No. 28175

IN THE SUPREME COURT OF THE STATE OF HAWAII

MAUNALUA BAY BEACH OHANA 28, a Hawaii Non-Profit Corporation; MAUNALUA BAY BEACH OHANA 29, a Hawaii Non-Profit Corporation; and MAUNALUA BAY BEACH OHANA 38, a Hawaii Non-Profit Corporation, individually and on behalf of all others similarly situated, Plaintiffs-Appellees, vs. STATE OF HAWAII, Defendant-Appellant.	CIVIL NO. 05-1-0904-05 EEH (Inverse Condemnation) APPEAL FROM THE ORDER GRANTING PLAINTIFF'S AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT FILED FEBRUARY 13, 2006 (filed Sep. 1, 2006) FIRST CIRCUIT COURT HON. Elizabeth Eden Hifo

MOTION OF PACIFIC LEGAL FOUNDATION FOR LEAVE TO SUBMIT BRIEF AMICUS CURIAE IN SUPPORT OF MAUNALUA BAY BEACH OHANA 28'S APPLICATION FOR A WRIT OF CERTIORARI

EXHIBIT "A"

CERTIFICATE OF SERVICE

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MOTION OF PACIFIC LEGAL FOUNDATION FOR LEAVE TO SUBMIT BRIEF AMICUS CURIAE IN SUPPORT OF MAUNALUA BAY BEACH OHANA 28'S APPLICATION FOR A WRIT OF CERTIORARI

Pursuant to Haw. R. App. P. 28(g), Pacific Legal Foundation (PLF) respectfully moves for an order permitting it to submit a brief amicus curiae in support of Maunalua Bay Beach Ohana 28's Application for a Writ of Certiorari (filed Apr. 22, 2010). PLF's amicus brief will address the first Question Presented by the Application:

> Did the ICA commit grievous error and disregard controlling decisions from this Court when it held that the State can permanently fix the seaward boundary of oceanfront properties and deprive littoral property owners of future accretion without paying just compensation?

PLF's proposed amicus curiae brief is attached as Exhibit "A."

I. IDENTITY AND INTEREST OF PLF AS AMICUS CURIAE

Founded in 1973, PLF has a long tradition of appearing as a friend of the court and on behalf of parties in support of constitutional rights in Hawaii and federal courts, and has participated in some of the most important regulatory takings, shoreline, and property cases in this Court and the U.S. Supreme Court. PLF is a nonprofit tax-exempt public interest law foundation organized under the laws of the State of California, registered with the State of Hawaii, supported primarily by voluntary private donations from thousands of citizens across the country, including numerous supporters in Hawaii. PLF has offices in Honolulu, as well as Sacramento, California; Stuart, Florida; and Bellevue, Washington.

II. PLF's ABILITY TO AID RESOLUTION OF THIS CASE

PLF submitted an amicus brief in the Intermediate Court of Appeals in the present case. PLF is participating to provide the Court with historical perspective on the accretion rules and takings remedies, and because it is concerned whenever the government attempts to upset long-standing rules and settled expectations, in order to take private property by legislative decree. PLF attorneys have directly represented parties or amicus curiae in many of the most important regulatory takings, shoreline, and property decisions from the U.S. and Hawaii Supreme Courts. Most recently, PLF participated as amicus curiae in *Leslie v. Bd. of Appeals, County of Hawaii*, 109 Haw. 384, 126 P.3d 1071 (2006) (shoreline issues), represented a party in *Maui Tomorrow v. State of Hawaii*, 110 Haw.

234, 131 P.3d 517 (2006) (public trust issues and federal civil rights), and represented parties in *County of Kauai* ex rel. *Nakazawa v. Baptiste*, 115 Haw. 15, 165 P.3d 916 (2007)

PLF also filed an amicus curiae brief in *Stop the Beach Renourishment, Inc. v. Florida Dep't of Environmental Protection*, No. 08-11 (U.S., cert. granted. June 15, 2009), a case now awaiting decision by the U.S. Supreme Court involving the question of whether the Florida Supreme Court's interpretation of its common law of littoral accretion is constrained by the Takings and Due Process Clauses of the U.S. Constitution. PLF has participated in the most important takings and shoreline cases of the past 30 years. *See, e.g., Kelo v. City of New London,* 545 U.S. 469 (2005) (public use in condemnation); *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528 (2005) (regulatory takings); *Palazzolo v. Rhode Island*, 533 U.S. 601 (2001) (regulatory takings); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (regulatory takings and shoreline); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (same); *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (regulatory takings); *Dolan v. City of Tigard*, 512 U.S.374 (1994) (regulatory takings); *Kaiser Hawaii Kai Dev. Co. v. City and County of Honolulu*, 777 P.2d 244 (Haw. 1989) (shoreline); *Robinson v. Ariyoshi*, 933 F.2d 781 (9th Cir. 1991) (takings); *Public Access Shoreline Hawaii v. Hawaii Planning Comm'n*, 902 P.2d 1246 (Haw. 1996) (public trust); *In re Water Use Permit Applications*, 25 P.3d 802 (Haw. 2001) (public trust).

PLF believes that its public policy perspective and long-time litigation experience in takings, shoreline, and coastal zone law will provide a helpful perspective to aid this court in resolution of this case. For the above reasons, PLF requests that its motion to file a brief amicus curiae be granted.

DATED: Honolulu, Hawaii, April 28, 2010.

Respectfully submitted,

DAMON KEY LEONG KUPCHAK HASTERT

ROBERT H. THOMAS
Attorneys for Amicus Curiae
Pacific Legal Foundation

No. 28175

IN THE SUPREME COURT OF THE STATE OF HAWAII

MAUNALUA BAY BEACH OHANA 28, a Hawaii Non-Profit Corporation; MAUNALUA BAY BEACH OHANA 29, a Hawaii Non-Profit Corporation; and MAUNALUA BAY BEACH OHANA 38, a Hawaii Non-Profit Corporation, individually and on behalf of all others similarly situated, Plaintiffs-Appellees, vs. STATE OF HAWAII, Defendant-Appellant.	CIVIL NO. 05-1-0904-05 EEH (Inverse Condemnation) APPEAL FROM THE ORDER GRANTING PLAINTIFF'S AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT FILED FEBRUARY 13, 2006 (filed Sep. 1, 2006) FIRST CIRCUIT COURT HON. Elizabeth Eden Hifo

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF MAUNALUA BAY BEACH OHANA 28'S APPLICATION FOR A WRIT OF CERTIORARI

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EXHIBIT "A"

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF MAUNALUA BAY BEACH OHANA 28'S APPLICATION FOR A WRIT OF CERTIORARI

Amicus Curiae Pacific Legal Foundation (PLF) submits this brief in support of the Application for Writ of Certiorari filed by Maunalua Bay Beach Ohana 28. This brief addresses the first Question Presented by the Application:

> Did the ICA commit grievous error and disregard controlling decisions from this Court when it held that the State can permanently fix the seaward boundary of oceanfront properties and deprive littoral property owners of future accretion without paying just compensation?

This Court should grant the Application and vacate that portion of the ICA's opinion that holds that Act 73 was not a taking of "future" accretion, and enter judgment for plaintiffs that Act 73 effected an uncompensated taking of their right to littoral accretion.

SUMMARY OF ARGUMENT

The ICA got it mostly right. It correctly held that Act 73 was a taking because it abrogated the long-standing common law of the Kingdom, Territory, and State of Hawaii by reassigning ownership of accreted land from littoral owners to the State without providing compensation. *Maunalua Bay Beach Ohana 28 v. State of Hawaii*, 122 Haw. 34, 55, 222 P.3d 441, 462 (Haw. Ct. App. 2009) ("[A]t the time Act 73 was enacted, it was Hawai'i common law that shoreline property from the sea to the high-water mark was owned by the State, and any oceanfront accretions above the high-water mark belonged to the adjoining property owner . . . Act 73 clearly changed the common law by declaring that all accreted lands . . . was now state or public property.") (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). *See, e.g., Halstead v. Gay*, 7 Haw. 587, 588 (1889) (accreted lands "belong to the owner of the contiguous land to which the addition is made").

However, the ICA gravely erred when it crafted an artificial distinction between "existing" and "future" accretion, and held that "future" accretion was not "vested" and was therefore was not property protected from uncompensated appropriation. *Maunalua Bay*, 122 Haw. at 54, 222 P.3d at

461 ("Plaintiffs have no vested right to future accretions that may never materialize and, therefore, Act 73 did not effectuate a taking of future accretions without just compensation.").

This brief addresses two issues.

First, the Takings and Due Process Clauses of the United States Constitution, and their counterparts in the Hawaii Constitution, do not recognize any distinction between "vested" existing accretion which is property, and "future" accretion, which is not. The right of littoral owners to acquire ownership of accreted land – even if it occurs in the future or indeed, may never occur at all on any particular littoral parcel – is a present, vested property right, long-recognized by the decisions of this Court and the U.S. Supreme Court as a fundamental attribute of property protected from uncompensated acquisition by the State.

Second, by holding that "future accretion" is not property and that its ownership may be claimed by the State, the ICA effectively redrew the public/private beach boundary recognized by this Court in *In re Ashford*, 50 Haw. 314, 440 P.2d 76 (1968). In *Ashford*, this Court held that the "upper reaches of the high wash of the waves" is the boundary between public beach and private property on *all* beaches. *Ashford*, 50 Haw. at 315, 440 P.2d at 77. However, under the ICA's confirmation of Act 73's arbitrary "existing/future" distinction, the boundary will vary from parcel-to-parcel, depending on whether it has been subject to erosion or accretion, and whether the accretion occurred before 2003, or after. The practical consequence of the ICA's conclusion on "future accretion" is statewide confusion about the location of the public/private boundary on the beaches.

IDENTITY AND INTEREST OF AMICUS CURIAE

Founded in 1973, PLF has a long tradition of appearing as a friend of the court and on behalf of parties in support of federal and Hawaii constitutional rights in Hawaii and federal courts, and has participated in some of the most important regulatory takings, shoreline, and property cases in this Court and the U.S. Supreme Court.[1] PLF and undersigned counsel also filed amicus curiae briefs in

---

1. *E.g.*, *Kelo v. City of New London*, 545 U.S. 469 (2005) (public use in condemnation); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005) (regulatory takings); *Palazzolo v. Rhode Island*, 533 U.S. 601 (2001) (regulatory takings); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (regulatory takings and shoreline); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (same); *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (regulatory takings); *Dolan v. City of Tigard*, 512 U.S.374 (1994) (regulatory takings); *Kaiser Hawaii Kai Dev. Co. v. City and County of Honolulu*, 70 Haw. 480, 777 P.2d 244 (1989) (continued...)

Stop the Beach Renourishment, Inc. v. Florida Dep't of Environmental Protection, No. 08-11 (U.S., cert. granted. June 15, 2009), a case now awaiting decision by the U.S. Supreme Court involving the question of whether the Florida Supreme Court's interpretation of its law of littoral accretion is constrained by the Takings and Due Process Clauses of the U.S. Constitution.

PLF is participating to provide the Court with historical perspective on the accretion rules and takings remedies, and because it is concerned whenever the government attempts to upset long-standing rules and settled expectations, and take private property by legislative decree.

ARGUMENT

I. ALL ACCRETION – WHETHER PRESENTLY EXISTING OR NOT – IS A "VESTED" PROPERTY INTEREST PROTECTED FROM UNCOMPENSATED EXPROPRIATION

A. Act 73: Accretion Is "State Property"

Until the Legislature adopted Act 73 in 2003, the common law of the Kingdom, Territory, and State of Hawaii uniformly held that littoral owners lose ownership of land when it erodes, but when it accretes, the new land belongs to the owner of the littoral parcel. *See Halstead v. Gay*, 7 Haw. 587, 588 (1889); *State* ex rel. *Kobayashi v. Zimring*, 56 Haw. 106, 120-21, 566 P.2d 725, 734 (1977); *In re Banning*, 73 Haw. 297, 304, 832 P.2d 724, 728 (1992). "The rules applying to accretion and erosion are inseparably bound together, the gains of one compensating for the losses of the other." Comment, *The Rights of a Riparian Owner in Land Lost by Erosion*, 24 Yale L.J. 162 (1914). These rules insure that littoral parcels remain so, even when the water's edge shifts naturally over time. This is arguably the dominant and most valuable aspect of owning a littoral parcel. *See Hughes v. Washington*, 389 U.S. 290, 293 (1967).

As the ICA held, in Act 73 the Legislature radically altered that ancient balance. Overthrowing the reciprocal system of accretion and erosion, Act 73 instead decreed that the

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1. (...continued)
(shoreline); *Robinson v. Ariyoshi*, 933 F.2d 781 (9th Cir. 1991) (takings); *Public Access Shoreline Hawaii v. Hawaii Planning Comm'n*, 79 Haw. 425, 902 P.2d 1246 (1996) (public trust); *In re Water Use Permit Applications*, 94 Haw. 97, 25 P.3d 802 (Haw. 2001) (public trust); *Leslie v. Bd. of Appeals, County of Hawaii*, 109 Haw. 384, 126 P.3d 1071 (2006) (shoreline issues); *Maui Tomorrow v. State of Hawaii*, 110 Haw. 234, 131 P.3d 517 (2006) (public trust issues and federal civil rights); *County of Kauai* ex rel. *Nakazawa v. Baptiste*, 115 Haw. 15, 165 P.3d 916 (2007) (property taxation).

government henceforth owns everything. Under this newly created one-sided regime, the State not only continues to acquire private lands lost to erosion, but also owns accreted lands, and no one but the State is able to register or quiet title to accreted land unless upland owners overcome a virtually insurmountable standard of proof. The ICA correctly recognized that the Takings and Due Process Clauses of the U.S. and Hawaii Constitutions prohibit the State from destroying settled expectations and confiscating private property rights by legislative fiat, and declaring – without even the minimal protections of predeprivation condemnation procedures and payment of just compensation – that what had been private property for centuries is, from here forward, public property. The ICA correctly held that Act 73 abolished the accretion rule and turned the reciprocal equation into a one-way street: an owner still lost land when it eroded, but when it accreted, a formerly beachfront parcel would be separated from contact with the upper reaches of the high wash of the waves by a State-owned beach, potentially transforming beach*front* land into beach*view* land.

However, the court held that because "future" accretion might never happen, the State could acquire it without first paying compensation. *Maunalua Bay*, 122 Haw. at 53, 222 P.3d at 460. The panel accepted the State's argument that Act 73 did not affect a taking of future accretion, because the right is simply a contingent future interest. The panel 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.*

B. "Future" Accretion Is A Present Property Interest

The ICA panel erroneously dismissed as mere "dictum" the U.S. Supreme Court's determination that:

> *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). It is this ancient balance – the littoral owner must take the bitter with the sweet – that compels this result: the right to accretion that may attach to a littoral parcel in the future is a right presently "vested" because the littoral owner is bearing the risk of erosion now.

The ICA panel relied on four cases to support its holding that "future" accretion is not property. The most critical case is *Damon v. Tsutsui*, 31 Haw. 678 (Terr. 1930), because the court asserted it presented "a somewhat similar situation." *Maunalua Bay*, 122 Haw. at 53, 222 P.3d at 460. The court quoted *Damon* for the proposition that "[r]ights are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. On the other hand, a mere expectancy of future benefit, or a contingent interest in property founded on anticipated continuance of existing laws, does not constitute a vested right." *Damon*, 31 Haw. at 693, quoted in *Maunalua Bay*, 122 Haw. at 53, 222 P.3d at 460. The ICA's reliance on this case to hold that "future accretion" is not a property interest is misplaced for two reasons.

First, under *Damon*'s definition of a "vested right," the right to accreted land – even land that has not yet accreted – is a "right to enjoyment, present *or prospective*" that has become the property of specific people as a present interest. *Damon*, 31 Haw. at 693 (emphasis added). Thus, *Damon* case should cut *for* the littoral property owners in the case at bar, not against them. It is true that land may never accrete on any particular littoral owner's land; but if it does, the common law rule is that it becomes the property of the littoral owner. *Halstead v. Gay*, 7 Haw. 587 (1889) (accreted lands "belong to the owner of the contiguous land to which the addition is made"). That is a valuable property interest, presently vested in the littoral owner.

Second, *Damon* was not a case which presented a "somewhat similar situation" to the case at bar. *Damon* turned on whether a lessee had offshore fishing rights allegedly granted to his predecessor during the Kingdom period. Exclusive fishing rights were originally created in 1839 when the King (who, as the sovereign, had allodial title to all land and fishing rights) "gave" a portion of them "to the common people." *Haalelea v. Montgomery*, 2 Haw. 62, 65 (1858). These rights, which granted *ahupuaa* tenants fishing rights as long as they remained tenants, were

eventually codified by statute. The *Damon* court made it clear that these rights were limited and stemmed from – and were dependent upon – the King's original gift:

> But for this gift or grant the tenants would not have had any rights; and they have them only to the extent and with limitations expressed in the grant.

Damon, 31 Haw. at 688. After annexation of Hawaii by the United States in 1898, the Hawaii Organic Act of 1900 repealed these laws, exempting, however, those who could show "vested rights" by judicial confirmation. Those who did not confirm their fishing rights were not "vested" under the Organic Act, and were subject to the repeal of the King's gift:

> In our opinion those persons who became tenants after April 30, 1900, as did Tsutsui in 1929, did not have any "vested" rights within the meaning of the Organic Act and therefore the repealing clause was operative as against them.

Damon, 31 Haw. at 693. The ICA conflated the statutory rights in *Damon* with the common law right of accretion. The fishing rights in *Damon* were a case of "what the King giveth, the King may taketh away," much like the modern cases which hold that there is no property or reliance right in the continued existence of a statutory scheme. *See, e.g., American Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1379 (Fed. Cir. 2004).

The Organic Act's repeal of the King's gift at issue in *Damon* is a long way from the Legislature prospectively abolishing a common law right which does not have its origin in a grant or a statute. The fishing right at issue in *Damon* was solely the product of positive law, and consequently could be altered or repealed by the sovereign. The common law right of accretion, by contrast, does not exist by virtue of a grant or by statute; rather, it is a normative "stick" of the "bundle of rights," immunized by the Fifth and Fourteenth Amendments from a state legislature's or state court's reassignment of the right to the public without condemnation and payment of just compensation. As Justice Thurgood Marshall once observed:

> 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 Shopping Center v. Robins, 447 U.S. 74, 93-94 (1980) (Marshall, J., concurring). The nearly universal rules of accretion and erosion are precisely this type of "core" property right. The ability to maintain a littoral parcel's physical contact with the upper reaches of the wash of the waves perpetually is not simply a unilateral expectation or a product of positive law, but an expectation "that has the law behind it." *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1978). In other words, it is "property" within the meaning of the Fifth and Fourteenth Amendments.

C. The ICA's "Notice" Theory Was Rejected By The U.S. Supreme Court

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), the U.S. Supreme 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 ICA, however, did not mention these cases. It relied on three others, *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*, 122 Haw. at 53, 222 P.3d at 460. These cases are distinguishable, as summarized in Maunalua Bay Beach Ohana 28's Application for a Writ of Certiorari (filed Apr. 22, 2010), and even if they were not, the U.S. Supreme Court's rule in *County of St. Clair* quoted above that the "right to future alluvion is a vested right" is more compelling than outdated lower court cases.

Other, more recent decisions from the U.S. Supreme Court have also repudiated the ICA's rationale. For example, the Ninth Circuit's statement, quoted by the ICA, 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 U.S.

Supreme Court's rejection of the "notice" defense in *Palazzolo v Rhode Island*, 533 US 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. . . Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through passage of time or title. 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. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

Palazzolo, 533 U.S. at 626-27. The ICA's rationale was precisely the opposite of this holding, 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*, 122 Haw. at 54, 222 P.3d at 461 (citing *In re Water Use Permit Applications*, 94 Haw. 97, 135, 9 P.3d 409, 447 (2000)). This is very nearly a paraphrase of the "notice" defense rejected in *Palazzolo*.

A hypothetical starkly illustrates the fallacy of the ICA's rationale. Under the panel's "future" accretions theory, the Legislature could adopt a law mandating that from here forward, upon someone's death, all of her property escheats to the State. That interest, after all, is not "vested" in future heirs, and (in the ICA's words) "may never materialize," so it is not property and the State is free to acquire it without compensation. 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 (and their Hawaii Constitution counterparts) is clear. *See, e.g., Babbitt*, 519 U.S. at 245; *Webb's Fabulous Pharmacies*, 449 U.S. at 161.

II. THE ICA DECISION CONTRADICTS *ASHFORD*

Act 73 did not just abrogate the common law of accretion. In doing so, it also changed the common law of shoreline boundaries. Under the rule of *In re Ashford*, 50 Haw. 314, 440 P.2d 76 (1968), the boundary between public and private beach on most littoral parcels is defined by the "upper reaches of the high wash of the waves." As beaches are constantly either gradually eroding or accreting, that boundary is not fixed in one place, but moves wherever the high wash normally is. The boundary is the same on nearly all littoral parcels, and is relatively easy to locate. (Under *Ashford*, the "debris line" and the "vegetation line" are merely *evidence* of the location of the high wash of the waves and helpful in locating it, but are not the boundary line itself.) Consequently, a person walking laterally along a beach would have a fairly good idea of what property is public (the beach *makai* of the high wash of the waves as evidenced by the debris or vegetation line), and what is private (the beach *mauka* of that line). The *Ashford* rule is universally applicable, regardless of whether a particular beach is accreting or eroding.

After Act 73, however, the high wash is only the public-private boundary on eroded beaches, or where the beach has not changed. Where a beach has grown, the public-private boundary is somewhere further inland from the high wash of the waves, since Act 73 as interpreted by the ICA's "future accretion" holding fixed the boundary in 2003, and creates a State-owned strip of public beach seaward of the "old" 2003 boundary. The ICA also did not address what would be the state of ownership if a beach first eroded, then accreted.

The pre-Act 73 *Ashford* rule, with its single demarcation of the littoral boundary between public and private beach at least provided some certainty: if members of the public remained seaward of the high wash – wherever it was on a particular day – they were on a public beach. Now, a person walking along the beach would very likely have no idea of where the "new" post-*Maunalua Bay* boundary is, or which part of a beach is private and which is public.

CONCLUSION

This Court should grant the Application and vacate that portion of the ICA's opinion that holds that Act 73 was not a taking of "future" accretion, and enter judgment for plaintiffs that Act 73 effected an uncompensated taking of their right to littoral accretion.

DATED: Honolulu, Hawaii, _____, 2010.

Respectfully submitted,

DAMON KEY LEONG KUPCHAK HASTERT

_____

ROBERT H. THOMAS
Attorneys for Amicus Curiae
Pacific Legal Foundation

No. 28175

IN THE SUPREME COURT OF THE STATE OF HAWAII

MAUNALUA BAY BEACH OHANA 28, a Hawaii Non-Profit Corporation; MAUNALUA BAY BEACH OHANA 29, a Hawaii Non-Profit Corporation; and MAUNALUA BAY BEACH OHANA 38, a Hawaii Non-Profit Corporation, individually and on behalf of all others similarly situated, Plaintiffs-Appellees, vs. STATE OF HAWAII, Defendant-Appellant.	CIVIL NO. 05-1-0904-05 EEH (Inverse Condemnation) APPEAL FROM THE ORDER GRANTING PLAINTIFF'S AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT FILED FEBRUARY 13, 2006 (filed Sep. 1, 2006) FIRST CIRCUIT COURT HON. Elizabeth Eden Hifo

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date a true and correct copy of foregoing document was duly served upon the following individuals by mailing said copy, postage prepaid, to their last known addresses as follows:

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DATED: Honolulu, Hawaii, April 28, 2010.

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