No. 10-331

In The
Supreme Court of the United States

MAUNALUA BAY BEACH OHANA 28, *et al.*,

Petitioners,

v.

HAWAII,

Respondent.

On Petition For Writ Of Certiorari To The Intermediate Court Of Appeals Of Hawaii

BRIEF OF LAND USE RESEARCH FOUNDATION OF HAWAII AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

In 2003, the Hawaii legislature adopted Act 73, which declared that the private right to own accretion on beachfront parcels was public property. The statute did not provide for compensation, and upon challenge by the Petitioners, a state trial court invalidated Act 73 as a regulatory taking.

The Intermediate Court of Appeals of Hawaii partially affirmed, concluding that Act 73 was a taking of accreted land in existence in 2003 when the Act became effective. It also concluded, however, that the statute was *not* a taking of "future accretion," or land that might be accreted after 2003, because there was no certainty that accretion would occur, and littoral owners' right to accretion was therefore not "vested." The court concluded the legislature was free to recharacterize the private right to accretion as state property without compensation because Petitioners never owned it. In other words, the right to accretion is not "property" as that term is used in the Fifth and Fourteenth Amendments.

The question presented is whether the right to accretion is property within the meaning of the Fifth and Fourteenth Amendments, and therefore protected from *ipse dixit* redefinition into public property.

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INTEREST OF AMICUS CURIAE

Land Use Research Foundation of Hawaii (LURF) is a private, non-profit research and trade association whose members include major Hawaii landowners, developers, and a utility company.[1] It is incorporated as a Hawaii non-profit corporation. LURF was established in 1979 to promote and advance the interests of the property owners and the development community, particularly in the areas of land use laws and regulations. Over the years, LURF has been a strong voice of reason, working to represent the interests of its membership and at the same time find common ground for the concerns of government, business, and the community.

One of LURF's missions is to advocate for reasonable, rational and equitable land use planning, legislation and regulations that encourage well-planned economic growth and development, while safeguarding Hawaii's natural and cultural resources and public health and safety. In fulfilling this mission, LURF actively participates at the local, state, and federal levels of government, seeking passage and proper application of legislation and policies that create a favorable business climate in which

[1] All counsel of record consented to the filing of this brief, and received notice of the intention to file this brief at least ten days before it was due. This brief was not authored in any part by counsel for either party, and no person or entity other than amicus made a monetary contribution toward the preparation or submission of this brief.

landowners, developers, and the business community can grow and improve the quality of life for the citizens of Hawaii.

LURF has participated as amicus curiae in numerous cases in Hawaii courts, and possesses a long history and an intimate familiarity with Hawaii property law. LURF is participating as amicus curiae in this case to voice its concern that the decision below, if left unreviewed by this Court, will do immeasurable harm to the constitutional protections afforded property owners nationwide, because it allows a legislature to undertake a massive uncompensated property grab simply by redefining a long-established private property right as public property.

SUMMARY OF ARGUMENT

To rescue Act 73 from total invalidity under the Takings Clause, the court below created a distinction never before recognized in Hawaii law between "vested existing accretions" which are constitutionally protected property, and "unvested future accretions," which are not. The latter, the court concluded, could be transformed *ipse dixit* by the Hawaii legislature into public property without compensation. After all, how could a littoral owner possess a property interest in land that had not yet accreted?

The supposed distinction between "existing" and "future" accreted land is illusory, however, and overlooks the critical private property interest which Act

73 redefined as public property. Hawaii law had for over a century recognized that littoral owners possessed the *right* to accretion. That right was a present right, was "vested," and, as surely as interest follows principal,[2] cannot be transformed by the stroke of the legislature's pen into public property. The Constitution – in addition to recognizing as property the accreted land in existence at the time of the adoption of Act 73 in 2003 – also protects the right to *all* accretion. Thus, when Act 73 declared that accretion belonged to the state, it confiscated private property without due process or condemnation, and violated the Fifth and the Fourteenth Amendments.

This brief focuses on two issues. *First*, the right to accretion is a present property interest protected by the Fifth and Fourteenth Amendments from uncompensated legislative redefinition as public property. This right is not limited merely as accreted land in existence on the day the legislature adopted Act 73, and the court below strayed far afield from this Court's established precedents when it concluded that the only property interest protected by the Constitution was

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[2] *See Phillips v. Washington Legal Foundation*, 524 U.S. 156, 165 (1998) ("The rule that 'interest follows principal' has been established under English common law since at least the mid-1700's . . . Not surprisingly, this rule has become firmly embedded in the common law of the various States.") (footnote omitted); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (a state may not abrogate "the traditional rule that 'earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property.' ").

the land already accreted. *Second*, to provide context to the lower court's decision and how it reached its conclusion, this brief summarizes the decades-long experiences of Hawaii's property owners who have seen their established common law property rights eroded into public property. The case at bar is only the latest example.

ARGUMENT

I. THE RIGHT TO ACCRETION IS A PRIVATE PROPERTY RIGHT

A. Accreted Land vs. The Right To Accretion

"Accretion" or "accreted" lands refers to land "gradually deposited by the ocean on adjoining upland property." *Hughes v. Washington*, 389 U.S. 290, 291 (1967). Until the Hawaii legislature adopted Act 73 in 2003, the common law of the Kingdom, Territory, and State of Hawaii conformed to traditional accretion law, with a pedigree reaching back to the Institutes of Justinian. Until Act 73 and the decision of the court below, Hawaii common law protected private accretion rights, and made no distinction between "existing" accreted land, and the right to "future" accretion. *See Halstead v. Gay*, 7 Haw. 587, 589-90 (1889) ("By the definitions we have given, it follows that the plaintiff has the rights of a littoral proprietor, and that the accretion is his.");

State ex rel. *Kobayashi v. Zimring*, 566 P.2d 725, 734 (Haw. 1977) ("When accretion is found, the owner of the contiguous land takes title to the accreted land."); *In re Banning*, 832 P.2d 724, 728 (Haw. 1992) ("Land now above the high water mark, which has been formed by imperceptible accretion against the shore line of grant, has become attached by the law of accretion to the land described in the grant and belongs to the littoral proprietor.") (*quoting Halstead*, 7 Haw. at 588). This Court long ago affirmed the same principle:

> *The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property.* The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil one. The maxim "qui sentit onus debet sentire commodum" ["he who enjoys the benefit ought also to bear the burdens"] lies at its foundation. The owner takes the chances of injury and of benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if, a gradual gain, it is his.

County of St. Clair v. Lovingston, 90 U.S. 46, 68-69 (1874) (emphasis added). *See also* Comment, *The Rights of a Riparian Owner in Land Lost by Erosion*, 24 YALE L.J. 162 (1914) ("The rules applying to accretion and erosion are inseparably bound together,

the gains of one compensating for the losses of the other."). It is this ancient balance – the littoral owner must take the bitter with the sweet – that compels the result: the ability to own accretion that may attach to a littoral parcel in the future is a present right because the littoral owner bears the risk of erosion now.

The accretion and erosion doctrines ensure that riparian and littoral property owners – short of a sudden avulsive or erosive event – maintain their parcel's access to water when the water's edge shifts naturally over time. *See Hughes*, 389 U.S. at 293. Very often, the most valuable feature of littoral property is its proximity and connection to ocean. In Act 73 the Hawaii legislature radically altered that ancient balance, supplanting the reciprocal system of accretion and erosion with a statutory scheme in which the public gains when littoral land either erodes or accretes. Act 73 simply decreed that the state owns it all. Under this one-sided regime, the state not only continues to acquire private lands lost to erosion, but also owns existing unregistered accreted lands and the right to future accretion, and no one but the state is able to register or quiet title to accreted land.

The court below correctly recognized that the Takings and Due Process Clauses prohibit the state from destroying settled expectations and confiscating private property rights by legislative fiat, and declaring – without even the minimal protections of pre-deprivation condemnation procedures and payment of

just compensation – that what had been a private right for centuries was, by the stroke of a pen, transformed into public property. *Maunalua Bay Beach Ohana 28 v. Hawaii*, 222 P.3d 441 (Haw. Ct. App. 2009). The court held that Act 73 was a taking because it expressly abolished the long-standing common law accretion rule, and transformed the reciprocal erosion-accretion equation into a one-way street: an owner still lost land when it eroded, but when it accreted, a formerly beachfront parcel would be fronted with a state-owned strip of beach.

However, the court held that because "future" accretion might never happen, the state could simply seize it without first paying compensation. *Maunalua Bay*, 222 P.3d at 460. The court held that Act 73 did not affect a taking of the right to accretion because the right is simply a contingent future interest. The court concluded, "any claims that Plaintiff may have to future accretions are purely speculative, and other courts have held that a riparian owner has no vested right to future accretions." *Id*. In effect, the court concluded that the only property subject to confiscation by Act 73 was *existing* accreted land.

But by focusing solely on the land in existence at the time of Act 73's adoption, the court below missed the intangible, but more critical property right being taken by the legislature – the right to *all* accretion – and, in effect, read that valuable right out of existence. In *Pritchard v. Norton*, 106 U.S. 124 (1882), this Court instructed that "property" is not limited to land

or tangible things, but included intangible rights, in that case a legal remedy for breach of contract:

> Hence it is that a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away.

Id. at 132. Thus, the right to accretion – which is a separate and distinct property right from accreted land, and includes within its meaning the "future accretions" the court below blithely ignored – was also taken when Act 73 declared it to be public property. *See Fidelity & Deposit Co. v. Arenz*, 290 U.S. 66 (1933) ("'Property' is a word of very broad meaning, and when used without qualification, expressly made or plainly implied, it reasonably may be construed to include obligations, rights and other intangibles as well as physical things.") (citations omitted).

As this Court explained in *Lovingston*, the right to accretion is a presently vested right because a littoral property owner bears the risk of erosion presently, so she should also reap any benefits if and when they occur. A "right" is "a power, privilege, faculty, or demand, inherent in one person and incident upon another." BLACK'S LAW DICTIONARY 1189 (5th ed. 1979). *See also* BLACK'S LAW DICTIONARY 551 (Pocket ed. 1996) (a right is "[a]n interest or expectation guaranteed by law[.]"). Thus, the very concept of a "right" includes within its meaning future interests

or expectations, even though those interests might never by realized.[3] It matters only that the right itself is a present interest. *See Hodel v. Irving*, 481 U.S. 704, 715 (1987) ("the right to pass on 'property' is itself a valuable right"). In *Hornsby v. United States*, 77 U.S. 224 (1870), this Court held:

> By the term property, as applied to lands, all titles are embraced, legal or equitable, perfect or imperfect. It was so held by this court in the case of *Soulard v. The United States*, when considering the import of the term in a stipulation contained in the treaty by which Louisiana was acquired, providing that the inhabitants of that territory should be protected in the enjoyment of their property. "It comprehends," said the court, "every species of title, inchoate or complete. *It is supposed to embrace those rights which are executory as well as those which are executed*."

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[3] The reported Hawaii cases which involve accretion deal with land already accreted. *See*, *e.g.*, *Halstead v. Gay*, 7 Haw. 587, 589-90 (1889) (action for trespass on accreted land seaward of the plaintiff's littoral property as described in his deed); *State* ex rel. *Kobayashi v. Zimring*, 566 P.2d 725, 734 (Haw. 1977) (state sought to quiet title to new land formed by active volcano); *In re Banning*, 832 P.2d 724, 728 (Haw. 1992) (action to register title to accreted land under Hawaii's Torrens title system). This should come as no surprise since only once land is actually accreted and becomes permanent would a property owner institute a judicial action to confirm title and ownership.

Id. at 242 (*quoting Soulard v. United States*, 29 U.S. 511) (1830) (Marshall, C.J.)) (footnote omitted) (emphasis added).

A hypothetical starkly illustrates the fallacy of the Hawaii court's rationale. Under the "future accretion" theory, a legislature would be free to enact a statute abolishing the right to pass property to one's heirs at death, and that instead, upon a person's death, all of her property becomes public property. The interests of a person's potential heirs, after all, are not "vested," and (in the Hawaii court's words) "may never materialize" because it is possible the heirs could be disinherited or could predecease the donor, before their interests vest. Thus, the theory goes, their rights are not "property" and the state may acquire them. That the right to bequeath and inherit are "property," and that such a scheme would violate the U.S. Constitution's Takings and Due Process Clauses is clear. *See*, *e.g*., *Babbitt v. Youpee*, 519 U.S. 234, 245 (1997) (ability to give property to heirs is itself a property right).

B. Accretion Follows Littoral Ownership As Interest Follows Principal

The right to accretion is property, even when the accretion has not yet taken place, and indeed, may never occur at all. The paradigm example of this principle is the traditional rule that interest follows principal. In two cases, this Court has held that interest on deposited funds is a property right

without regard to whether that interest had yet been earned, and that a state cannot simply reassign that property right to the public *ipse dixit* without running afoul of the Takings Clause.

In *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), this Court concluded that interest on lawyers' trust accounts is a property right. Under its Interest on Lawyers Trust Account (IOLTA) program, the Texas Supreme Court adopted a rule which required attorneys to place certain client funds that otherwise could not earn interest into a pooled interest-bearing IOLTA account. That interest, once earned, would be paid to a nonprofit corporation established by the Texas Supreme Court to deliver legal services to low income clients. This Court concluded that because "under Texas law the principal held in IOLTA trust accounts is the 'private property' of the clients," 524 U.S. at 164-65, and "[t]he rule that 'interest follows principal' has been established under English common law since at least the mid-1700's," the interest was Constitutional property. The Court rejected the state's claim that the interest follows principal rule was a matter purely of state law, and that Texas law had previously carved out an exception to the general rule. This Court examined Texas law and concluded it had always considered interest as following principal, and was therefore a property right. *Id*. at 168-69.

Similarly, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980), the Court held

that interest is traditionally an "incident of ownership," and that the state could not simply reassign interest on interpleaded funds to the state. This Court concluded that the interest was private property in words that also apply to the case at bar:

> Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as "public money" because it is held temporarily by the court. The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property. The state statute has the practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry.

Id. at 163.

Phillips and *Webb's Fabulous Pharmacies* establish that certain fundamental aspects of private property rights cannot be recharacterized by the state as public property. While the contours of what constitutes property is left mostly to definition by state legislatures and courts, *see*, *e.g*., *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979), it is well-accepted that the Takings and Due Process Clauses constrain a state from rewriting the accepted rules of property and declaring that what has always been private is now public. *See Webb's Fabulous Pharmacies,* 449 U.S. at 164 (the state may not, "by ipse dixit

. . . transform private property into public property without compensation"); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) ("the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits").

The case at bar presents the Court the opportunity to provide definitive guidance that "property" is not a completely malleable term, but rather embodies a core set of normative principles immunized by the Fifth and Fourteenth Amendments from a state's redefinition, especially where, as here, the result of state action is a naked declaration that what was private property is now public.

This Court has addressed the principle before, although never directly. *See*, *e.g.*, *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 93 (1980) (Marshall, J., concurring) ("I do not understand the Court to suggest that rights of property are to be defined solely by state law, or that there is no federal constitutional barrier to the abrogation of common law rights by Congress or a state government. The constitutional terms 'life, liberty, and property' do not derive their meaning solely from the provisions of positive law. They have a normative dimension as well, establishing a sphere of private autonomy which government is bound to respect."); *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring) (government cannot wipe out property rights simply by legislating the property out of existence).

Common law rules of accretion are exactly the type of long-standing expectations which the Takings and Due Process Clauses were designed to protect from transfer to the public by a state court or legislature.[4] *See*, *e.g.*, *Kaiser Aetna*, 444 U.S. at 179-80 ("we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation") (footnote omitted); *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 172 (1998) (interest on lawyer's trust accounts is private property); *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (passing property by inheritance is a fundamental attribute of property); *Babbitt v. Youpee*, 519 U.S. 234, 239 (1997) (the statue in *Hodel* was struck down because "[s]uch a complete abrogation of the rights of descent and devise could not be upheld."). In *PruneYard*, Justice Marshall concurred in the Court's holding that no judicial taking had occurred when the California Supreme Court concluded that California law required the owner of a shopping

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[4] It is irrelevant whether this case is viewed as a traditional regulatory taking by the legislature, or a judicial taking, since the Fourteenth Amendment's Due Process Clause incorporates the guarantees of the Fifth Amendment against the states, not merely state legislatures and state executive branches. U.S. Const. amend. XIV ("nor shall any State deprive any person of life, liberty, or property, without due process of law"). *See also Stop the Beach Renourishment, Inc. v. Florida Dep't of Envt'l Protection*, 130 S. Ct. 2592, 2601-02 (2010) (Scalia, J.) ("In sum, the Takings Clause bars the State from taking private property without paying for it, no matter which branch is the instrument of the taking.").

center to allow public handbilling on its property, but acknowledged:

> Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way. Indeed, our cases demonstrate that there are limits on governmental authority to abolish "core" common-law rights, including rights against trespass, at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.

PruneYard, 447 U.S. at 93-94 (Marshall, J., concurring). Justice Marshall noted that in *Ingraham v. Wright*, 430 U.S. 651 (1977), the Court determined the Due Process Clause prohibits abolishment of "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Id*. at 672-73, *quoted in PruneYard*, 447 U.S. at 94 n.3 (Marshall, J., concurring).

The ability to maintain a littoral parcel's physical contact with the ocean is not simply a unilateral expectation or a product of positive law, but an expectation "that has the law behind it." *Kaiser Aetna*, 444 U.S. at 178. Thus, it is property expressly protected by the Fifth and Fourteenth Amendments from arbitrary or capricious state action which includes a state legislative or court summarily altering established common law rules on which property owners have relied for more than a century.

C. In *Palazzolo*, This Court Rejected The "Notice" Theory

The court below distinguished between existing pre-2003 accreted land, and the right to future accretion, suggesting that littoral property owners from 2003 forward were on notice of the change in the law. When a legislature transfers valuable legal rights from an owner to the state (even when those interests may come into being in the future, or not at all), this Court has found a property interest exists, and that the legislation is a taking. For example, the Court invalidated as a taking a statute in which Congress determined that small interests in Indian land would escheat to the tribe and could not be passed to heirs by descent or devise. *Babbitt v. Youpee*, 519 U.S. 234, 245 (1977). Similarly, when the Florida legislature reassigned interest on monies which litigants deposited in the courts from the owners of the funds to the state, the Court found a taking, even though the interest had not yet been earned. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980). The court below, however, ignored this point. It relied on three other cases, *Western Pac. Ry. Co. v. Southern Pac. Co.*, 151 F. 376 (9th Cir. 1907); *Cohen v. United States*, 162 F. 364 (C.C.N.D. Cal. 1908); and *Latourette v. United States*, 150 F. Supp. 123 (D. Or. 1957), to hold that "future accretion" was not property so the legislature could take it without consequence. *Maunalua Bay*, 222 P.3d at 460.

Other, more recent decisions from this Court have repudiated that rationale. For example, the

Ninth Circuit's statement, quoted by the court below that "there can be no question, we think, that the right to future possible accretion could be divested by legislative action," *Western Pac.*, 151 F. at 399 (quoted in *Maunalua Bay*, 122 Haw. at 53, 222 P.3d at 460), in addition to being contradicted by *Babbitt* and *Webb's Fabulous Pharmacies*, is directly at odds with the rejection of the "notice" defense in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). There, the state argued the property owner lost his right to claim a taking because it acquired the property after the regulation claimed to work a taking was adopted. *Palazzolo* dismissed the argument as "Hobbesian" –

> The theory underlying the argument that postenactment purchasers cannot challenge a regulation under the Takings Clause seems to run on these lines: Property rights are created by the State. So, the argument goes, by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation.
>
> The State may not put so potent a Hobbesian stick into the Lockean bundle . . . Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect,

> to put an expiration date on the Takings Clause.

Palazzolo, 533 U.S. at 626-27. The rationale of the court below was precisely the opposite, as evidenced by its conclusion that the Hawaii Constitution's "public trust" provision, Haw. Const. art. XI, § 1, "clearly diminishes any expectation that oceanfront owners in Hawaii had and may have in future accretions to their property." *Maunalua Bay*, 222 P.3d at 461 (*citing In re Water Use Permit Applications*, 9 P.3d 409, 447 (Haw. 2000)). This is very nearly a paraphrase of the "notice" defense rejected in *Palazzolo*.

II. HAWAII'S LONG HISTORY OF TRANSFERRING ESTABLISHED PRIVATE PROPERTY RIGHTS TO THE PUBLIC WITHOUT JUST COMPENSATION

The case at bar is the latest chapter in a long history of erosion of traditional common law property rights in Hawaii in favor of the public. The examples summarized in this section culminated with the Hawaii Supreme Court concluding that "the western concept of exclusivity is not universally applicable in Hawaii." *Public Access Shoreline Hawaii v. County of Hawaii Planning Comm'n*, 903 P.2d 1246, 1268 (Haw. 1995), *cert. denied*, 517 U.S. 1163 (1996). The summaries of these cases provides context to the decision in the case at bar, and reveal the "poor relation" status afforded long-standing common law property

rights in Hawaii. These cases show why this Court's review of the case at bar is vitally needed – to recognize that core property rights cannot be redefined without compensation.

In *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985), a case in which the Ninth Circuit invalidated the Hawaii Supreme Court decision on judicial takings grounds, started out in 1959 in a Kauai county trial court as a dispute among several sugar plantations over which of them possessed the rights to surplus water in a Kauai stream. The parties based their claims on long-standing water law and prescriptive rights precedent of the Kingdom, Territory, and State of Hawaii. Nine years later, the trial court issued a 65-page decision based on that precedent, and declared who was entitled to what. At that stage, the case was just another in a long line of water disputes between private parties. The losing parties appealed to the Hawaii Supreme Court, where no party – including the State – argued the controlling water law was anything but as established by long-standing Hawaii precedent.

The Hawaii Supreme Court, however, "sua sponte overruled all territorial cases to the contrary and adopted the English common law doctrine of riparian rights." *Robinson*, 753 F.2d at 1470 (*citing McBryde Sugar Co. v. Robinson*, 504 P.2d 1330 (Haw. 1973)). The court "also held sua sponte that there was no such legal category as 'normal daily surplus water'

and declared that the state, as sovereign, owned and had the exclusive right to control the flow," and "that because the flow of the Hanapepe [stream] was the sovereign property of the State of Hawaii, McBryde's claim of a prescriptive right to divert water could not be sustained against the state." *Robinson*, 753 F.2d at 1470. In other words, in a dispute between "A" and "B" over which of them possessed water rights, the Hawaii Supreme Court simply declared "neither of you do, the State owns it all." But after a rehearing on a narrow issue of state law, during which the court rebuffed an attempt by the private parties to raise federal constitutional issues, the court reaffirmed the *McBryde* ruling, with two Justices dissenting. *See McBryde Sugar Co. v. Robinson*, 517 P.2d 26 (Haw. 1973) (per curiam) (*McBryde II*). One justice switched his vote from the first opinion, concluding that it was a "radical departure" from established law, and was a taking. *McBryde II*, 517 P.2d at 27 (Levinson, J., dissenting). This Court declined to review the Hawaii Supreme Court.

But that was not the last word. The sugar companies sued state officials in federal district court under 42 U.S.C. § 1983. The district judge held that the Hawaii Supreme Court's *McBryde* decision took property without just compensation, and enjoined the state from enforcing the decision. *See Robinson v. Ariyoshi*, 441 F. Supp. 559 (D. Haw. 1977). On appeal, the Ninth Circuit addressed the merits:

> The state conceded at oral argument that the Fourteenth Amendment would require it to

> pay just compensation if it attempted to take vested property rights. The substantive question, therefore, is whether the state can declare, by court decision, that the water rights in this case have not vested. The short answer is no.

Robinson, 753 F.2d at 1473. The court determined the water rights claimed by the private parties were vested rights, and that neither the state legislature nor the state supreme court could abrogate those private rights in favor of the public rights without condemnation and payment of just compensation.

In *In re Ashford*, 440 P.2d 76 (Haw. 1968), the Hawaii Supreme Court rejected over 100 years of its own precedent, which held the boundary between public and private property on Hawaii's beaches was the mean high water line. The *Ashford* court disregarded these established precedents and changed the legal boundary of littoral parcels from the mean high water line to the "upper reaches of the waves," effectively confiscating for the public 20 to 30 lateral feet of what had until then always been private property. *Ashford*, 440 P.2d at 77. The court reached this result by reinterpreting the term *ma ke kai* ("along the sea" in Hawaiian) in the parcel's royal patent, concluding the earlier cases all misunderstood the true meaning of the phrase. To reinterpret the meaning of *ma ke kai*, the court turned to oral testimony and reputation evidence regarding "customary" usage of the shoreline. *Id*. One Justice dissented, noting the majority relied on "spurious historical

assumptions," and concluded there was nothing in ancient tradition, custom, practice, or usage which dictated the use of the upper reaches of the waves instead of the mean high water mark as established by the earlier cases. *Ashford*, 440 P.2d at 93 (Marumoto, J., dissenting).

In *County of Hawaii v. Sotomura*, 517 P.2d 57 (Haw. 1973), *cert. denied*, 419 U.S. 872 (1974) the Hawaii Supreme Court sua sponte redefined the seaward boundary of a Torrens-titled littoral parcel from the high water mark to the "upper reaches of the wash of the waves," holding the county owed no compensation for the land seaward of the new boundary line because it was owned by the state. One Justice dissented, noting:

> I will not indulge in an extensive dissertation against the holding, for to do so will be but an exercise in futility. I merely point out that, in my opinion, the holding is plain judicial law-making. That is apparent from the quoted statement in the opinion that the holding is being made "as a matter of law," and from the following reason given therefor: "*Public policy, as expressed by this court*, favors extending to public use and ownership as much as possible of Hawaii's shoreline as is reasonably possible."

Sotomura, 517 P.2d at 189 (Marumoto, J., dissenting) (emphasis original). The property owners brought suit in federal district court for due process violations. The court determined "[j]udicial transfers of title to

private lands to the State which do not permit the owner an opportunity to be heard or to present evidence is not constitutionally valid." *Sotomura v. County of Hawaii*, 460 F. Supp. 473, 478 (D. Haw. 1978).

> Hawaii, the seaweed line was used to indicate the level of the high tides and high water mark. The decision in *Sotomura* was contrary to established practice, history and precedent and, apparently, was intended to implement the court's conclusion that public policy favors extension of public use and ownership of the shoreline. A desire to promote public policy, however, does not constitute justification for a state taking private property without compensation.

Id. at 480-81.

Relying on the public trust doctrine, in *Hawaii v. Zimring*, 566 P.2d 725 (Haw. 1977), the Hawaii Supreme Court ignored its prior precedent regarding construction of property descriptions on the shoreline and publicized extensions of land occurring after a lava flow. In 1955, the active volcano on the island of Hawaii created 7.9 acres of new land when lava flowed into the ocean. *Id*. at 727. The state assessed the littoral landowner property taxes on the new land, but thirteen years later sought to quiet title, asserting public ownership of the new land in itself. *Id*. at 738. The littoral owner's boundary description extended ownership to the "high water mark."

The Hawaii Supreme Court, however, disregarded the accepted meaning of this term, holding instead the description was merely a "natural monument" and not an "azimuth and distances" description. *Id*. at 745 (Vitousek, J., dissenting). Consequently, the court vested title to the new land in the state because to adhere to the deed's language would, in the court's view, result in an inequitable "windfall" that should not "enrich" any one landowner, but rather should inure to the collective public. *Id*. at 734-35.

Finally, in *Public Access Shoreline Hawaii v. County of Hawaii Planning Comm'n*, 903 P.2d 1246, 1268 (Haw. 1995), *cert. denied*, 517 U.S. 1163 (1996), the Hawaii Supreme Court redefined the nature of fee simple absolute ownership, and abandoned the "Western concept of exclusivity" to impose a blanket physical easement retroactively over all Hawaii property. The case arose as a dispute over the standing of native Hawaiians to intervene in an agency hearing regarding a coastal permit sought by a property owner. *Id*. at 1250. The agency denied standing, concluding the plaintiffs did not have interests different from the general public. The Hawaii Supreme Court determined that as native Hawaiians, the plaintiffs did possess unique rights, because custom dictated that Hawaii property owners never possessed the right to fully exclude native Hawaiians who wished to exercise "customary and traditional practices" on private property. *Id*. at 1268. The court found its decision did not work a taking because the custom was a "background principle" of Hawaii

property law, despite the fact it virtually eliminated the right to exclude. *Id*. at 1268 (*citing Stevens v. City of Cannon Beach*, 854 P.2d 449, 456 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994)).

Act 73 and the case at bar are simply the latest example of these kind of decisions from Hawaii's courts and legislature. This Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari to the Hawaii Intermediate Court of Appeals court should be granted.

Respectfully submitted,

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