

No. 10-\_\_\_\_\_

..... ♦ .....

**In the Supreme Court of  
the United States**

..... ♦ .....

DONN CARSWELL, GALE CARSWELL, FRANK  
O. HAY, PAUL T. MATSUNAGA, ARLINE Y.  
MATSUNAGA, LINDA M. ALIMBAYO GUEN,  
PETER BECKERMAN, PETER K. BALDWIN,  
SAMUEL BLAIR, PAULETTE BURTNER, JOEL  
CAVASSO, FRANK W.N. COX, VIRGINIA M.H.  
DUNAS, ELIZABETH DUNFORD, GLENN  
HONTZ, WAYNE JACINTHO, CRYSTAL S.  
JONES, RICHARD C. JONES, DAVID KOCH,  
LEALANI CORPORATION, JOANN GIVENS,  
MICHAEL GIVENS, BASIL L. MAYO, SHERILL  
E. MILLER, BARBARA PUTZIER, KARL  
RAMIREZ, PATRICIA SHEEHAN, VICKY  
TAYLOR, A.J. TOULON, JR., ELIZABETH  
TOULON, WAIMEA GARAGE, LTD., CECILIA  
A. WILLIAMS, HARWOOD D. WILLIAMSON,  
NANCY H. WILLIAMSON, CYNTHIA WILSON,  
JAMES WILSON, WAIYEE CARMEN WONG,

*Petitioners,*

v.

DEPARTMENT OF LAND AND NATURAL  
RESOURCES, STATE OF HAWAII,

*Respondents.*

..... ♦ .....

.....

On Petition For A Writ Of Certiorari  
To The Supreme Court of The State of Hawaii

..... ♦ .....

**PETITION FOR A WRIT OF  
CERTIORARI**

..... ♦ .....

DANIEL G. HEMPEY  
*Counsel for Petitioners*

HEMPEY & MEYERS, LLP  
3175 Elua Street, Suite C  
Lihu'e, Hawai'i 96766  
Telephone: (808) 632-2444

## QUESTION PRESENTED

The State of Hawaii owns land in Kokee State Park on the island of Kauai. Petitioners, have leasehold estates in parcels on the land and own private cabins thereon. Each Petitioner, or his or her predecessor in interest bought, built or inherited his or her private cabin. Collectively, the cabins are worth several million dollars. In 1985 when the prior land leases expired, the State required Petitioners, as a condition of retaining their leasehold interests in the land to sign 20-year land leases containing a clause whereby Petitioners would be required to surrender their pre-existing residence cabins to the State in 2006, when the 1985 lease expired – and receive no compensation in return.

## Question Presented

Whether a state may escape its constitutional obligation to pay just compensation for the taking of a citizen's pre-existing private property, by requiring the un-compensated surrender of the citizen's private property as a contract term in a land lease, where the lease contains no knowing, voluntary, clear or intelligent *waiver* of the constitutional right to just compensation – and where the state would have taken the same private property without just compensation if the lease was not signed, as drafted by the State.

## **RULE 29.6 STATEMENT**

Petitioners have no parent companies, and  
no public company owns ten percent or more of  
their Stock

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Intermediate Court of Appeals of the State of Hawai`i and the Order Rejecting Application for Writ of Certiorari of the Supreme Court of the State of Hawai`i in this case.

### **OPINIONS BELOW**

The Order Rejecting Application for Writ of Certiorari of the Supreme Court of the State of Hawai`i is unreported and is reproduced in the Appendix C. The Order of the Intermediate Court of Appeals of the State of Hawaii, I.C.A. No. 28730, is unreported and is reproduced in the Appendix B.

### **JURISDICTION**

The Order Rejecting Application for Writ of Certiorari of the Supreme Court of the State of

Hawai`i was entered on October 12, 2009. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

## **RELEVANT CONSTITUTIONAL PROVISIONS**

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall \* \* \* be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

## **STATEMENT OF THE CASE**

This case presents a critical issue in the development of jurisprudence involving the takings clause of the Fifth Amendment to the

United States Constitution. The State of Hawai`i owns land in Kokee State Park on the island of Kauai. Petitioners own private cabins on that land. For nearly ninety years, citizens of this historic community have occupied that land under various forms of permits or leases, sometimes for as long as two decades at a time. Appellants or their predecessors-in-interest constructed or purchased the cabins at their own expense. In 1985 the state required that Petitioners execute 20-year Kokee land leases, as drafted by the state, as a condition of lease renewal. These 1985 leases contained a term that the state would later claim required Petitioners to surrender their pre-existing residence cabins to the state in 2006, when the 1985 lease expired.

The 1985 lease is silent as to the issue of “just compensation”.

The relevant text of the “surrender” clause of the 1985 leases was as follows:

That the Lessee shall, at the end of said term or other sooner termination of this lease, peaceably deliver unto the Lessor possession of the demised premises, together with all improvements existing or constructed thereon unless provided otherwise.

If Petitioners refused to sign the 1985 leases, they would have summarily lost their cabins and received no compensation from the State of Hawai`i at that time. Instead, Petitioners signed the 1985 leases – thus

temporarily keeping their cabins from the state.

Twenty-one years later, when the 1985 leases expired, the state claimed ownership of these cabins, maintaining that Petitioners had agreed to “surrender” them to the state – for no compensation - by signing the 1985 leases. The 1985 leases, nor any prior leases, contain any traditional waiver of the lessee’s right to just compensation upon a taking of their private cabins for public use.

On February 10, 2006 the Hawai‘i Board of Land and Natural Resources voted to auction the Kokee Land leases to the public at the end of the 1985 lease term, with new leases including both the land and the cabins to go to the highest bidder at public auction. Petitioners timely filed a request for a Contested Case Hearing with the

Land Board, which was denied. Petitioners filed their Complaint in the Fifth Circuit Court of the Fifth Circuit of the State of Hawai'i on April 11, 2006, and filed a First Amended Complaint on June 20, 2006. Count one of their Complaint sought declaratory relief; Count two sought compensation for a taking of private property; and Count three sounded in reverse (or inverse) condemnation. (App. E. (1<sup>st</sup>. Amended Complaint)).

Petitioners and Respondents each filed motions for Summary Judgment in June 2006. The trial court denied both motions for Summary Judgment and the case went to trial on November 20, 2006. Prior to the taking of evidence at trial, the Parties stipulated that the case would be decided based on the testimony of “representative

Plaintiffs” - and that the findings as to those representative Plaintiffs would be fairly applied to all of the Plaintiffs. The Parties stipulated at trial, inter alia, that:

“As of November 2006, each named plaintiff is the owner, or affiliated with the owner of (at least) some interest in the cabins at issue (except Blair/Wong and Wisen as to which there is a dispute)”; and

“The State of Hawaii refused to allow the successful bidders in the 1985 auction to alter any of the terms in the 1985 lease as presented to them after the auction.”

Stipulated Facts 122 and 123. App. D.

Petitioners argued at Summary Judgment that like all other fundamental constitutional rights, the right to just compensation upon the state taking private property cannot be *contracted* away, absent a knowing, intelligent and clear waiver, of the right – fairly negotiated by the parties.

Petitioners also contended that the state had the burden of proving that Petitioners waived the constitutional right to just compensation if the state took the cabins – and the State presented no evidence of such a waiver at trial.

In Opening Statement at trial, Petitioners' stated, "The burden of proof rests on the government defendants to show a valid waiver of the constitutional right that the government seeks to negate. In this case, the government



seeks to negate the Constitutional right to compensation upon the taking of private property.”

The State’s burden of proving a valid waiver, before it could deprive a citizen of a fundamental constitutional right, also was the first topic addressed in closing argument.

On December 18, 2006 the trial court issued its Findings of Fact and Conclusions of Law, which denied Petitioners’ request for just compensation. App. A., Findings of Fact and Conclusions of Law.

The Court held that there was no necessity of a waiver of the right to just compensation, holding that plaintiffs’ property rights had been surrendered pursuant to the lease – implicitly finding that no waiver of the right was

constitutionally required – and that there property rights were not at issue.

Specifically, the Court ruled that:

“41. Based on the factual findings noted above, the court concludes (even if the leases are ambiguous) that the parties understood, intended, and agreed that at the end of the lease term the State would own all improvements, including the cabins, and that the State would not compensate lessees for the cabins.

42. It follows that lessees have no "private property" that is or can be either taken or damaged. There is no taking and the State is not required to pay just compensation to plaintiffs.”

App. A., Conclusions of Law. 41 and 42.

No Court reviewing the case however has considered whether a constitutionally sufficient waiver of the right to just compensation is required in a contract when the effect of the contract is the loss of the constitutional right.

On August 15, 2007 Petitioners stipulated for the dismissal without prejudice of Count two of the Complaint and the trial court entered judgment in favor of Respondents on all counts. The Court found that,

[I]n this case, the Board is acting as a landlord, i.e. in its proprietary rather than its government capacity. The State is to be treated as other landlords in analogous

situations. The 1985 Lease is governed generally by the law applicable to Leases between private individuals.”

Id. (Conclusion of Law 43., p. 38).

Petitioners timely appealed to the Hawaii Intermediate Court of Appeals (hereinafter referred to as, “I.C.A.”) on September 4, 2007. Petitioner’s first claim of error on appeal was that, “The trial court committed reversible error when it held that the state need not obtain a waiver before forcing a citizen to surrender a constitutional right as a condition of contracting with the state.”

In their brief, Petitioners argued that:

[T]he trial Court erred by failing to require the State to prove that

Plaintiffs waived their constitutional right to be compensated if the state condemned their cabins – and allowing the State to take ownership of millions of dollars worth of private residence-cabins, paying nothing in return. Appellants also contend that the Court erred in permitting the State to make the surrender of this fundamental constitutional right a condition of leasing land from the State in 1985.

Appellant's Opening Brief, I.C.A. at 27.

The Intermediate Court of Appeals, like the trial court, held that Petitioners had contracted away their property rights (via leases that were silent as to compensation), and absent

such property rights, the State could take title to private cabins and pay no compensation in return.

Specifically, the I.C.A found that “the State did not need to obtain Plaintiffs' waiver of their constitutional right to just compensation before claiming the cabins on Plaintiffs' leased lots because according to the unambiguous language of the 1985 Leases -- particularly the “Surrender” provision -- Plaintiffs had no such constitutional right.” (App. B, I.C.A. Summary Disposition Order, p. 3, filed May 22, 2009).

In their Application for Writ of Certiorari to the Hawaii Supreme Court, Petitioners argued, Petitioners were deprived of the right to be justly compensated when the State took their cabins in 2006.

Although the courts below avoided the issue of waiver by holding that Petitioners had no property rights for which just compensation was due, Petitioners maintain that a waiver of the right to just compensation is required when the State seeks to rely on a term in a lease to justify its taking of private property without paying just compensation.

Application for a Writ of Certiorari P. 13.

Petitioners further argued that the 1985 lease cannot be considered a waiver of the right to just compensation, complaining that,

[T]he trial Court held that the matter of compensation for the loss

of property rights in the cabins was purely *contractual*. This holding ignores the fact that the subject lease resulted in the loss of a fundamental constitutional right, and that such a contract cannot stand absent a waiver.

Id. at p. 14.

The Hawaii Supreme Court rejected Petitioners' application for writ of certiorari without comment on October 12, 2009. App. C. Order Rejecting Application for a Writ of Certiorari.



## **REASONS FOR GRANTING THE PETITION**

This case raises a substantial federal question on an issue of national importance concerning conditions under which a state may deprive persons of their constitutional right to just compensation under the Fifth Amendment of the Constitution for the taking of pre-existing private property.

The decision of the Supreme Court of Hawaii poses a fundamental threat to this right.

If the question presented by the petition is resolved against the Petitioners, the immediate effect will be virtually to nullify the constitutional compensation rights to just compensation through generic contract terms and fully absent any waiver of the right.

Petitioners contend that the fundamental constitutional right to just compensation upon the taking of private property is among those other constitutional rights for which knowing, voluntary and intelligent waivers are required before the government may escape its constitutional obligations to justly compensate those from whom it takes private property.

This court has not directly confronted the question of what standard of consent is required for a person to waive the right to just compensation when the state takes the person's property by *contract*. Petitioners urge that any such waiver must be knowing, intelligent and clear.

The Declaration of Independence describes as inalienable the rights to life, liberty, and the

pursuit of happiness. Some rights, however, are alienable and may be waived. For instance, consent to search is a means of waiving Fourth Amendment rights. Wayne R. LaFave, et al. CRIMINAL PROCEDURE § 3.10 (3d ed. 2000). Consent to adoption is a means of waiving parental rights. Homer H. Clark, Jr. THE LAWS OF DOMESTIC RELATIONS IN THE UNITED STATES § 20.4 (2d ed. 1988). While consent is a means of waiving rights in many areas of law, these areas vary in their standards of consent. For example, the standards of consent governing contract clauses waiving the constitutional right to a trial by jury tend to be higher than those governing contracts generally. Jean R. Sternlight, *Mandatory Binding Arbitration and Demise of the*

*Seventh Amendment Right to a Jury Trial*, 16

OHIO ST. J. ON DISP. RESOL. 669, 674 (2001).

While never having directly addressed the standard of consent required when a state alleges that a person has waived the person's right to just compensation for the taking of the person's property, in 1972 this Court did address contractual waivers of constitutional rights in a pair of cases touching on the deprivation of property.

In *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972), this Court considered whether to enforce a cognovit note, a contractual agreement "by which the debtor consents in advance to the holder's obtaining a judgment without notice or hearing, and possibly even with the appearance, on the

debtor's behalf, of an attorney designated by the holder.” *Id.* at 176. The Court considered the constitutional requirement of due process “in a context of contract waiver, before suit has been filed, before any dispute has arisen, and whereby a party gives up in advance his constitutional right to defend any suit by the other, to notice and an opportunity to be heard, no matter what defenses he may have, and to be represented by counsel of this own choice.” *Id.* at 184. In enforcing the contractual waiver of due process rights, the Court applied the standards applicable to waiver of constitutional rights in a criminal proceeding and held that the waiver was “voluntary, intelligently and knowingly” made. *Id.* at 187.

In *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L. Ed. 2d 556 (1972) (plurality decision) this Court held that debtors were deprived of their property without due process of law where debtor and creditor “were far from equal in bargaining power,” and the “waiver provision was a printed part of a form sales contract.” The Court held that a “waiver of constitutional rights in any context must, at the very *least*, be clear,” and that it need not consider “the involuntariness or unintelligence of a waiver when the contractual language relied upon does not, on its face, even amount to a waiver.” *Id.* at 95. There was no clear waiver because the contracts

“simply provided that upon a default the seller ‘may take back,’ ‘may retake’ or ‘may repossess’

merchandise. The contracts included nothing about the waiver of a prior hearing. They did not indicate *how or through what process*—a final judgment, selfhelp, prejudgment replevin with a prior hearing, or prejudgment replevin without a prior hearing—the seller could take back the goods.”

*Id* at 95-95.

Similarly, federal courts have generally held that a contract that waives a constitutional litigation right should be enforced only if the waiver was knowing, voluntary, and in most cases, intelligent. *See, e.g., Lake James Cmty. Volunteer Fire Dep’t Inc. v. Burke County*, 149 F.3d 277, 280 (4<sup>th</sup> Cir. 1998)(stating that a

contractual waiver of a constitutional right must be knowing and voluntary); *United States v. Local 1804-1, Int'l Longshoremen's Ass'n, AFL-CIO*, 44 F.3d 1091, 1098 n.4 (2d Cir. 1995)(stating that a waiver of constitutional rights must be “voluntary, knowing, and intelligent”); *W.B. v. Matula*, 67 F.3d 484, 497 (3d Cir. 1995)(declining to enforce the agreement “unless its execution was knowing and voluntary”); *Mosley v. St. Louis Sw. Ry.*, 634 F.2d 942, 946 n. 5 (5<sup>th</sup> Cir 1981)(a waiver “not only must be voluntary but must be knowing , intelligent [and] done with sufficient awareness of the relevant circumstances and likely consequences.”); *cf. Ceter v. I.N.S.*, 121 F.3d 1285, 1293 (9<sup>th</sup> Cir. 1997)(stating that principles governing waiver of constitutional rights apply equally in criminal and civil context).



Thus this Court and other federal courts have applied a heightened standard of consent when reviewing contract clauses that affect a waiver of constitutional rights.

In contrast, in the present case, the Hawaii trial court found that the state agency was acting as a landlord, i.e. in its proprietary rather than its government capacity, and that the state's action with regard to the lease with Petitioners is to be treated by the courts in the same way as any other landlord-tenant agreement.

“[I]n this case, the Board is acting as a landlord, i.e. in its proprietary rather than its government capacity. The State is to be treated as other landlords in analogous situations. The 1985 Lease is governed generally by

the law applicable to Leases between  
private individuals.”

App. A. Conclusion of Law 43., p. 38).

Thus, ruled the court, The 1985 Lease is governed generally by the law applicable to leases between private individuals – without regard to the necessity of a separate waiver of the resultant lost constitutional right.

The Hawaii Intermediate Court of Appeals determined in the present case that the state did not need to obtain Plaintiffs’ waiver of their constitutional right to just compensation before claiming the cabins on Plaintiffs’ leased lots – based on a *contract* analysis. According to the court, under the “surrender” provision of the 1985 leases, Plaintiffs had no such constitutional right.

But the “surrender” provision was more akin to the invalidated clause in *Fuentes v. Shevin* than to an actual waiver as in *Fuentes*, the clause “included nothing about the waiver of a prior hearing.” Here, the “surrender” clause made no mention whatsoever that the lessee was waiving a right to just compensation (or to due process, for that matter) but instead merely required the lessee to “peaceably deliver unto the Lessor possession of the demised premises, together with all improvements existing or constructed thereon[.]” The very mention of compensation is absent in the lease that purportedly disposes of the right to just compensation by its terms.

By the rulings and Orders in this case, the Hawaii state courts subject a contract clause

effectuating a waiver of a person's constitutional right to just compensation under the Fifth Amendment to the same standards as those governing contracts generally. This standard is a far lower bar than the standards of consent governing contract clauses waiving, for instance, the constitutional right to a trial by jury.

However, the just compensation clause, called by one constitutional scholar, "a paradigm of American privilege and immunity," was one of the first rights of the Bill of Rights to be applied to the states and, in fact, "[j]ury rights have fared less well in the Supreme Court." Akhil Reed Amar, *THE BILL OF RIGHTS* (1998). Deprivations based on alleged contractual waiver of the just compensation right should be subject to a higher

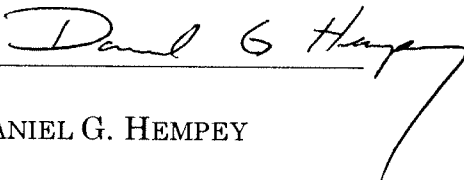
standard than those applying under contract law generally.

Until this Court articulates a uniform standard, states will continue to effectively nullify the just compensation right in cases where a state is able to prevail upon a court that contract language is a valid substitute for a waiver of such right, as occurred in this case.

### CONCLUSION

For all of the foregoing reasons, Petitioners respectfully submit that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

  
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DANIEL G. HEMPEY

*Counsel for Petitioners*

HEMPEY & MEYERS, LLP

3175 Elua Street, Suite C

Lihu'e, Hawai'i 96766

Telephone: (808) 632-2444