOATT, in their official
capacities as members of the Hawaiian Homes Commission,
Defendants-Appellees-Cross-Appellees,

and

WESLEY MACHIDA, in his official capacity as the State Director of
Finance, and the STATE OF HAWAI'I,
Defendants-Appellants-Cross-Appellees.

SCAP-16-0000496

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CAAP-16-0000496; CIV. NO. 07-1-1663)

FEBRUARY 9, 2018

DISSENTING OPINION BY WILSON, J.

Forty years ago representatives of the people of this
State, meeting in the 1978 constitutional convention, instructed
the legislature to adequately fund "the administration and

operating budget" of DHHL by embedding that command in the state constitution. Haw. Const. art. XII, § 1 ("The legislature shall make sufficient sums available for the following purposes . . . (4) the administration and operating budget of the department of Hawaiian home lands . . . by appropriating the same in the manner provided by law."). The history of neglect, delay, and injustice that necessitated this constitutional mandate was chronicled in Nelson I. Nelson v. Hawaiian Homes Comm'n, 127 Hawai'i at 188-89, 277 P.3d at 282-83. In particular, we quoted from a speech that Prince Jonah Kuhio Kalaniana'ole, then Hawaii's delegate to Congress, gave in 1920 advocating for the passage of the federal Hawaiian Homes Commission Act. Id. at 188, 277 P.3d at 282. Prince Jonah's lament over belated justice is quoted more fully below.

I think a situation is presented here that can be distinguished from any other. Perhaps we have a legal right, certainly we have a moral right, to ask that these lands be set aside. We are not asking that what you are to do be in the nature of a largesse or as a grant, but as a matter of justice -- belated justice -- and extend at least a helping hand, without cost to the Government of the United States, to the Hawaiians in their endeavor to rehabilitate themselves, a people who are thoroughly loyal to the Government of the United States. . . . I feel a heavy and special responsibility resting upon me in this matter, but it is one in which you all must share; nor shall we be acquitted by man or our Maker of a neglect of duty if we fail to act speedily and effectually in the cause of my people.

59 Cong. Rec. 7453 (1920) (statement of Prince Jonah Kuhio).
The issue before us is a matter of "belated justice." As we

recognized in Nelson I, the record reveals abundantly that the people's instruction has not been adequately heeded in the forty years since the adoption of that portion of Article XII, Section 1. See Nelson I, 127 Hawai'i at 205, 277 P.3d at 299. This case, in both its earlier and present stages, poses the question of what the judiciary is to do where an explicit constitutional command of the people has gone unheeded.

Because the majority construes Nelson I more narrowly than Nelson I itself was written, and construes it in a manner inconsistent with the constitutional obligation at stake here, I respectfully dissent.

I. The Political Question Doctrine as Applied in Nelson I

It is settled that the issue of whether "sufficient sums" have been made available for "the administration and operating budget of the department of Hawaiian home lands" as mandated by Article XII, Section 1 is a justiciable issue, and not a "political question." Under the political question doctrine, an issue is nonjusticiable where its resolution is reserved to another branch of the government by a "textually demonstrable" constitutional commitment of the issue to the other branch. Hussey v. Say, 139 Hawai'i 181, 188, 384 P.3d 1282, 1289 (2016). Similarly, if there is "a lack of judicially discoverable and manageable standards for resolving" the issue,

the issue may be deemed a nonjusticiable political question. Nelson I, 127 Hawai'i at 194, 277 P.3d at 288 (citation omitted). In addition, if it is impossible to decide the issue "without an initial policy determination of a kind clearly for nonjudicial discretion," or if a court could not undertake an independent resolution of the issue without "expressing lack of respect due coordinate branches of government," the court may decide the issue is nonjusticiable under the political question doctrine. Id. (citation omitted); see also Baker v. Carr, 369 U.S. 186, 217 (1962); id. at 198 (in considering whether a case is nonjusticiable under the political question doctrine, "the Court's inquiry necessarily proceeds to the point of deciding [1] whether the duty asserted can be judicially identified and [2] its breach judicially determined, and [3] whether protection for the right asserted can be judicially molded." (material in braces added)).

First, in Nelson I, we "judicially identified" -- consistent with Baker v. Carr -- the constitutional "duty asserted," when we observed that the 1978 constitutional convention replaced the permissive term "may" with the mandatory term "shall" in relation to funding of DHHL. 127 Hawai'i at 189, 277 P.3d at 283 (noting that the 1978 amendments to what is now Article XII, Section 1 of the Hawai'i Constitution replaced the

permissive word "may" with the mandatory word "shall" so that "through this amendment, the discretionary funding language was changed to mandatory funding language."); id. at 198, 277 P.3d at 292 (detailing the explicit intent of the drafting committee "to no longer allow the legislature discretion in this area"); id. at 199, 277 P.3d at 293 (noting that "[t]he committee considered it especially problematic that DHHL was the only one of 17 executive departments forced to finance itself by leasing its own land 'in order to generate revenues to support its administrative and operating budget'"). In short, the "duty asserted" is a constitutional duty in the form of an explicit constitutional command to the legislature to adequately fund DHHL's administrative and operating budget. Haw. Const. art. XII, § 1 ("The legislature shall make sufficient sums available for the following purposes . . . the administration and operating budget of the department of Hawaiian home lands[.]").

Second, we also established that the constitutional duty's breach could be "judicially determined." Baker v. Carr, 369 U.S. at 198; Nelson I, 127 Hawai'i at 199, 277 P.3d at 293 (quoting a constitutional delegate's statement that the "Hawaiian homes department and the act were and are the most neglected part of the State of Hawai'i, the most neglected department. It was woefully lacking in funds at its inception,

and for the past 50 years and even today, it lacks funds to run the department properly, lacks funds to construct homes and facilities necessary to service existing and future applicants."); id. at 200, 277 P.3d at 294 ("In short, in 1978, it was apparent that DHHL was swept up in a vicious cycle: in order to fulfill its mission of providing homestead lots to beneficiaries, the department had to raise revenue to sustain its programmatic and human infrastructure costs (administrative and operating expenses), and in order to raise money for administrative and operating expenses, the department had to lease the vast majority of its lands that otherwise would have been used for homestead lots."). As we concluded, the constitutional duty's breach was manifest 'by any reasonable measure' in light of undisputed facts.

We agree with the Plaintiffs that, 'the State has failed, by any reasonable measure, under the undisputed facts, to provide sufficient funding to DHHL.' The State's track record in supporting DHHL's success is poor, as evidenced by the tens of thousands of qualified applicants on the waiting lists and the decades-long wait for homestead lots. With the benefit of 35-90 years of hindsight, it is clear that DHHL is underfunded and has not been able to fulfill all of its constitutional purposes. . . .

Id. at 205, 277 P.3d at 299 (braces and citation omitted).

Third, we also addressed "whether protection for the right asserted can be judicially molded." Baker v. Carr, 369 U.S. at 198; Nelson I, 127 Hawai'i at 194, 277 P.3d at 288 (noting that this court has "adopted the test enunciated by the

United States Supreme Court in Baker v. Carr"); Nelson I, 127 Hawai'i at 205-06, 277 P.3d at 299-300. To do so, we considered whether there exist "judicially discoverable and manageable standards for resolving" the issue. Nelson I, 127 Hawai'i at 194, 277 P.3d at 288 (citing Trustees of Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 170, 737 P.2d 446, 455 (1987) (quoting Baker v. Carr, 369 U.S. at 217)).

We held there were such standards governing the legislature's constitutional duty to "make sufficient sums available for . . . the administration and operating budget of the department of Hawaiian home lands . . . by appropriating the same in the manner provided by law." Haw. Const. art. XII, § 1; Nelson I, 127 Hawai'i at 188, 277 P.3d at 282 (holding "that the 1978 Constitutional Convention history provides judicially discoverable and manageable standards, as well as initial policy determinations, as to what constitutes 'sufficient sums' for DHHL's administrative and operating expenses only; therefore, judicial determination of 'sufficient sums' as to that purpose under Article XII, Section 1 of the Hawai'i State Constitution is not barred as a nonjusticiable political question, and the ICA did not err in so holding."). We found that the constitutional convention history for the 1978 amendment contained "detailed

explanation[s] as to how administrative and operating costs" for DHHL were allocated. Id. at 200, 277 P.3d at 294.

Central to our opinion was our holding that, "At a minimum, funding at or above the \$1.3 to \$1.6 million envisioned in 1978 would be required." Id. at 203, 277 P.3d at 297

(emphasis added). In a footnote to that sentence, we added: "Presumably, this figure could be adjusted to reflect the impact of factors such as inflation or increased collective bargaining costs, both of which were acknowledged by Delegate De Soto as factors that could be taken into account in determining the required contribution." Id. at 203 n.8, 277 P.3d at 29 n.8. Given the judicially discoverable and manageable standards available to determine administrative and operating costs, we concluded, "the determination of what constitutes 'sufficient sums' for administrative and operating expenses is not barred by the political question doctrine." Id. at 203, 277 P.3d at 297.

II. The Circuit Court Correctly Fulfilled Its Duty to Determine Whether the Constitutional Mandate to Provide "Sufficient Sums" for Administrative and Operational Costs Was Followed.

The majority concludes that on remand in this case, "the circuit court exceeded our mandate in Nelson I when it determined the amount DHHL actually needed for its administrative and operating expenses." Majority, at 4.

According to the majority, the circuit court's role on remand

should have been restricted to "determin[ing] the current value of \$1.3 to 1.6 million (in 1978 dollars), adjusted for inflation." Majority, at 4. The majority bases this conclusion on its assertion that under our holding in Nelson I, "the only judicially discoverable and manageable standard for determining 'sufficient sums' for DHHL's administrative and operating budget was established by the delegates of the 1978 constitutional convention as \$1.3 to 1.6 million, adjusted for inflation." Majority, at 4. Respectfully, that assertion significantly misconstrues the scope of our prior holding.

A. Nelson I set a minimum floor for "sufficient sums," not a maximum ceiling.

As interpreted by the majority, our holding in Nelson I concluded that the delegates to the 1978 constitutional convention froze the maximum amount of "sufficient sums" DHHL would need for administrative and operating costs to a base amount of \$1.3 million to \$1.6 million. In so doing the majority incorrectly posits that our holding in Nelson I can be encapsulated in the statement that "[l]imited judicially discoverable and manageable standards existed to interpret the term 'sufficient sums,' based on the 1978 Constitutional Convention delegates' estimate that DHHL's administrative and operating costs were \$1.3 to 1.6 million dollars at that time, and, going forward, that figure could be adjusted for

inflation." Majority, at 2. This view conflicts with the actual language in our holding, which establishes \$1.3 to \$1.6 million as a minimum amount of "sufficient sums" for DHHL's administrative and operating costs in 1978. Our holding authorized the circuit court to set the sufficient sums requirement "at or above" that minimum amount, not merely "at" that amount. As noted, the actual words we used in our holding are "minimum" (as in, "at a minimum") and "above" (as in, "at or above"): "At a minimum, funding at or above the \$1.3 to \$1.6 million envisioned in [the] 1978 [constitutional convention] would be required." Nelson I, 127 Hawai'i at 203, 277 P.3d at 297.

The majority interprets the \$1.6 million figure as a fixed cap or ceiling on the meaning of "sufficient sums," subject to adjustment for inflation, not a minimum threshold "at or above" which the circuit court could set a baseline of "sufficient sums," subject to adjustment for inflation. The majority's interpretation, however, ignores the phrase introducing the \$1.6 million figure ("at a minimum"). In addition, interpreting the \$1.6 million as a cap or ceiling requires ignoring the phrase modifying the \$1.6 million figure ("at or above").

Once again, our actual holding -- as opposed to the majority's incorrect interpretation of it -- reads: "At a minimum, funding at or above the \$1.3 to \$1.6 million envisioned in [the] 1978 [constitutional convention] would be required." 127 Hawai'i at 203, 277 P.3d at 297. See Oxford English Dictionary (3rd ed. 2009), www.oed.com (defining "above" as meaning "surpassing something in quantity, amount, or number; more than a stated amount.").

1. **Nelson I's \$1.3 to \$1.6 million figure represented the specific, actual DHHL administrative and operating budget for the fiscal years 1976-77 and 1977-78.**

In Nelson I we stated that the required "minimum" figure should be "at or above" \$1.3 to \$1.6 million. The majority incorrectly assumes the two numbers represent set future expenses. See Majority, at 24 n.9 ("The delegates arrived at this numerical determination after extensive discussion of the 1976 DHHL General Plan, the increasing number of homestead applicants, the need for a bigger DHHL staff, and the need for automated record-keeping systems.").

That is incorrect. The figures (\$1.3 and \$1.6 million) are specific operating budgets for the two years prior to the constitutional convention. The \$1.3 million number is the specific, actual figure for DHHL's administrative and operating budget for fiscal year 1976-77. The \$1.6 million

number is the specific, actual figure for DHHL's administrative and operating budget for the fiscal year 1977-78. Nelson I, 127 Hawai'i at 202, 277 P.3d at 296 (quoting Delegate Sutton's statement, "The \$1.3 to \$1.6 million is for administrative costs at present." (emphasis added)); see also id. (quoting Delegate De Soto's statement that sufficient sums "is the administrative and [operating] costs of running the Hawaiian homes program, which would amount to operating and administrating approximately \$1.3 million to \$1.6 million").¹ The figures represent DHHL's administrative and operating costs "at present," not estimates of future needs within a margin of error. Id. at 202, 277 P.3d at 296. In response to a question about the estimated cost of the sufficient sums requirement specifically in relation to DHHL's administrative and operating budget, Delegate De Soto

¹ Delegate Sutton's assertion that the two figures represented "administrative costs at present" (127 Hawai'i at 202, 277 P.3d at 296) is borne out by the record. Those figures, \$1.3 million and \$1.6 million, are (with a qualification noted below) the actual figures for DHHL's administrative and operating costs for the two fiscal years immediately prior to the constitutional convention, that is, for the fiscal year 1976-77 and for the fiscal year 1977-78. Circuit court finding of fact 14 ("Prior to the 1978 Constitutional Convention, DHHL's administrative and operating budget consisted of more than \$1.4 million (from special funds)."). Circuit court finding of fact 15 ("For fiscal year 1977-78, DHHL's administrative and operating budget consisted of more than \$1.6 million (from special funds).") The variance between \$1.3 million (reported by Delegates Sutton and De Soto) and \$1.4 million (as found by the circuit court on remand) is explained by the fact that while DHHL's administrative and operating budget for 1976-77 was \$1,413,829 (in accord with the circuit court's finding of fact), \$216,750 of that was transferred to the Department of Education, leaving DHHL's actual administrative and operating budget for fiscal year 1976-77 at just under \$1.2 million.

gave the relevant statistics for the administrative and operating budget of DHHL for the two previous years, \$1.3 million and \$1.6 million respectively. Because those were the actual, specific figures from the DHHL administrative and operating budget for the two most recent fiscal years, the numbers reflect the delegates' expectation that sufficient sums would expand in future years in tandem with the department's actual budget and actual needs.

2. **Under Nelson I, the actual administrative and operating expenses for DHHL are to be calculated based on the purpose of Article XII, Section 1 to "relieve DHHL of the burden of general leasing its lands to generate administrative and operating funds."**²

In Nelson I, we stated that the intended purpose of the "sufficient funds" mandated by Article XII, Section 1 was "to relieve DHHL of the burden of general leasing its lands to generate administrative and operating funds[.]" 127 Hawai'i at 203, 277 P.3d at 297. Further, we stated that the delegates "identified the minimum funding necessary for such expenses" in light of "that end" (i.e., relieving DHHL of the burden of leasing in order to generate its administrative and operating funds). Id. (emphasis added). In other words, we explicitly noted that the "minimum" figure at or above which funding should

² Nelson I, 127 Hawai'i at 203, 277 P.3d at 297.

be pegged by the circuit court on remand would be "the minimum funding necessary," id., to relieve DHHL of its "burden of general leasing" in order to generate administrative and operating expenses.³ Our decision in Nelson I thus set a minimum figure, not a maximum figure, for the "required contribution" from the legislature to the DHHL for its administrative and operating expenses. We based the minimum figure, in part, on the remarks of Delegate De Soto and others regarding DHHL's actual administrative and operating expenses in 1976-78. See supra, at 12 n.1. But we also emphasized the rationale for the

³ In fiscal year 1976-77, DHHL's budget for administrative and operating expenses was \$1.3 million. Stand. Comm. Rep. No. 56, 1 Proceedings, at 631 ("The department's current budget is approximately \$1.3 million."); Nelson I, 127 Hawai'i at 200, 277 P.3d at 294 ("At present, the DHHL budget calls for an expenditure of \$1.3 million." (quoting Delegate Sutton)). Of that, approximately \$1.1 million came from general leases, licenses, and revenue permits. Stand. Comm. Rep. No. 56, 1 Proceedings, at 631-32; 127 Hawai'i at 200, 277 P.3d at 294 ("At present, the DHHL budget calls for the expenditure of \$1.3 million; \$1.1 million is through land revenues and Time Certificates of Deposits (TCDs)." (quoting Delegate Sutton)). Thus, by 1978 at least 85% of DHHL's administrative and operating budget was funded by land revenues -- 100% if the certificates of deposit themselves derived from past land revenues. In addition, 34% of the staff in 1978 were funded through other state and federal funds (Comprehensive Employment and Training Act (CETA) funds and State Comprehensive Employment and Training (SCET) program funds). Nelson I, 127 Hawai'i at 200, 277 P.3d at 294. In other words, over one third of DHHL's personnel costs fell outside the \$1.3 million administrative and operating budget for that fiscal year. See circuit court finding of fact 14 (stating that prior to the 1978 constitutional convention, DHHL's administrative and operating budget "consisted of more than \$1.4 million" drawn from special funds, and that more than one-third of DHHL's staff in 1977 were paid for by CETA and SCET funds.). "These additional funds were not part of DHHL's operating budget." Circuit court finding of fact 14 (emphasis added). As one of the delegates noted with regard to the CETA and SCET funds, "If these temporary dollars are cut, the staff would have to be cut accordingly." Nelson I, 127 Hawai'i at 201, 277 P.3d at 294.

minimum figure, namely, the delegates' clear intention "to require appropriation of 'sufficient sums' to relieve DHHL of the burden of general leasing its lands to generate administrative and operating funds[.]" 127 Hawai'i at 203, 277 P.3d at 297; id. ("to that end, they [the delegates] identified the minimum funding necessary for such expenses.").

3. The majority mistakenly requires the circuit court to set sufficient funds at \$1.6 million and then adjust for inflation, rather than remanding for the circuit court to set the "sufficient sums" figure "at or above" the minimum figure of \$1.6 million, as required by Nelson I.

The majority analysis contends the "minimum" figure we identified in our holding in Nelson I as the required legislative contribution is also the maximum figure, "adjusted for inflation."⁴ See Majority, at 3-4. Although the phrase, "adjusted for inflation," is used 26 times by the majority opinion to conclude that Nelson I required sufficient sums to be

⁴ Although in Nelson I we identified the \$1.3 million and \$1.6 million figure as a "minimum" figure "at or above" which the circuit court could peg the determination of "sufficient sums" for DHHL's administrative and operating budget (127 Hawai'i at 203, 277 P.3d at 297), the majority treats the figure as a maximum "baseline" figure, which is then adjusted for inflation. Majority, at 29 (referring to the "standard identified in Nelson I: the 1978 baseline of \$1.3 to 1.6 million, adjusted for inflation."). With respect, the baseline (which after it was set could then be adjusted for inflation) under Nelson I is whatever the circuit court on remand set it to be, so long as the baseline was "at or above" the \$1.3 to \$1.6 million "minimum." 127 Hawai'i at 203, 277 P.3d at 297 (noting that in floor debate, delegates' use of the \$1.3 to \$1.6 million figure "identified the minimum funding necessary" in order to achieve "that end," namely, "reliev[ing] DHHL of the burden of general leasing its lands to generate administrative and operating funds").

based on \$1.3 million to \$1.6 million adjusted for inflation, that phrase never actually appears in Nelson I. Nelson I noted "this figure could be adjusted to reflect the impact of factors such as inflation" 127 Hawai'i at 203 n.8, 277 P.3d at 297 n.8 (emphasis added). As the phrase "could be" indicates, adjustment for inflation is not required; it is allowed. In addition, any adjustment for inflation is to be performed after the circuit court sets the sufficient sums figure "at or above" \$1.3 to \$1.6 million, not before. That is because setting the figure "at or above" \$1.3 to \$1.6 million is mandatory under our holding, but the inflation-adjustment suggested in footnote eight is optional.

Adjustments to the "sufficient sums" figure are mentioned only in footnote eight of Nelson I, which we placed at the end of the sentence containing our central holding. Id. at 203, 277 P.3d at 297 ("At a minimum, funding at or above the \$1.3 to \$1.6 million envisioned in [the] 1978 [constitutional convention] would be required."). The footnote reads in its entirety as follows:

8. Presumably, this figure could be adjusted to reflect the impact of factors such as inflation or increased collective bargaining costs, both of which were acknowledged by Delegate De Soto as factors that could appropriately be taken into account in determining the required contribution. See Debates in the Committee of the Whole on Hawaiian Affairs Comm. Prop. No. 11, in 1 Proceedings, at 421.

Id. at 203 n.8, 277 P.3d at 297 n.8 (emphases added). The majority misconstrues footnote eight in three important ways.

First, the majority construes footnote eight to require an adjustment for inflation. The majority must do so, because without a mandatory adjustment for 40 years of intervening inflation, the majority's interpretation of \$1.6 million as a cap or ceiling rather than a minimum threshold for "sufficient sums" would be manifestly unreasonable. However, footnote eight begins with the decidedly non-mandatory word, "presumably." Since that word conditions the meaning of the rest of the footnote, footnote eight is decidedly not mandatory, but instead offers optional indications to the circuit court on remand concerning ways in which the figure in our holding "could be adjusted" in light of "such factors as inflation or increased collective bargaining costs" Id. The words "presumably," "could," and "such as" carry no mandatory connotations.

Second, footnote eight authorized the circuit court on remand to "adjust[]" the "required contribution," id., and those adjustments are not restricted to adjustments for inflation. By its terms, the footnote presumes room for more than "inflation and collective bargaining" as costs of administration and operation. As can be seen, footnote eight remarks that

additional factors could be considered by the circuit court beyond the 1978 operating budget, factors "such as" collective bargaining costs and inflation.⁵ Id. Nothing in footnote eight or in our holding limits the adjustments for "factors that could appropriately be taken into account in determining the required contribution" to those specific factors mentioned by Delegate De Soto. For example, an additional factor or funding variable mentioned in the history of the constitutional convention in the context of adequate funding -- though not mentioned by Delegate

⁵ In the one place where the majority does quote footnote eight, it uses an "i.e." to assert that the Nelson I holding limits the 'sufficient sums' constitutionally owed to DHHL for administrative and operating expenses to the predetermined amount of "\$1.3 to 1.6 million in 1978 dollars, adjusted for inflation." Majority, at 11. But footnote eight of Nelson I does not say that.

In her comment at the convention (to which footnote eight alludes), Delegate De Soto stated: "What we propose with respect to 'shall fund' is the administrative and [operating] costs of running the Hawaiian homes program, which would amount to operating and administrating approximately \$1.3 million to \$1.6 million, taking into consideration inflation, collective bargaining agreements that go into inflation with the pay." Debates in the Committee of the Whole on Hawaiian Affairs, Comm. Prop. No. 11, in 2 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 421 (September 2, 1978). Delegate De Soto's statement was in answer to Delegate Burgess' question, "what would be the estimated cost of these programs which are mandated?" Id. The \$1.3 and \$1.6 million figures given by Delegate De Soto were, as noted supra, the figures, respectively, for the DHHL administrative and operating budget for the two fiscal years immediately preceding the constitutional convention. In other words, she used those actual, specific budget figures to give an "estimated" cost of the program. Id. It is important to notice the time frame implicit in these remarks. Importantly, the figures represented the then-present administrative and operating costs, not future costs. Id. at 422 ("The \$1.3 to \$1.6 million is for administrative costs at present." (emphasis added) (quoting Delegate Sutton)). The delegates did not express an intent that this estimate be a figure frozen in time, fixed forevermore as both a baseline and a rigid maximum measure of what would be a "sufficient sum" for DHHL's operating expenses.

De Soto -- was "the increasing number of applicants coming into the program[.]" Debates in the Committee of the Whole on Hawaiian Affairs, Comm. Prop. No. 11, in 2 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 423 (September 2, 1978) (hereafter, "2 Proceedings") (Delegate Ontai stating that the "funding setup for the Hawaiian homes act in 1920 . . . was doomed to failure; it did not take into account the increasing numbers of applicants coming into the program . . .").

Moreover, in the body of Nelson I (though not in footnote eight) we quoted a portion of the debates at the constitutional convention, which we characterized as providing specific and detailed explanations on how DHHL's administrative and operating costs were allocated. 127 Hawai'i at 200, 277 P.3d at 294. The portion we quoted includes this statement: "As demands on the department and staff grow, a much⁶ bigger staff will be required. At present, the DHHL budget calls for the expenditure of \$1.3 million[.]" (emphasis added). See also 2

⁶ The majority leaves out the quantifier "much" in its suggestion that these factors were somehow already included in the \$1.3 and \$1.6 million figures. Majority, at 24 n.9 ("The delegates arrived at this numerical determination after extensive discussion of the 1976 DHHL General Plan, the increasing number of homestead applicants, the need for a bigger DHHL staff, and the need for automated record-keeping systems."). With respect, it is difficult to see how financial figures representing the actual administrative and operating expenses of DHHL in the two years prior to the convention could encompass the much larger expenditures involved in hiring "a much bigger staff," the considerable expenditures involved in supporting "a staff to adequately service the department's beneficiaries," the increased expenditures required to purchase computer equipment, etc.

Proceedings, at 414 ("Again, to the word 'sufficient' -- what does this really mean? . . . For the administration, there is need for support of a staff to adequately service the department's beneficiaries and to purchase equipment which will allow sufficient management of its resources and records."

(Delegate Sutton speaking) (emphasis added)). In other words, the delegates to the convention envisioned that "sufficient sums" for administrative and operating expenses would take into account the growth in DHHL's administrative and operating budget resulting from better implementing the mission of the department and better meeting the needs of increasing numbers of Hawaiians in the future.

That recognition by the delegates at the convention is consistent with the mandate of Article XII, Section 1 that "[t]he legislature shall make sufficient sums available[.]" Whatever the word "sufficient" may ultimately mean, it does not mean "insufficient," "inadequate," or "woefully lacking." See Black's Law Dictionary (10th ed. 2014), at 1661 (defining "sufficient" as meaning "Adequate; of such quality, number, force, or value as is necessary for a given purpose" (emphasis added)); see also Nelson I, 127 Hawai'i at 199, 277 P.3d at 293 (quoting a constitutional delegate's statement that the "Hawaiian homes department and the act were and are the most

neglected part of the State of Hawai'i, the most neglected department. It was woefully lacking in funds at its inception, and for the past 50 years and even today, it lacks funds to run the department properly[.]” (emphasis added).⁷

For that matter, nothing in the convention history indicates that the delegates intended to exclude subsequent administration and operating expenses not specifically anticipated by delegates at the convention as bases for any future estimate of “sufficient sums.” Such an argument would contravene the requirement of “sufficient sums.” To the contrary, we must attribute commonsense foresight to the delegates that administrative and operating costs would increase in time.⁸ The figures mentioned at the convention were

⁷ The majority interprets this passage as an argument “that the dictionary definition of ‘sufficient’ provides a judicially discoverable and manageable standard for determining ‘sufficient sums.’” Majority, at 27 n.11. With respect, the majority misapprehends the argument. The point is not that the dictionary can tell us what counts as “sufficient sums.” The point is that a standard of sufficient sums, such as the one proffered by the majority, which would yield a woeful lack of funds -- a woeful lack lamented by the delegates to the constitutional convention and recognized by Nelson I -- can hardly be a standard that was intended by either the delegates or Nelson I. A standard for “sufficient sums,” like the majority’s, which at best would deliver around 25% of DHHL’s present-day, actual administrative and operating costs, is insufficient on its face. See infra, at 59, n.21.

⁸ For example, administration now necessarily includes computers rather than typewriters. Computers cost more than typewriters. It is unreasonable to conclude that the constitutionally-required “sufficient sums” cannot take such subsequent and unpredictable changes in administrative and operating expenses into account merely because they were unknown at the time of the convention. And an inflation index designed to measure increases in prices for milk and eggs and gasoline will not capture the increased costs
(. . . continued)

"estimated" costs "at present." See supra, at 18 n.5. The delegates explicitly envisioned the increasing future demand for DHHL's services and asserted, quite logically, that "a much bigger staff will be required." Nelson I, 127 Hawai'i at 200, 277 P.3d at 294 (citation omitted). In short, the delegates' discussion of the administrative and operating expenses of DHHL was consistently in terms of its actual administrative and operating expenses, including its actual future costs.

4. **Nothing in Delegate De Soto's floor remarks suggests that the delegates intended DHHL's specific, actual administrative and operating expenses for 1976-78 to become the fixed paradigm for all future "sufficient sums"; rather, the delegates expected that sufficient sums would increase year to year.**

In her remark to the convention (mentioned in footnote eight of Nelson I), Delegate De Soto stated: "What we propose with respect to 'shall fund' is the administrative and [operating] costs of running the Hawaiian homes program, which would amount to operating and administrating approximately \$1.3 million to \$1.6 million, taking into consideration inflation, collective bargaining agreements that go into inflation with the pay." 2 Proceedings, at 421. The majority interprets Delegate

(continued. . .)
specifically incurred by administrative agencies transitioning into the information age. See, e.g., 2 Proceedings, at 414 (noting that in 1978 DHHL had "only electric typewriters." (Delegate Sutton speaking) (quoted in Nelson I, 127 Hawai'i at 200, 277 P.3d at 294)).

De Soto's phrase, "taking into consideration inflation, collective bargaining agreements that go into inflation with the pay," to mean the \$1.3 million to \$1.6 million figure is a set base figure to which inflation and collective bargaining costs would be added in the future. In light of that interpretation, the majority argues that if the delegates intended DHHL's actual administrative and operating expenses -- as opposed to the administrative and operating costs identified at the 1978 constitutional convention -- to be the standard for "sufficient sums," there would "have been no need for Delegate De Soto to state that the \$1.3 to 1.6 million figure could be adjusted for inflation, as any present calculation of 'actual sums' would not need to be adjusted for inflation." Majority, at 28.

With respect, that argument is incorrect. Delegate De Soto never said that the sufficient sums figure would be set at \$1.3 million to \$1.6 million, subject to adjustment for inflation. When asked how much sufficiently funding DHHL's operating budget would cost, she responded with the actual figures for the actual DHHL administrative and operating budget for the two most recent fiscal years. She did not pick those numbers at random, nor was she guessing about future inflation rates. Both the delegates and DHHL were well aware that DHHL needed many more personnel to service its beneficiaries

adequately. Both the delegates and DHHL were well aware that the amounts DHHL needed in order to cover its actual administrative and operating expenses were rising year by year. Indeed, that was the very problem necessitating the constitutional amendment. DHHL had a finite resource, 200,000 acres of Hawaiian home lands, that it was forced to continually deplete in order to meet its rising costs, since that resource was its exclusive source of revenues. As of 1978, nearly 113,000 of the 200,000 acres in DHHL's inventory were leased, licensed, or under permit to persons other than the beneficiaries those lands were intended for. "This represent[ed] 57 percent of the total land inventory released to the general public for purposes of generating revenues to administer DHHL programs." Stand. Comm. Rep. No. 56, in 1 Proceedings, at 631. If one included the Hawai'i home lands held by other state agencies, the percentage of already-encumbered Hawaiian home lands was closer to 85%. 2 Proceedings, at 415 ("The DHHL has 200,000 acres of land, of which 170,000 are already encumbered through homestead leasing, general leasing and state agencies.").

Any cumulatively increasing administrative costs for DHHL translated directly into cumulative depletion of the very resource -- lands for homesteading -- intended for the

beneficiaries. That is why the delegates were concerned to compel the legislature to appropriate sufficient sums to meet not only DHHL's actual administrative costs in a given year (such as 1978) but also the increased future actual costs resulting from inflation and other factors. See Nelson I, 127 Hawai'i at 200, 277 P.3d at 294 (quoting Stand. Comm. Rep. No. 56, which states that DHHL "presently general leases its lands to obtain moneys for administrative expenses and salaries. In order to keep up with a built-in inflation rate . . . DHHL continues to general lease more of its lands"); id. at 200, 277 P.3d at 294 (quoting Delegate Sutton's statement, "Even this figure [relating to staff salaries] will rise as this portion of the staff is civil service and subject to an 8-percent annual inflation rate."). Indeed, anticipated adjustments for inflation and collective bargaining costs for the succeeding fiscal year appear to have been part of DHHL's budgeting process. In the section of its annual report for fiscal year 1976-77 devoted to its administrative and operating expenses, DHHL states: "Projected collective bargaining increase for 1978 -- is \$55,000." In short, both the delegates and DHHL were well aware that the actual amounts needed for sufficient funding of

DHHL's annual administrative and operating costs were ceilings subject to change.⁹

⁹ The majority contends that our holding in Nelson I could not have intended to authorize the circuit court on remand to consider DHHL's actual current expenditures for administrative and operating expenses in determining the meaning of "sufficient sums." The majority argues that, were that the case, Nelson I would have some language indicating "that what constitutes 'sufficient sums' would be recalculated periodically by the circuit court as 'actual sums,'" and no such language is found in Nelson I. Majority, at 24. With respect, as explained in this dissent, Nelson I authorized the circuit court on remand to consider DHHL's current expenditures for administrative and operating expenses because it was the delegates' clear intent to relieve DHHL of its burden of paying any of its administrative and operating expenses out of its land revenues. Nelson I, 127 Hawai'i at 203, 277 P.3d at 297. To the extent that DHHL continues to be compelled to pay significant portions of its administrative and operating expenses out of those revenues, it continues to violate the clear intent of the delegates and of Nelson I. As for 'periodic recalculations,' footnote eight expressly authorizes "adjust[ments]" for factors such as inflation, and nothing limits those adjustments to a single instance.

The majority also argues that such adjustments "would involve the judiciary in 'initial policy determinations of a kind clearly for nonjudicial discretion.'" Majority, at 24. With respect, the argument fails in three ways. First, Baker v. Carr and Nelson I suggest that a case may be nonjusticiable under the political question doctrine if accepting the case would require the judiciary to become involved in "initial policy determinations of a kind clearly for nonjudicial discretion." Nelson I, 127 Hawai'i at 193, 277 P.3d at 287 (emphasis added). But the initial policy determinations in this case were made by the delegates to the constitutional convention when they decided to make it mandatory, rather than permissive, for the legislature to adequately fund DHHL's administrative and operating expenses. Second, the majority suggests that its "mathematically determined, not judicially determined" standard avoids making policy determinations. Majority, at 24. That may be true, but determining whether DHHL is required to draw on its land revenues to pay its administrative and operating costs is also mathematically determinable. See id. at 203, 277 P.3d at 297 (holding that the clear intent of the constitutional delegates was "to require appropriation of 'sufficient sums' to relieve DHHL of the burden of general leasing its lands to generate administrative and operating funds, and to that end, they identified the minimum funding necessary for such expenses"). In addition, determining the amount DHHL actually expended on administrative and operating expenses in any given year is also mathematically determinable, so long as the record contains the relevant documents, which it does in this case. Third, in any event, one can assume for the sake of argument that the majority's "mathematically determined" standard is both certain and convenient. It does not follow that its standard is either necessary, accurate, or in accord with the delegates' clear intent.

The majority's argument, quoted above, also relies on a mistaken assumption concerning the \$1.3 million to \$1.6 million figure given by Delegate De Soto and Delegate Sutton. The majority assumes the \$300,000 difference between the figures to be an expression by the delegates of the possible increase in collective bargaining costs and inflation between 1976 and 1978. To the contrary, the \$1.3 million and \$1.6 million figures cited in our central holding in Nelson I were not meant as an approximation of a \$300,000 possible increase in the collective bargaining costs and inflation that might arise between 1976 and 1978. Rather, the two figures were, respectively, the actual sums expended by DHHL on administrative and operating costs for the fiscal years immediately prior to the constitutional convention, that is, for fiscal year 1976-77 and for fiscal year 1977-78. 2 Proceedings, at 422 ("The \$1.3 to \$1.6 million is for administrative costs at present." (emphasis added) (Delegate Sutton speaking)); Nelson I, 127 Hawai'i at 203, 277 P.3d at 297 (quoting Delegate Sutton's remark); 127 Hawai'i at 200, 277 P.3d at 295 ("At present, the DHHL budget calls for expenditure of \$1.3 million" (quoting a different remark by Delegate Sutton)); see also circuit court finding of fact 15 ("For fiscal year 1977-78, DHHL's administrative and operating budget consisted of more than \$1.6 million (from special funds)"). In other words,

the delegates considered "sufficient sums" to mean DHHL's actual administrative and operating budget as illustrated by the most recent data on that budget. Nothing in the delegates' remarks, and nothing in Nelson I, suggests that the meaning of "sufficient sums" is confined to the actual administrative and operating figures for 1976-78, multiplied by the Consumer Price Index (which is never mentioned either in the convention debates or in Nelson I).

Rather, the clear import of Delegate De Soto's remark concerning inflation is that the "sufficient sums" mandated by the constitutional amendment are the same as "the minimum funding necessary" to accomplish the purpose of "reliev[ing] DHHL of the burden of general leasing its lands to generate administrative and operating funds[.]" Nelson I, 127 Hawai'i at 203, 277 P.3d at 297. As we stated in Nelson I, quoting the Standing Committee Report:

It is clear to your Committee that the intent and spirit of the Act would be better . . . served by releasing the department of its present burden to generate revenues through the general leasing of its lands. Your Committee decided that through legislative funding this dilemma would be resolved. In that manner more lands could be made available to the intended beneficiaries.

Id. at 199, 277 P.3d at 293. Given that the Hawaiian home lands were (aside from temporary infusions from state and federal grants) the exclusive revenue source for DHHL's administrative and operating budget, the minimum funding necessary to

accomplish that purpose equates to the actual expenditures of DHHL for administrative and operating expenses in any given year.

The inflation mentioned on the convention floor by Delegate De Soto reflected her commonsense anticipation that DHHL's actual administrative and operating expenses would continue to increase based on various factors, including wage pressures built into collective bargaining. Nothing suggests the delegates intended that the particular administrative budget figures for 1976-1978 would become the fixed paradigm for all future "sufficient sums." Nor does it make sense to imagine the delegates thought that DHHL's administrative costs would rise in strict tandem with increasing consumer costs as measured by the Consumer Price Index. The very figures at issue here show the contrary. The increase in DHHL's administrative and operating budget from fiscal year 1976-77 (\$1.3 million) to fiscal year 1977-78 (\$1.6 million) represents an increase of 23 percent. The Consumer Price Index increased for those two years only a total of 14 percent.¹⁰

¹⁰ According to the CPI, the annual rate of inflation for 1976 was 5.6 percent; the annual rate of inflation for 1977 was 6.5 percent. Consumer Price Index, 1913-, <https://www.minneapolisfed.org/community/financial-and-economic-education/cpi-calculator-information/consumer-price-index-and-inflation-rates-1913>.

5. Nelson I held the constitutional delegates clearly intended "sufficient sums" to mean those sums necessary to relieve DHHL of drawing on land revenues to meet its administrative and operating expenses; Nelson I applied this definition of "sufficient sums" as a judicially discoverable and manageable standard rendering the administrative expenses purpose justiciable, in contrast to the other three purposes within Article XII, Section 1.

As previously noted, the majority opinion contains a mistaken and narrow interpretation of our holding in Nelson I. "At a minimum" does not mean "at a maximum." "At or above" a specified figure does not mean "strictly confined to only that figure." The illustrative phrase, "such factors as" inflation and collective bargaining costs, neither mandates an adjustment for inflation nor excludes adjustments for other such factors. 127 Hawai'i at 203 n.8, 277 P.3d at 297 n.8. In addition to these departures from the controlling language of our holding, the majority neglects Nelson I's emphasis that the \$1.3 million and \$1.6 million figures (representing the actual DHHL administrative and operating expenses for fiscal years 1976-77 and 1977-78) would be "a minimum" for the required contribution.

In the paragraph immediately following our holding,¹¹ we added clarity to the meaning of the required minimum

¹¹ That holding was, again, "At a minimum, funding at or above the \$1.3 to \$1.6 million envisioned in [the] 1978 [constitutional convention] would be required." 127 Hawai'i at 203, 277 P.3d at 297.

contribution. In the third sentence of that paragraph, "we reject[ed] the State's suggestion that challenges associated with determining the upper limit of the required administrative funding render the calculation of the minimum required contribution nonjusticiable." In the fourth sentence of that paragraph, we clarified the substantive meaning of the justiciable "minimum required contribution": "It is clear that the constitutional delegates intended to require appropriation of 'sufficient sums' to relieve DHHL of the burden of general leasing its lands to generate administrative and operating funds, and to that end, they identified the minimum funding necessary for such expenses." Id. at 203, 277 P.3d at 297 (emphasis added).

We contrasted the delegates' clarity of intent and rationale regarding "sufficient sums" for administrative and operating expenses with the vague and unfocused discussions at the convention concerning the other three purposes enumerated in Article XII, Section 1. Thus, as to purpose 1, "the development of home, agriculture, farm, and ranch lots," we noted that "the delegates made only passing references to the 'sufficient sums' needed[.]" Id. As to purpose 2, we remarked that "[t]he delegates also did not discuss what 'sufficient sums' would be as to the second purpose: 'home, agriculture, aquaculture, farm

and ranch loans.'" Id. at 204, 277 P.3d at 298. As to purpose 3, "rehabilitation projects to include, but not limited to, educational, economic, political, social and cultural processes by which the general welfare and conditions of native Hawaiians are thereby improved," we noted that "the delegates proposed that funding for this purpose come from the 'Native Hawaiian Rehabilitation Fund,' and amended Section 213 of the Hawaiian Homes Commission Act to establish this fund," and we observed that this new provision was not extensively discussed. Id. In the end, we concluded that "the constitutional convention delegates made only passing references to the three remaining purposes under Article XII, Section 1." Id. at 205, 277 P.3d at 299.

The majority argues that if our intent in Nelson I was to allow the circuit court to use "actual sums" as the standard to determine "sufficient sums" -- rather than the 1978 baseline standard of \$1.3 million to \$1.6 million -- we would have remanded for such a determination on the other three constitutional purposes as well. Majority, at 27-28. But that argument overlooks the unique nature of the category of "administrative and operating expenses." As noted, Nelson I contrasted the justiciability of DHHL's administrative and operating expenses with the non-justiciability of the other

three purposes by explaining that "Article XII, Section 1 and its constitutional history . . . do not shed light on what would constitute 'sufficient sums' for the other three enumerated purposes" 127 Hawai'i at 206, 277 P.3d at 300.

We used this metaphor of the constitutional convention's history "shedding light" on what would constitute 'sufficient sums' three times to emphasize that purpose four is justiciable. Id.; id. at 188, 277 P.3d at 282 (holding "that the 1978 Constitutional Convention history provides judicially discoverable and manageable standards . . . as to what constitutes 'sufficient sums' for DHHL's administrative and operating expenses" but noting that "Article XII, Section 1 and the 1978 Constitutional Convention do not shed light on what would constitute 'sufficient sums'" for the other three purposes); id. at 205, 277 P.3d at 299 (noting that with respect to the other three enumerated purposes, "Article XII, Section 1 and its constitutional convention history shed no light on what those 'sufficient sums' might be."); id. at 206, 277 P.3d at 300.

Thus, our analysis of what constituted "judicially discoverable and manageable standards," 127 Hawai'i at 188, 277 P.3d at 282, led us to distinguish sharply between the DHHL administrative and operating expenses purpose and the other

three purposes. We distinguished between them on the basis of whether the constitutional history shed adequate light on the meaning of the "sufficient sums" requirement, and we found that the constitutional history shed sufficient light "as to what constitutes 'sufficient sums' for DHHL's administrative and operating expenses[.]" Id. In contrast, the constitutional history did "not shed light on what would constitute 'sufficient sums' for" the other three. Id.; 127 Hawai'i at 201, 277 P.3d at 295 ("The constitutional convention delegates focused on providing sufficient sums to DHHL for its administrative and operating expenses in particular, to free up homestead lands for DHHL beneficiaries. Once homestead lands ceased serving as the source of administrative and operating expenses, however, the constitutional convention delegates could not agree as to what would constitute 'sufficient sums' for the other three purposes[.]" (emphases added)). In this "light," administrative and operating expenses are amenable to calculation as actual "sufficient sums" -- namely, the actual amount necessary to relieve DHHL of the burden of using revenues from Hawaiian home lands as a source for paying administrative and operating costs -- whereas the other three purposes are not amendable to calculation.

In short, we left the maximum figure for sufficient sums for DHHL administrative and operating expenses open-ended. The various additional remarks from delegates to the convention, together with their explicit rationale of eliminating the use of leasing of DHHL lands to cover administrative and operating expenses, cumulatively allowed us to conclude that we were not running afoul of the political question doctrine, that we had discovered manageable standards by which to resolve the issue of the meaning of the constitutional demand for "sufficient" funds for DHHL's administrative and operating expenses. Stated another way, the delegates' various remarks at the convention allowed us to conclude that, in the words of Baker v. Carr, "protection for the right asserted" by the plaintiffs with regard to DHHL's administrative and operating budget "can be judicially molded." Baker v. Carr, 369 U.S. at 198.

In sum, the majority's holding in Nelson II (a) ignores our conspicuous and deliberate use of the terms "at a minimum" and "at or above" at the core of our holding in Nelson I; (b) ignores the language of footnote eight and actually contravenes that language; (c) ignores our explanation for the use of "at a minimum" and "at or above" in our holding by reference to the "clear" intent of the delegates in regard to the criterion for sufficient sums for administrative and

operating expenses, that is, to remove Hawaiian home lands as a source of revenue with which to pay DHHL's actual administrative and operating expenses; and (d) ignores our contrast of that clear intent as to purpose four with the lack of clarity for the other three purposes specified in Article XII, Section 1.

B. Nelson I explicitly linked the meaning of "sufficient sums" to minimizing or eliminating the use of Hawaiian home lands to generate income for DHHL's administrative and operating expenses.

As noted above, in Nelson I we concluded that "the determination of what constitutes 'sufficient sums' for administrative and operating expenses under the Hawai'i Constitution's Article XII, Section 1 is justiciable and not barred as a political question." 127 Hawai'i at 206, 277 P.3d at 300. We considered in more detail those aspects of the constitutional history that shed light on the meaning of the constitutional command to the legislature to make sufficient sums available to DHHL for its administration and operating budget. We discussed the delegates' repeated and pointed concern with the trade-off that historically occurred when DHHL was forced to lease Hawaiian home lands just in order to fund its own operating and administrative budget. Id. at 199, 277 P.3d at 293 ("The Committee [of the Whole on Hawaiian Affairs] noted that overreliance on leasing occurred at the expense of the department's mission to rehabilitate native Hawaiians.").

We noted that the committee had held statewide public hearings, through which "it became apparent that the identifiable problem areas were -- first, that the DHHL . . . has a *monumental and eternal dilemma in funding*[" 127 Hawai'i at 198-99, 277 P.3d at 292-93 (quoting Delegate De Soto) (internal quotation marks omitted, underscored emphasis added, italicized emphasis added by Nelson I).

Drawing on additional statements from the constitutional history, we characterized that "monumental dilemma" this way: "In short, in 1978, it was apparent that DHHL was swept up in a vicious cycle: in order to fulfill its mission of providing homestead lots to beneficiaries, the department had to raise revenue to sustain its programmatic and human infrastructure costs (administrative and operating expenses), and in order to raise money for administrative and operating expenses, the department had to lease the vast majority of its lands that otherwise would have been used for homestead lots." Id. at 200, 277 P.3d at 294. We also drew attention to Delegate Sutton's statement referring to the 1976 DHHL General Plan "as setting standards for determining DHHL funding." 127 Hawai'i at 201, 277 P.3d at 295; id. ("The standards which define 'sufficient' are contained in the department's [1976] general plan . . .") (quoting Delegate Sutton)). Moreover, we quoted the

objective of goal three of the 1976 plan: "Reduce by at least 20,000 acres the lands presently under general lease and temporary use permit and make these lands available for direct use by native Hawaiians." Id. (quoting Hawaiian Home Lands General Plan ii (1976)). Finally, we quoted the objective of goal four of the 1976 plan: "Use only a small fraction of Hawaiian Home Lands to generate income for operating and administrative expenses." Id.

The relevant constitutional history shed sufficient light on the purpose of the constitutionally required "sufficient sums" for DHHL's administrative and operating budget to render it justiciable under the political question doctrine. Drawing on these items from the convention history, we stated unequivocally: "It is clear that the constitutional delegates intended to require appropriation of 'sufficient sums' to relieve DHHL of the burden of general leasing its lands to generate administrative and operating funds, and to that end, they identified the minimum funding necessary for such expenses." Nelson I, 127 Hawai'i at 203, 277 P.3d at 297.

In other words, according to our opinion in Nelson I, the clear intent of the delegates was to require the legislature to appropriate funds sufficient to allow DHHL to avoid, so to speak, mortgaging Hawaiian home lands in order to fund its

administrative and operating budget and to pay its administrative and operating expenses. That "burden" could only be lifted, that "vicious cycle" could only be broken, when DHHL no longer was required to use Hawaiian home lands as a source of revenue for operating expenses -- or, at a minimum, when DHHL "use[s] only a small fraction of Hawaiian Home Lands to generate income for operating and administrative expenses." Id. at 201, 277 P.3d at 295 (quoting Hawaiian Home Lands General Plan ii (1976)).

That clear intent and lucid objective shed an abundance of light on the meaning of "sufficient sums" in this context and provided, as well, judicially discoverable and manageable standards.¹² "Sufficient sums" under Article XII,

¹² Nelson I did not define what we meant by the phrase, "judicially discoverable and manageable standards." But we treated the delegates' repeated emphasis on the identifiable purpose and rationale for the "sufficient sums" constitutional requirement as clear enough to allow the dispute about the meaning of "sufficient sums" in the context of DHHL's administrative and operating budget to be justiciable. We spoke of "the 1978 baseline identified by the delegates" as the minimum, in 1978 terms, to accomplish the delegates' clear intention "to require appropriation of 'sufficient sums' to relieve DHHL of the burden of general leasing its lands to generate administrative and operating funds[.]" 127 Hawai'i at 203, 277 P.3d at 297. A court is capable of discovering in the budgetary record (and through a non-jury trial) whether DHHL is still being required to draw on its trust and special funds (that is, funds whose proceeds are ultimately traceable to leasing of Hawaiian homelands), in violation of the clear intent of the constitutional requirement of sufficient sums. That provides an intelligible principle or criterion that can be judicially discovered and practically applied, and that is all that is meant by the phrase "judicially discoverable and manageable standards." Richard H. Fallon, Jr., Judicially Manageable Standards and Constitutional Meaning, 119 Harv. L. Rev. 1274, 1285-87 (2006) (surveying U.S. Supreme Court cases on the political question (. . . continued)

Section 1 will be the actual sums that accomplish the objective of bringing DHHL to the point where it "use[s] only a small fraction of Hawaiian Home Lands to generate income for operating and administrative expenses." 127 Hawai'i at 201, 277 P.3d at 295 (quoting Hawaiian Home Lands General Plan ii (1976)). Thus, "sufficient sums" under Nelson I "at a minimum" would be "at or above" the figures estimated by the delegates in 1978 to accomplish the purpose of removing revenues from Hawaiian home lands as a source for paying DHHL's administrative and operating expenses. We said "at or above" those figures, because the meaning of "sufficient sums" in this context under Nelson I is whatever determinate amount is needed to eliminate Hawaiian home lands as a source of revenue for paying administrative and operating expenses. The figure we identified (\$1.3 to \$1.6 million) was the amount the delegates estimated in 1978 would be necessary to accomplish that goal. The delegates' figure of \$1.3 million was the actual DHHL administrative and operating budget for fiscal year 1976-77, and the delegates' figure of

(continued. . .)

doctrine, and concluding, "For a standard to count as judicially manageable, the most basic requirement is intelligibility, or 'capability of being understood.' . . . Beyond the threshold requirement of intelligibility, it is possible to tease from the opinions of the Supreme Court a number of practical desiderata that guide assessments of judicial manageability. Importantly, each of these practical desiderata is capable of being realized to a greater or lesser degree." (footnote omitted).

\$1.6 million was the actual DHHL administrative and operating budget for fiscal year 1977-78. Since DHHL's administrative and operating budget was derived entirely from its land revenues, the delegates' intention of relieving DHHL of the burden of leasing its lands to generate funds would "require appropriation of 'sufficient sums'" equal to DHHL's actual administrative and operating budgets. 127 Hawai'i at 203, 277 P.3d at 297. The figure was not a cap on the amounts it would take to accomplish that same goal forty years later.

- C. The circuit court on remand properly followed Nelson I by interpreting the "sufficient sums" mandated by Article XII, Section 1 to mean, at a minimum, the amounts necessary to relieve DHHL of the burden of relying on revenue from Hawaiian home lands to fund its administrative and operating budget.**

The majority concludes that the circuit court "exceeded our mandate in Nelson I when it determined the amount DHHL actually needed for its administrative and operating expenses" and, as a result, the majority vacates the circuit court's judgment and remands to the circuit court "to determine the current value of \$1.3 to 1.6 million (in 1978 dollars), adjusted for inflation." Majority, at 4.

The majority is mistaken regarding "our mandate" to the circuit court. We did not provide any specific remand instructions to the circuit court in Nelson I. We did, however, signal the circuit court that a "judicial determination of what

affirmatively constitutes 'sufficient funds'" for the constitutional purpose of funding "administrative and operating expenses" for DHHL was "justiciable and not barred as a political question." Id. at 206, 277 P.3d at 300 (emphasis added) (quoting from the last sentence of the penultimate paragraph and the first sentence of the concluding paragraph of our opinion).

In addition, we stressed the clear intent of the constitutional delegates "to require appropriation of 'sufficient sums' to relieve DHHL of the burden of general leasing of its lands to generate administrative and operating funds," and we expressly recognized that "to that end, they identified the minimum funding necessary [in 1978] for such expenses." Id. at 203, 277 P.3d at 297 (emphasis added). Thus, the figure of \$1.3 million to \$1.6 million was the delegates' estimate, in 1978, of the minimum funding necessary "to relieve DHHL of the burden of general leasing of its lands to generate administrative and operating funds[.]" Id. As noted above, that "minimum funding necessary" matched the actual, specific DHHL administrative and operating budgets for 1976-78. When we stated in our holding that, "At a minimum, funding at or above the \$1.3 to \$1.6 million envisioned in 1978 would be required," the "minimum" we referred to was "the minimum necessary" in

order "to relieve DHHL of the burden of general leasing its lands to generate administrative and operating funds[.]" Id. Because DHHL was entirely dependent on its land revenues for its administrative and operating funds, "the minimum funding necessary," id., coincided with the actual, specific DHHL administrative and operating budgets for the two years preceding the convention. Never did we conclude that the minimum required for that purpose in 1978 would be the maximum required for that purpose now.

The circuit court on remand complied with the requirement of Nelson I to identify "the sufficient sums" necessary to relieve DHHL of the burden of relying on revenue from Hawaiian home lands to fund its administrative and operating budget.

Article XII, section 1 mandates that the legislature appropriate to the Department of Hawaiian Home Lands sufficient funding to meet the department's administrative and operating budget. When the department needs to use money from the use of Hawaiian home lands to pay its operating costs because of insufficient funding from the legislature, article XII, section 1 has been violated.

Conclusion of law 10 (citing, in part, Nelson I, 127 Hawai'i at 201 and 203, 277 P.3d at 295 and 297). Our separate decision governing attorney fees in Nelson I underscores that point. In that decision, we provided additional clarity and direction to the circuit court on remand when we stated, without qualification, that under Nelson I the State must fund

administrative costs sufficient to permit DHHL "to shift the funds it was spending on administrative and operating expenses towards fulfilling its trust duties to its beneficiaries."

Nelson v. Hawaiian Homes Comm'n, 130 Hawai'i 162, 167, 307 P.3d 142, 147 (2013); see also Nelson I, 127 Hawai'i at 203, 277 P.3d at 297 (recognizing the clear intent of the delegates "to require appropriation of 'sufficient sums' to relieve DHHL of the burden of general leasing its lands to generate administrative and operating funds, and to that end, they identified the minimum funding necessary for such expenses" (emphasis added)). In discussing the prongs of the private attorney general doctrine, we wrote:

In the instant case, Plaintiffs arguably met all three prongs, entitling them to attorneys' fees under the private attorney general doctrine. First, the "strength or societal importance of the public policy" they vindicated by their litigation was that the State now must fund DHHL's administrative and operating expenses. As a result, DHHL will be able to shift the funds it was spending on administrative and operating expenses towards fulfilling its trust duties to its beneficiaries.

Nelson, 130 Hawai'i at 167, 307 P.3d at 147 (all emphases added); id. at 168, 307 P.3d at 148 ("At the very least, a shift in funding for administrative and operating expenses provides a benefit to the Hawaiian Home Lands trust, impacting at least the tens of thousands of known beneficiaries on the waiting list, and ultimately benefitting the State as a whole . . .").

On remand, the circuit court met its mandate to render a "judicial determination of what affirmatively constitutes 'sufficient sums'" under the fourth constitutional purpose for administrative and operating expenses of DHHL. Nelson I, 127 Hawai'i at 206, 277 P.3d at 300 (emphasis added); see also Haw. Const. art. XII, § 1 ("The legislature shall make sufficient sums available for the following purposes . . . (4) the administration and operating budget of the department of Hawaiian home lands"). To do so, the circuit court held an eight-day, non-jury trial. The court heard extensive testimony from nine witnesses with the intent of obtaining "a more fully developed factual record" in light of which to apply our holding in Nelson I. The record includes 239 exhibits. Drawing on the extensive record developed on remand, including testimony, exhibits, and the parties' briefing and argument, the circuit court made 113 findings of fact and entered 26 conclusions of law.

Consistent with our holding in Nelson I, then, the circuit court developed an extensive record on remand to determine "what affirmatively constitutes 'sufficient sums'" required for DHHL's administrative and operating budget, in compliance with Article XII, Section 1. Nelson I, 127 Hawai'i at 206, 277 P.3d at 300; Haw. Const. art. XII, § 1 (requiring the

"legislature to make sufficient sums available for . . . the administration and operating budget of the department of Hawaiian home lands . . .").¹³ As the circuit court found on remand, "The primary source of revenue for the Hawaiian Home administration account is revenue generated from Hawaiian home lands (i.e., general leases, licenses, revocable permits of the 'available lands')." Circuit court finding of fact 54; see also circuit court finding of fact 72. Thus, "years of underfunding by the State continued to place DHHL in the intolerable position

¹³ The phrase, "what affirmatively constitutes 'sufficient sums,'" comes from the last sentence in our opinion prior to the conclusion section. That sentence explains why declaratory relief as to the other three constitutional purposes is unavailable, since (a) such a declaration would not "terminate the uncertainty or controversy giving rise to the proceeding" under HRS § 621-1(1993), because (b) a "judicial determination of what affirmatively constitutes 'sufficient sums' for the other three constitutional purposes is nonjusticiable, based on the political question doctrine." 127 Hawai'i at 206, 277 P.3d at 300. The sentence is followed immediately by this sentence: "We affirm the ICA's judgment . . . on the narrower ground that the determination of what constitutes 'sufficient sums' for administrative and operating expenses under the Hawai'i Constitution's Article XII, Section 1 is justiciable and not barred as a political question." Id.

If a judicial determination of "what affirmatively constitutes sufficient sums'" for the other three purposes is unavailable because those purposes are nonjusticiable under the political question doctrine, that implies that declaratory relief as to what affirmatively constitutes sufficient sums for the fourth purpose (DHHL's administrative and operating expenses) is available, because we explicitly held that purpose was justiciable. Construing the sentence in question, the circuit court arrived at the same conclusion. "Based on the Supreme Court's determination that affirmative injunctive relief was not available to plaintiffs on the three enumerated purposes set forth in Article XII, Section 1 because what constitutes sufficient sums as to those purposes were non-justiciable political questions, then the opposite must also be true, that affirmative injunctive relief is available to plaintiffs on the enumerated purpose that the Hawai'i Supreme Court did determine what was justiciable[,] the determination of what constitutes sufficient sums for DHHL's administrative and operating budget."

of having to use the Department's own funds (including revenue from general leasing of Hawaiian home lands to non-beneficiaries) to pay for its administrative and operating expenses[.]” Circuit court conclusion of law 23.

The circuit court concluded that what affirmatively constitutes the constitutionally required “sufficient sums” is (a) the amount DHHL actually requires for its administration and operating budget, (b) funded from the general fund rather than from special and trust funds which themselves ultimately derive from the use of Hawaiian home lands, since (c) if DHHL received sufficient general funds for its administrative and operating expenses from the State, DHHL would then be able to use its special funds and trust funds to assist beneficiaries, as the delegates intended. See, e.g., circuit court findings of fact 35, 69, 70, 71, 73, 75, 76; see also Order ¶¶ 1-3.

D. The circuit court applied judicially discoverable and manageable standards to affirmatively identify administrative and operating expenses in an amount “at or above” the minimum necessary to meet DHHL’s administrative and operating needs.

As we stated in Nelson I, “It is clear that the constitutional delegates intended to require appropriation of ‘sufficient sums’ to relieve DHHL of the burden of general leasing its lands to generate administrative and operating funds, and to that end they identified the minimum funding

necessary for such expenses." 127 Hawai'i at 203, 277 P.3d at 297. That clear intent cannot be fulfilled unless DHHL's actual administrative and operating expenses are paid for by appropriations from the State's general fund rather than Hawaiian home lands. The reason is straightforward: unless the actual administrative and operating expenses are paid for out of the general fund, DHHL will be constantly forced back into the "monumental and eternal dilemma in funding" and the "vicious cycle" which were the impetus for the constitutional amendment to begin with. Id. at 198-99, 277 P.3d at 292-93 ("Delegate De Soto explained that the committee had held public hearings statewide, where it became apparent that the identifiable problem areas were -- first, that the DHHL . . . *has a monumental and eternal dilemma in funding[.]*" (emphasis in Nelson I)); id. at 200, 277 P.3d at 294 ("In short, in 1978, it was apparent that DHHL was swept up in a vicious cycle: in order to fulfill its mission of providing homestead lots to beneficiaries, the department had to raise revenue to sustain its programmatic and human infrastructure costs (administrative and operating expenses), and in order to raise money for administrative and operating expenses, the department had to lease the vast majority of its lands that otherwise would have been used for homestead lots.").

In Nelson I, we made clear that the intent of the constitutional convention was to break this vicious cycle by requiring the legislature to appropriate sufficient sums for DHHL's administrative and operating expenses.

The 1978 Constitutional Convention history of Article XII, Section 1 can be broadly understood as committing the legislature to funding DHHL's administrative and operating expenses, because DHHL was the only executive agency within the State forced into leasing its own lands to administer its own programs. Further, placing DHHL on the horns of the funding dilemma occurred at the expense of its own beneficiaries, as the leased lands became unavailable for homesteads. Alleviating the DHHL of the burden of general leasing its own lands was an important first step towards assisting the department in fulfilling its mission.

Id. at 203, 277 P.3d at 297.¹⁴ When the legislature appropriates insufficient administrative and operating sums from the general fund, it forces DHHL back onto the horns of the same funding dilemma: choosing between funding its administrative and operating expenses out of its own trust funds, special funds, or leasing revenues -- or fulfilling its mission to its beneficiaries. Unfortunately, as detailed below, the legislature has been failing to appropriate sufficient sums to

¹⁴ In the passage just quoted from Nelson I, we referred to "the funding dilemma" as the unavailability of "the leased lands" for homesteads caused by the need of DHHL to lease its lands in order to finance its administrative and operating budget. Id. The relevant point is not that the lands are "leased" but that they are unavailable for homesteads because they are being used as revenue sources for DHHL. Thus, the circuit court on remand properly concluded that "there is no legally significant distinction between money raised through a general lease and money raised through a license, revocable permit, or any other use of Hawaiian home lands for non-homesteading purposes." Circuit court conclusion of law 9.

DHHL's administrative and operating expenses in every year since the amendment to Article XII, Section 1 was passed.

The circuit court's application of judicially discoverable and manageable standards on remand provides compelling support for its finding that DHHL has received insufficient sums for administrative costs and expenses since 1978. Circuit court findings of fact 47, 71. As found by the circuit court, "DHHL has had to rely on special funds and trust funds every year to cover a substantial portion of DHHL's operating costs." Circuit court finding of fact 68. In other words, DHHL has been consistently compelled to resort to revenue drawn from special funds and trust funds (themselves derived in one way or another from leases or other uses of Hawaiian home lands) in order to meet its administrative and operating expenses. See circuit court findings of fact 68-69, 71-76.¹⁵

¹⁵ The following findings of fact by the circuit court are relevant:

68. DHHL has had to rely on special funds and trust funds every year to cover a substantial portion of DHHL's operating costs. . . .

69. DHHL has had to rely on its own funds to pay for its administrative and operating expenses. Partial Tr. 06/29/15 p.m. at 6-8 (Testimony of Rodney Lau).

70. The use of special funds and trust funds to cover DHHL's administrative and operating costs results in less money available to DHHL for land development, loans and other activities that assist the beneficiaries of the Hawaiian Home Lands Trust. Exh. 4 at 4; Exh. 5; Exh. B-12 at 2; Testimony of

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Rodney Lau; Tr. 07/02/15p.m. at 6-8 (Testimony of Jobie Masagatani).

71. Since 1978, DHHL has continued to rely upon the Hawaiian Home administration account to pay for its administrative and operating costs. Partial Tr. 06/29/15 p.m. at 30-31, 41-42 (Testimony of Rodney Lau); *Exh. A-66* at 21 (FY '79); *Exh. A-67* at 22 (FY 80); *Exh. A-68* at 24 (FY '81); *Exh. A-69* at 24 (FY '82); *Exh. A-70* at 32 (FY '83); *Exh. A-71* at 00324 (FY '84); *Exh. A-72* at 29 (FY '85); *Exh. A-73* at 27 (FY '86); *Exh. A-74* at 20 (FY '87); *Exh. A-75* at 15 (FY '88); *Exh. A-76* at 19 (FY '89); *Exh. A-41* at 29 (FY '94); *Exh. A-42* at 30 (FY '95); *Exh. 31* at 3 and 4 (FY '95); *Exh. 4* at 4 (FY '95-96); *Exh. A-43* at 33 (FY '96); *Exh. A-44* at 35 (FY '97); *Exh. A-45* at 29 (FY '98); *Exh. A-46* at 28 (FY '99); *Exh. 6* (FY '99); *Exh. A-47* at 27 (FY '00); *Exh. A-48* at 33 (FY '01); *Exh. A-49* at 11 (FY '02); *Exh. A-50* at 21 (FY '03); *Exh. A-51* at 23 (FY '04); *Exh. A-52* at 23 (FY '05); *Exh. A-53* at 23 (FY '06); *Exh. 32* at 3 (FY '06); *Exh. 33* at 3 (FY '07); *Exh. A-54* at 15 (FY '07); *Exh. A-55* at 15 (FY '08); *Exh. 34* at 3 (FY '08); *Exh. 35* at 3 (FY '09); *Exh. A-56* at 15 (FY '09); *Exh. A-57* at 15 (FY '10); *Exh. A-58* at 15 (FY '11); *Exh. B-17* at 3 (FY '11); *Exh. A-59* at 15 (FY '12); *Exh. 36* at 3 (FY '12); *Exh. A-60* at 16 (FY '13); *Exh. A-61* at 6 and 16 (FY '14); *Exh. 19* (FY '14).

72. The Hawaiian Homes administration account is comprised entirely of money generated from: (a) general leases, rents, licenses, revocable permits, rock sales, and other uses of Hawaiian homelands; (b) interest and income earned from investment of these revenues; and (c) minimal or small amounts of miscellaneous revenue. Partial Tr. 06/29/15 at 30-31, 39 (Testimony of Rodney Lau); *Exh. A-66* at 20; *Exh. A-67* at 21; *Exh. A-68* at 23; *Exh. A-69* at 23; *Exh. A-70* at 12; *Exh. A-71* at 00324; *Exh. A-72* at 29; *Exh. A-73* at 27; *Exh. A-74* at 20; *Exh. A-75* at 15; *Exh. A-76* at 19; *Exh. A-77* at 18; *Exh. A-39* at 26-29; *Exh. A-40* at 27; *Exh. A-41* at 29; *Exh. A-42* at 30; *Exh. A-43* at 33; *Exh. A-44* at 35; *Exh. A-45* at 29; *Exh. A-46* at 28; *Exh. A-51* at 23; *Exh. A-52* at 23; *Exh. A-53* at 23; *Exh. A-54* at 15; *Exh. A-55* at 15; *Exh. A-56* at 15; *Exh. A-57* at 15; *Exh. A-58* at 15; *Exh. A-59* at 15; *Exh. A-60* at 16; *Exh. A-61* at 16.

73. A large portion of the principal upon which DHHL earns interest and investment income initially came from the general leasing of Hawaiian home lands. DHHL has relied on this interest/investment income generated from the general leasing of its lands to pay for its administrative and operating expenses. Partial Tr. 06/29/15 p.m. at 30-31 (Testimony of Rodney Lau).

74. DHHL has had to rely on Act 14 settlement monies to pay for some of its administrative and operating expenses. Partial Tr. 06/29/15 p.m. at 33-34 (Testimony of Rodney Lau).

(. . . continued)

The record below establishes a pattern of unequivocally insufficient funding during years where no funding was provided for administrative costs and expenses. For example, the circuit court found that from the constitutional convention through 1989, with few exceptions, "DHHL received no general (or external) funding for its administrative and operating expenses." Circuit court finding of fact 13 (emphasis in original). This was in spite of the fact that the Hawai'i constitution expressly mandated that the "legislature shall make sufficient sums available" for the department's administrative and operating budget. Haw. Const. art. XII, § 1; circuit court findings of fact 3-5. Similarly, in the four fiscal years 2010 through 2013, the State appropriated from general funds precisely \$0.00 to DHHL each year for its administrative and operating budget. Circuit court finding of fact 23, 26. Thus,

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75. Every year since 1992, DHHL has had to rely on revenue generated from general leases, licenses, and revocable permits of Hawaiian home lands to make up for the State's failure to appropriate sufficient sums for DHHL's administrative and operating budget. Partial Tr. 06/29/15 p.m. at 41-42, 44-45 (Testimony of Rodney Lau); Tr: 07/02/15 p.m. at 25, 74 (Testimony of Jobie Masagatani); *Exh. A-61* at 6; *Exh. B-9* at 1.

76. General lease revenues are used to fund DHHL's operations. Partial Tr. 06/29/15 p.m. at 41-42, 44-45 (Testimony of Rodney Lau); Tr. 07/02/15 at 43-44 (Testimony of Rodney Lau); *Exh. A-69* at 2; *Exh. 10* at 2; *Exh. A-61* at 22.

for 15 of the 37 fiscal years from 1979 through 2013, the legislature appropriated zero or near-zero sums to DHHL for its administrative and operating expenses.

As another measure of insufficiency, the circuit court identified the empirically-determinable gap between DHHL's actual administrative and operating expenditures in any given past year compared with the sums actually appropriated from the general fund by the legislature to DHHL for its administrative and operating expenses that same year. Each year, DHHL must expend determinate amounts relating to its actual administrative and operating expenses. Each year, the legislature has appropriated a determinate amount of general funds to DHHL (as noted, sometimes even the determinate amount of zero).¹⁶ In

¹⁶ For ten fiscal years following the 1978 constitutional convention, the State failed to provide any general fund appropriation to DHHL for its administrative and operating budget. Circuit court finding of fact 22. The circuit court's finding of fact 23 on remand provides additional annual totals:

The State appropriated the following amounts of money to DHHL for its administrative and operating budget in general funds (i.e., not including (i) any loans to the department, (ii) any funding financed through revenue bonds, (iii) any money generated by the leasing, renting, or licensing of Hawaiian home lands or waters, or (iv) any payments pursuant to Act 14, Session Laws of Hawaii 1995, Special Session) in each of these fiscal years:

- a. 1991-92: \$4,278,706
- b. 1992-93: \$3,850,727
- c. 1993-94: \$3,251,162
- d. 1994-95: \$3,251,162
- e. 1995-96: \$2,565,951

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other words, administrative and operating expenses have not been a vague or indeterminate amount -- the expenses have been a series of quite determinate historical and legislative facts, facts that can be very easily "judicially identified" and "judicially discovered." Baker v. Carr, 369 U.S. at 198; Nelson I, 127 Hawai'i at 194, 277 P.3d at 288.

The record developed by the circuit court below discloses large and enduring gaps between (a) the amounts DHHL actually expended on administrative and operating costs in any given year, and (b) the corresponding amounts the legislature appropriated to DHHL from the general fund for its administrative and operating expenses for the same year. As the circuit court found: "Between fiscal years 2008 and 2014, DHHL's

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f. 1996-97: \$1,569,838
g. 1997-98: \$1,493,016
h. 1998-99: \$1,347,684
l. 1999-00: \$1,298,554
j. 2000-01: \$1,298,554
k. 2001-02: \$1,359,546
l. 2002-03: \$1,196,452
m. 2003-04: \$1,297,007
n. 2004-05: \$1,277,007
o. 2005-06: \$817,559
p. 2006-07: \$1,067,559
q. 2007-08: \$1,169,174
r. 2008-09: \$883,699
s. 2009-10: 0
t. 2010-11: 0
u. 2011-12: 0
v. 2012-13: 0
w. 2013-14: \$9,632,000
x. 2014-15: \$9,632,000
y. 2015-16: \$9,632,000

actual administrative and operating budget expenses have ranged between \$16 million and \$19.6 million." Circuit court finding of fact 31. For each of those fiscal years, the sums appropriated from general funds by the legislature for DHHL's administrative and operating expenses were, respectively, \$1,169,174 (2008), \$883,699 (2009), \$0 (2010), \$0 (2011), \$0 (2012), \$0 (2013), and \$9,632,000 (2014).¹⁷ Circuit court finding of fact 45.

The large and recurring gap between the two figures -- what DHHL actually had to expend in past years to cover its

¹⁷ These gaps, though significant, appear to have stemmed to some large degree from confusion about the nature of the constitutional mandate rather than bad will or lack of solicitude on the part of the legislature or DHHL. See circuit court conclusions of law, 14-16. The blame for these demonstrably insufficient sums cannot be entirely assigned to the legislature. "DHHL Defendants did not take meaningful steps during the relevant time period to obtain funding from the legislature for sufficient sums for DHHL's administrative and operating budget." Circuit court finding of fact 87. For those fiscal years where the legislature appropriated \$0 to DHHL for its administrative and operating budget, that is, for "fiscal years 2009-10, 2010-11, 2011-12, and 2012-13, DHHL requested no general funds to pay for its administrative and operating budget." Circuit court finding of fact 83. See generally circuit court findings of fact 81-89. Nor, apparently, can the blame be assigned entirely to DHHL, which requested sufficient sums be appropriated from the legislature for its administrative and operating budget in fiscal year 2009-10 of \$19,603,754, of the same amount for fiscal year 2010-11, of \$20,122,220 for fiscal year 2011-12, of the same amount for fiscal year 2012-13. Circuit court finding of fact 37. DHHL requested those funds "regardless of the means of financing[.]" Circuit court finding of fact 37. "Means of financing" is a legislative term of art referring to the 18 different types of funds used to finance programs, only one of which is the general fund. Rather, the problem appears to be that neither the legislature nor DHHL were fully cognizant of the fact that under the 1978 constitutional amendment, DHHL's administrative and operating expenses should be paid out of general funds, not DHHL's special and trust funds. See circuit court findings of fact 53-67; circuit court conclusions of law 14-15.

administrative and operating costs and what the legislature actually appropriated from the general fund to cover those costs -- has required DHHL to use trust funds and special funds to bridge the gap. Thus, as the circuit court found, the primary revenue source for the DHHL administration account has been revenue generated from Hawaiian home lands, the very problem the 1978 constitutional amendment was designed to cure, the very problem we acknowledged in Nelson I the delegates "clearly" intended to redress by mandating sufficient sums for DHHL's administrative and operating budget. Circuit court findings of fact 54, 70-75. 127 Hawai'i at 203, 277 P.3d at 297.¹⁸

The proposition that the delegates' intent was to freeze administrative and operating expense at 1978 levels, with adjustment only for annual inflation and collective bargaining costs, was deemed "absurd" by the circuit court.¹⁹ It is

¹⁸ The revenue generated from Hawaiian home lands that is initially deposited into the Hawaiian Home administration account ends up in other DHHL trust funds and special funds. Circuit court finding of fact 55. When the legislature appropriates monies from those trust and special funds to DHHL in order that it may pay its administrative and operative expenses, that depletes funds that would otherwise go to serving beneficiaries including, as the circuit court noted, "the 27,000 qualified beneficiaries that are still on DHHL's waiting list." In effect, special fund 'appropriations' from the legislature to DHHL are merely "authorizations for DHHL to spend its own money rather than a transfer of money to DHHL." Circuit court finding of fact 60. As a result, "DHHL has had to rely on special funds and trust funds every year to cover a substantial portion of DHHL's operating costs." Circuit court finding of fact 68 (emphasis added).

¹⁹ Conclusion of law 7 ("Article XII, section 1 cannot be interpreted in a manner that would render it devoid of any real substance and (. . . continued)

implausible that "sufficient sums" would be the same at present as it was in 1978, adjusted only for inflation and collective bargaining costs. As the circuit court demonstrated, DHHL's actual costs are determinable, not abstract or imponderable -- and the costs at present do not resemble the administration and operation costs in 1978.²⁰ The administrative and operating costs are based on an actual track record of actual agency expenditures extending over a number of years. The circuit court on remand found that without adequate appropriations of sufficient sums by the legislature from the general fund, DHHL will have no choice but to rely on revenues from general leases, licenses, and revocable permits. Circuit court findings of fact 53, 54. In addition, the circuit court found that "DHHL has had

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effect, or lead to an absurd result." (citation omitted)); Conclusion of law 13 ("The State's position that article XII, section 1 only requires funding of \$1.3 - \$1.6 million plus inflation would lead to absurd results. It would in effect mean that sufficient funds for DHHL's administrative and operating budget would be limited to funding the approximately 54 staff positions that were filled in 1978. It ignores the fact that one-third of the staff doing DHHL's important work in 1978 were paid for outside of DHHL's budget. In other words, \$1.3 - \$1.6 million was plainly insufficient for DHHL to pay all the employees for the work it was doing in 1978. The State's position ignores the constitutional convention delegates' recognition that DHHL needed far more resources and DHHL's over-reliance on its own funds.").

²⁰ As the circuit court noted on remand, ever since the passage of the Executive Budget Act of 1970, "operating costs" have been expressly defined as "recurring costs of operating, supporting, and maintaining authorized programs, including costs for personnel salaries and wages, employee fringe benefits, supplies, materials, equipment and motor vehicles." 1970 Haw. Sess. ch. 185, § 2, at 384. See HRS § 37-62 (2009). For 48 years, every state agency has had to budget for administrative and operating costs based on a determinate understanding of what that category means.

to rely on special funds and trust funds every year to cover a substantial portion of DHHL's operating costs." Circuit court finding of fact 68; see also circuit court findings of fact 53, 54. The circuit court specifically found that such reliance on special and trust funds would diminish funds needed to assist the needs of beneficiaries: "The use of special funds and trust funds to cover DHHL's administrative and operating costs results in less money available to DHHL for land development, loans and other activities that assist the beneficiaries of the Hawaiian Home Lands Trust." Circuit court finding of fact 70.

Thus, the extensive record developed by the circuit court amply demonstrates that freezing administrative and operating expenses to a 1978 baseline of \$1.3 to \$1.6 million would not provide sufficient funding to prevent the use of lease revenue, trust funds, and special funds to pay for administrative and operating expenses. In other words, the majority's definition of "sufficient sums" would not relieve DHHL of the burden of funding "a substantial portion" of its administrative and operating expenses out of special funds and trust funds. Circuit court finding of fact 68. If that were not the case, "[i]f DHHL received sufficient general funds for its administrative and operating expenses from the State, DHHL would be able to use its special funds and trust funds to

provide financial assistance to low-income beneficiaries to help them acquire homestead lots." Circuit court finding of fact 35; see also circuit court findings of fact 53, 54, and 55. In effect, by restricting the meaning of sufficient funds to a set amount of \$1.3 to \$1.6 million, the majority's definition contradicts the rationale for our holding in Nelson I and openly violates what we ourselves called the "clear" intent of the delegates.²¹ Nelson I, 127 Hawai'i at 203, 277 P.3d at 297 ("It

²¹ In its amicus brief in support of the motion for reconsideration on remand, the legislature remarked that the \$9,632,000 it appropriated to DHHL for administrative and operating expenses in fiscal years 2013-14, 2014-15, and 2015-16 "constitutes over sixty-five percent more than the '\$1.6 million envisioned in 1978,' adjusted for inflation." (The legislature used the Consumer Price Index calculator for cumulative annual inflation in its calculation.) To put this the other way around, the \$1.6 million in 1978 dollars adjusted for inflation -- construed by the majority as "the only 'judicially discoverable and manageable standard' for determining 'sufficient sums'" (Majority, at 28) -- represents less than 35% of what the legislature actually appropriated to DHHL specifically for administrative and operating expenses in each of the three fiscal years prior to 2017. See 2015 Haw. Sess. ch. 119, § 21, at 334 (providing that "the sum of \$9,632,000 for fiscal year 2015-2016 and the same sum for fiscal year 2016-2017 shall be deposited into the Hawaiian home administration account to be expended only for administrative and operating expenses of the department of Hawaiian home lands." (emphasis added)).

The \$1.6 million, adjusted for the Consumer Price Index, cannot by any reasonable measure be considered an adequate means by which to determine the "sufficient sums" contribution required by Nelson I. Even the legislature's appropriation of over \$9 million for 2015-2016 represents less than half of DHHL's actual, empirical administrative and operating expenses for fiscal years 2013 and 2014. Circuit court finding of fact 32. (Those expenses do not include funding for DHHL's vacant staff positions, much less the significant increases in positions DHHL estimates are necessary to adequately run its various programs for native Hawaiians. Circuit court findings of fact 33-36.) Thus, the \$1.6 million figure, adjusted for inflation, is demonstrably insufficient. It is less than half of the roughly \$9 million allocated by the legislature for fiscal years 2013-14 through 2016-17, which in turn is less than half of DHHL's actual administrative and operating expenses for those fiscal years. See circuit court finding of fact

(. . . continued)

is clear that the constitutional delegates intended to require appropriation of 'sufficient sums' to relieve DHHL of the burden of general leasing its lands to generate administrative and operating funds, and to that end, they identified the minimum funding necessary for such expenses.").

DHHL's actual, current administrative and operating costs will never return to 1978 levels, however adjusted those levels may be by a consumer price index that measures the increasing annual costs of bread and milk and eggs.²² The

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32. Even generously construed, the majority's criterion will provide DHHL about 25% of what it actually expends annually on administrative and operating expenses. However one chooses to interpret "sufficient sums," 25% of actual expenditures is not sufficient.

²² The Consumer Price Index is generated by the Bureau of Labor Statistics. It measures the inflation rate for consumers based on increases in prices for such things as bread, milk, eggs, chicken, and gasoline. <https://data.bls.gov/cgi-bin/surveymost?ap>. The BLS also maintains numerous other indices for inflation, including an Employment Cost Index. <https://www.bls.gov/ncs/ect/escalator.htm>.

The majority adopts the verifiably inadequate criterion of \$1.6 million in 1978 dollars, adjusted for inflation, because, it appears, the majority believes that such a figure is, at least, "certain." Majority, at 23 (quoting Nelson I, 127 Hawai'i at 202-03, 277 P.3d at 296-97). Even assuming arguendo that "certainty" is a minimum threshold for "judicially discoverable and manageable standards," the putative certainty relied upon by the majority evaporates once one adds the phrase, "adjusted for inflation." See, e.g., Majority at 2, 4, 23.

There are many measures of inflation, and it is not at all certain that a measure of inflation relevant to consumers and consumer items such as food and gasoline is the pertinent measure for inflation relevant to changes in an expanding administrative agency's administrative and operating expenses over 40 years. Indeed, neither Nelson I nor the majority opinion in Nelson II contains a discussion of what "adjusted for inflation" might concretely mean.

obvious and unavoidable effect of the majority's narrow reading of Nelson I will be to force DHHL to draw on lease revenue, special funds, and trust funds to bridge the recurrent gap between (a) DHHL expenditures for its administrative and operative expenses and (b) legislative appropriations from the general fund. As noted, this contravenes the delegates' clear rationale for requiring the legislature to provide sufficient sums to DHHL for its administrative and operating expenses.

The 1978 Constitutional Convention history of Article XII, Section 1 can be broadly understood as committing the legislature to funding DHHL's administrative and operating expenses, because DHHL was the only executive agency within the State forced into leasing its own lands to administer its own programs. Further, placing DHHL on the horns of the funding dilemma occurred at the expense of its own beneficiaries, as the leased lands became unavailable for homesteads. Alleviating the DHHL of the burden of general leasing its own lands was an important first step towards assisting the department in fulfilling its mission.

Nelson I, 127 Hawai'i at 203, 277 P.3d at 297.

The circuit court's ascertainment that funding for the administrative and operating costs was insufficient extended beyond the gap between DHHL's annual expenditures on administrative and operating expenses and what the legislature in any given year appropriated to DHHL for that purpose from the general fund. The circuit court record also established that DHHL's actual annual administrative and operating expenditures are themselves insufficient, because they "do not include funds for all the DHHL authorized positions that were vacant."

Circuit court finding of fact 33. Stated otherwise, DHHL has

lacked the funds with which to fill staff positions that have already been authorized. "Filling those vacancies would require more money than the \$16 million to \$18 million DHHL expended annually in fiscal years 2008 through 2014." Circuit court finding of fact 33. In short, DHHL's track record of expending \$16 million to \$18 million dollars on actual administrative and operating expenses in each of the last ten years -- a track record that is judicially discoverable -- itself understates DHHL's actual need because filling the staff positions currently authorized but vacant would require additional monies.

In this context, to use the 1978 baseline of \$1.3 to \$1.6 million adjusted for inflation as a definition for sufficient sums would not be credible. The circuit court identified 200 permanent and 11 temporary authorized positions. As of June 30, 2012, of 211 authorized positions, 83 were vacant, a vacancy rate of almost 40%.²³ As of November 30, 2012, 86 were vacant. Although the exact number of vacant but authorized positions varied for each year, each such position is

²³ The persistently high levels of vacant staffing positions at DHHL is partly a function of the unpredictable funding of its administrative and operating expenses. As the circuit court noted in ruling on the State's motion for reconsideration, evidence was presented at trial "concerning the operational shortfalls that the Department had been experiencing for years, including staffing shortages because of a lack of consistent funding from the State, which made it difficult for DHHL to fill positions because in each budget cycle DHHL did not know what level of funding would be provided from the State."

determinate, and each is correlated with an "actual salary last paid." DHHL estimated in 2013 that funding the vacant positions through the general fund (rather than through DHHL special funds) would require an appropriation of \$7.671 million. Adding that amount to the lower end of the \$16 million to \$18 million range of DHHL's actual administrative and operating expenditures annually in fiscal years 2008 through 2014 (circuit court finding of fact 33) would yield a sum of approximately \$23.6 million.

E. The circuit court on remand correctly declined to order the legislature to appropriate specific amounts.

The majority rightly seeks to avoid encroachment on the legislature's function. See Majority, at 9. So too did the circuit court. Its amended order contains the factual finding that legislative funding for DHHL falls far short of its actual administrative and operating expenses. However, the amended order does not directly command the legislature to appropriate funds to close that gap.

The circuit court on remand concluded: "The evidence at trial amply demonstrated that the amount DHHL requires for its administrative and operating budget for fiscal year 2015-2016 is more than 28 million, specifically, \$28,478,996.00, and that the amount appropriated by the Hawai'i State Legislature, \$9,632,000.00 was not sufficient." However, the court stressed

that it was not ordering the legislature to make a specific appropriation. "To be clear, the Court is not ordering an appropriation. The Court is, however, ordering that the State of Hawai'i must comply with its constitutional duty to make sufficient funds available to DHHL for its administrative and operating budget." To underscore its point that it was not ordering a specific appropriation of funds, and in response to a motion for reconsideration, the circuit court changed paragraphs 3 and 5 of its initial order. After the change,²⁴ paragraph 3 reads,

Although what is 'sufficient' will change over the years, the amount of general funds appropriated to DHHL for its administrative and operating budget for fiscal year 2015-16 (\$9,632,000) is not sufficient. The State is required to comply with the Hawai'i Constitution and must fund DHHL's administrative and operating expenses by making sufficient general funds available to DHHL for its administrative and operating budget for fiscal year 2015-16.

Similarly, the circuit court changed paragraph 5 to read, in its entirety, "The Defendants must fulfill their constitutional duties and trust responsibilities."²⁵

²⁴ Prior to the change, paragraph 3 had read (in its entirety), "Although what is 'sufficient' will change over the years, the sufficient sums that the legislature is constitutionally obligated to appropriate in general funds for DHHL's administrative and operating budget (not including significant repairs) is more than \$28 million for fiscal year 2015-16."

²⁵ Prior to the change, paragraph 5 had read (in its entirety), "The defendants shall prospectively fulfill their constitutional duties and trust responsibilities. They are enjoined from violating these obligations."

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And the legislature has done so without a judicial command to appropriate a specific amount. The legislature budgeted \$18,726,168 for DHHL for its "personal services," the major category of administrative expenses, for fiscal year 2018. State of Hawai'i Dep't of Budget and Finance, The Operating and Capital Budget-Department Summaries FY-19, at 75.²⁶ The legislature's general fund appropriation to DHHL for this year was \$23,370,730, together with a special fund appropriation of \$4,824,709, and a trust funds appropriation totaling \$3,740,534. Id.; see also State of Hawai'i Dep't of Budget and Finance, The Operating and Capital Budget by Major Program Area and Intermediate Levels of the Program Structure, at 1218, 1288.²⁷

Conclusion

The circuit court in its oral ruling on the State's motion for reconsideration spoke of "the special, unique, and extraordinary history and factual circumstances of this case." Similarly, Prince Jonah Kuhio poignantly captured the essence of

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²⁶ Available at: <https://budget.hawaii.gov/wp-content/uploads/2017/12/07.-Operating-and-Capital-Budget-Department-Summaries-FY-19-SUPP.2eM.pdf>

²⁷ Available at: <https://budget.hawaii.gov/wp-content/uploads/2017/12/29.-The-Operating-and-Capital-Budget-by-Major-Program-Area-and-Intermediate-Levels-of-the-Program-Structure-FY-19-SUPP.2eM.pdf>

the central issue in this case almost 100 years ago: "Perhaps we have a legal right, certainly we have a moral right, to ask that these lands be set aside. We are not asking that what you are to do be in the nature of a largesse or as a grant, but as a matter of justice -- belated justice." Nelson I, 127 Hawaii at 188, 277 P.3d at 282 (citation omitted).

The effect of the Constitutional Convention in 1978 was precisely to translate that moral right into a legal right. The intent, as we noted in Nelson I, was to break a vicious cycle in which, "in order to fulfill its mission of providing homestead lots to beneficiaries, the department had to raise revenue to sustain its programmatic and human infrastructure costs (administrative and operating expenses), and in order to raise money for administrative and operating expenses, the department had to lease the vast majority of its lands that otherwise would have been used for homestead lots." 127 Hawai'i at 200, 277 P.3d at 294.

For that reason, the 1978 constitutional amendments embodied in Article XII, Section 1 of the Hawaii Constitution translated "the moral right" of which Prince Jonah spoke into a legal right -- indeed, into "a matter of justice" in the form of a constitutional obligation. The circuit court acted in accordance with the direction of Nelson I, to apply this

constitutional rule of law requiring that "the legislature shall make sufficient sums available for . . . (4) the administration and operating budget of the department of Hawaiian home lands . . . by appropriating the same in the manner provided by law." Haw. Const. art. XII, § 1. Accordingly, the circuit court's "Findings of Fact, Conclusions of Law, and Order," as amended, should be affirmed.

/s/ Michael D. Wilson

