NO. 28175

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

MAUNALUA BAY BEACH OHANA 28, a Hawaii Non-Profit Corporation; MAUNALUA BAY BEACH OHANA 29, a Hawaii Non-Profit Corporation; MAUNALUA BAY BEACH OHANA 38, a Hawaii Non-Profit Corporation, individually and on behalf of all others similarly situated, Plaintiffs-Appellees, vs. STATE OF HAWAI`I, Defendant-Appellant.	CIVIL NO. 05-1-0904-05 EEH APPEAL FROM THE ORDER GRANTING PLAINTIFFS' AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT FILED FEBRUARY 13, 2006, filed on September 1, 2006 FIRST CIRCUIT COURT HONORABLE EDEN ELIZABETH HIFO Judge

APPLICATION FOR WRIT OF CERTIORARI TO REVIEW THE JUDGMENT ON APPEAL OF THE INTERMEDIATE COURT OF APPEALS FILED JANUARY 26, 2010

EXHIBIT "A"

CERTIFICATE OF SERVICE

PAUL ALSTON 1126
LAURA P. MORITZ 7860
1001 Bishop Street, 18th Floor
Honolulu, Hawai`i 96813
Telephone: (808) 524-1800
Facsimile: (808) 524-4591
E-mail:palston@ahfi.com
lcouch@ahfi.com

Attorneys for Petitioners-Plaintiffs-Appellees

NO. 28175

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

MAUNALUA BAY BEACH OHANA 28, a Hawaii Non-Profit Corporation; MAUNALUA BAY BEACH OHANA 29, a Hawaii Non-Profit Corporation; MAUNALUA BAY BEACH OHANA 38, a Hawaii Non-Profit Corporation, individually and on behalf of all others similarly situated, Plaintiffs-Appellees, vs. STATE OF HAWAI`I, Defendant-Appellant.	CIVIL NO. 05-1-0904-05 EEH APPEAL FROM THE ORDER GRANTING PLAINTIFFS' AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT FILED FEBRUARY 13, 2006, filed on September 1, 2006 FIRST CIRCUIT COURT HONORABLE EDEN ELIZABETH HIFO Judge

APPLICATION FOR WRIT OF CERTIORARI TO REVIEW THE JUDGMENT ON APPEAL OF THE INTERMEDIATE COURT OF APPEALS FILED JANUARY 26, 2010

Petitioners, Plaintiffs-Appellees Maunalua Bay Beach Ohana 28, Maunalua Bay Beach Ohana 29, Maunalua Bay Beach Ohana 38, individually and on behalf of all others similarly situated (collectively, "Petitioners") respectfully seek a writ of certiorari to review portions of the decision in *Maunalua Bay Beach Ohana 28, et al. v. State of Hawai`i,* 122 Hawai`i 34, 222 P.3d 441 (2009) ("*Maunalua*") (Exhibit A, attached) because the Intermediate Court of Appeals grievously erred and disregarded long-standing decisions of this Court.

I. INTRODUCTION

In May 2003, the State of Hawai`i (the "State") illegally took and injured property of private beachfront property owners through Act 73 ("Act 73"), which changed Hawai`i law relating to accretion. Specifically, without providing any just compensation, the Act:

- Took from beachfront property owners their unregistered and unrecorded accreted land (other than that which restored previously eroded land or was the subject of registration or quiet title proceedings on May 19, 2003) and declared all such land to be "state land";

- Took from beachfront property owners their vested property right in maintaining their *makai* boundary at the shoreline in the event of future accretion; and

- Caused severance damages to beachfront owners' remaining property by depriving them of their vested right to maintain their *makai* boundary at the shoreline.

In 2005, Petitioners filed a class action seeking declaratory and injunctive relief and damages on the basis that Act 73 was unconstitutional and could not be enforced without payment of just compensation. After the class was certified pursuant to HRCP 23(b)(1) and (2), Petitioners and the State filed cross-motions for summary judgment. After hearing the motions, the Circuit Court ruled that Act 73 effected a ***sudden change in the common law*** and, therefore, "an uncompensated taking" of littoral owners' accreted land and their vested right to have their *makai* boundary move with the shoreline as accretion occurred. The State appealed.

The ICA affirmed in part and reversed in part. It correctly held the State took existing unrecorded accretion without just compensation. It ***incorrectly*** held that Act 73 was not an unconstitutional taking of the right to a moveable boundary that included all ***future accretion***. In addition, without any notice to the Petitioners, the ICA inappropriately criticized the Circuit Court with respect to matters that the State never presented for review on appeal, directed remand based on patently incorrect statements about the record, and improperly denied with prejudice Petitioners *Request for Attorneys' Fees and Costs* filed February 12, 2010. In all these ways, the ICA gravely erred and disregarded prior rulings of this Court and parallel Federal law. Review by this Court is necessary to correct these blatant errors.

II. QUESTIONS PRESENTED

The issues before this Court are as follows:

1. 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?

2. Did the ICA commit grievous error by *sua sponte* criticizing the Circuit Court's order granting class certification - - which was not appealed - - without notice to the parties and without any valid basis for suggesting that class certification was improper?

3. Did the ICA commit grievous error by flagrantly misstating the record regarding the Petitioners' ownership of accreted land, the existence of which was never disputed by the State?

4. When Petitioners proved the State unconstitutionally took accreted beachfront land from property owners throughout the islands, did the ICA grievously err and disregard this Court's decisions in holding that Petitioners were not entitled to fees under the private attorney general doctrine?

III. STATEMENT OF THE CASE

For over 100 years, the decisions of this Court have recognized oceanfront landowners' vested right to have their properties expand seaward as accretion occurs.[1] However, Act 73 (adopted in 2003) made virtually all existing and future unrecorded accretion State land.[2] Since Act 73 provided no compensation to littoral owners, it was unconstitutional.

In May 2005, Petitioners filed suit seeking (1) payment of just compensation under Article I, Section 20 of the Constitution of the State of Hawai`i; and (2) declaratory and injunctive relief against enforcement of Act 73. (ROA I: 1-11).[3] Petitioners' class representatives successfully sought class certification on behalf of "all non-governmental owners of oceanfront real property in the State of Hawai`i on and/or after May 19, 2003." (*See Order*

---

[1] Accretion is "recorded" by either a quiet title decree or a land court decree. For simplicity, although these legal processes are different, they are referred to as "recording." In 1985, Act 221 (1985) ("Act 221") allowed littoral owners to record title to accreted land only if it was "permanent." That Act did not, however, alter littoral owners' title to accreted property. 1985 Haw. Sess. Laws 401. *Maunalua,* 122 Hawai`i at 54, 222 P.2d at 461.

[2] The only exceptions were (1) land subject to then-pending judicial proceedings to record title; and (2) accretion that restored eroded parcels to their original dimensions. Act 73, §§ 4, 5; H.R.S. §§ 501-33, 669-1(e).

[3] Citations to the Record on Appeal are referred to by "ROA," followed by the Volume Number, which will be followed by the page number.

Granting Plaintiffs' Amended Motion for Class Certification filed on October 28, 2005 (the "Class Certification Order," ROA II: 74-77).

In early 2006, Petitioners and the State filed cross-motions for summary judgment. (ROA I: 239-294; ROA II: 102-122.) The Circuit Court granted Petitioners' motion insofar as it sought declaratory relief and ruled that:

> (1) [Act 73] represented a sudden change in the common law and effected an uncompensated taking of, and injury to, (a) littoral owners' accreted land, and (b) littoral owners' right to ownership of future accreted land, insofar as Act 73 declared accreted land to be "public land" and prohibited littoral owners from registering existing and future accretion under H.R.S. Chapter 501 and/or quieting title under H.R.S. Chapter 669.
>
> . . .
>
> (3) Land which accreted naturally and imperceptibly before Act 221 was not made "public land," and was not taken from littoral landowners;

(ROA III: 7, 5-8). In accordance with *Allen v. Honolulu,* 58 Haw. 432, 571 P.2d 328 (1977), the Court did not mandate payment of just compensation. Instead, it left the State to decide whether to enforce or abandon Act 73 in order to minimize its obligation to pay just compensation. This interlocutory appeal followed because all parties recognized that the course of future proceedings depended upon the threshold question whether Act 73 effects a "taking."

IV. ARGUMENT

A. Insofar as it Applies to Future Accretion, The ICA's Decision is Contrary to the Law of Hawai`i, as Reflected in This Court's Decisions, and Federal Law

After correctly ruling that Act 73 took existing accretion without just compensation, the ICA ruled that littoral owners have no vested right to have their boundary move seaward to encompass future accretion. In doing so, the ICA relied on a handful of cases involving government control and development of its own submerged land. It wrongly ignored the cases that address the constitutionality of boundary changing laws like Act 73. *Maunalua,* 122 Hawai`i at 53, 222 P.3d at 460.

The ICA relied on three cases in particular: *Western Pacific Ry. Co. v. Southern Pac. Co.,* 151 F. 376, 398-399 (9th Cir. 1907) ("*Western Pacific*");[4] *Cohen v. United States,* 162 F.

---

[4] The ICA ignored the fact that, in *Strand Improv. Co. v. Long Beach,* 173 Cal. 765, 161 P. 975 (1916), the California Supreme Court **expressly repudiated** *Western Pacific's* reading of (continued...)

364, 370 (C.C. N.D. 1908) ("*Cohen*"); and *Latourette v. United States,* 150 F.Supp. 123, 126 (D. Ore. 1957) ("*Latourette*").

These cases, however, are all plainly inapplicable to this case. *Western Pacific* concerned filled land and a dispute over government improvements in a public harbor. It did not concern legislation fixing boundaries of properties entitled to accretion. *Cohen* involved the diversion of a creek in connection with public harbor improvements which ended a pattern of accretion without affecting the landowners' rights. *Latourette* involved the alleged adverse effects of a government jetty that was built in aid of navigation. All of these cases reflect the unremarkable and undisputed principle that every littoral owner's rights are subject to the government's rights to develop its adjoining submerged lands and to take other action to promote navigation and commerce, even if, in doing so, the government blocks riparian access or interferes with future accretion. *See e.g., Gibson v. Untied States,* 166 U.S. 269 (1897).

This is not such a case, and the ICA's decision is at odds with long-established state and federal case law. Act 73 was not intended to promote navigation or develop the State's submerged lands; instead, the sole purpose of Act 73 was to change the long-established boundary from one that "ambulates" to one that is fixed so the State-owned beaches extend above the future shoreline at the expense of the littoral owners. All of this Court's prior decisions regarding accretion recognize the sanctity of littoral owners' right to accretion and the ambulatory nature of the boundaries defined by the shoreline. *See, e.g., Halstead v. Gay,* 7 Haw. 587, 588 (1889) (land formed by gradual accretion from the water belongs to the owner of the contiguous land); *State v. Zimring,* 58 Haw. 106, 119, 566 P.2d 725, 734 (1977); *In re Sanborn,* 57 Haw. 585, 598, 562 P.2d 771, 778-779 (1977) (the "high water mark" as it moves over time, is the controlling boundary of a shoreline parcel, even if the metes and bounds description differs). The ICA misapplied these decisions in saying that the State can permanently fix the shoreline, for the State's benefit, without paying just compensation.

(...continued)
California law and that the entire discussion of accretion in *Western Pacific* was dicta that violated the doctrine of constitutional avoidance, which requires courts to avoid constitutional claims when alternative grounds are available. *See, e.g., Vernon v. City of Los Angeles,* 27 F.3d 1385, 1391-1392 (9th Cir. 1994).

Every other court presented with the question whether government can change a moveable shoreline boundary to one that is fixed has said "no." *Hughes v. Washington,* 389 U.S. 290, 293 (1967); *Purdie v. Attorney General,* 143 N.H. 661, 666-667, 732 A.2d 442, 447 (1999) (upholding common law rule that the private-public coastal boundary is the mean high tide, wherever it is determined to be); *Board of Trustees v. Medeira Beach Nominee, Inc.,* 272 So.2d 209, 211-212 (Fla. Ct. App. 1973) ("Freezing the [shoreline] boundary at a point in time" held improper); *Soo Sand & Gravel v. M. Sullivan Dredging,* 244 N.W. 138, 140-141 (Mich. 1932) (state cannot impair the rights of a riparian owner by obstructing his access to the water); And, most recently, the Ninth Circuit agreed with this position. *U.S. v. Milner,* 583 F.3d 1190 (9th Cir. 2009) ("*Milner*").

Milner involved a dispute between upland owners and the United States, as trustee for an Indian tribe which owned the adjoining tidal lands. Faced with chronic erosion (which expanded the tribe's holdings), the upland owners built structures halting the erosion and blocking expansion of the tribe's land. Both the District Court and the Ninth Circuit held the upland owners had no right to block further erosion and their defensive structures trespassed on the tribe's land. *Milner,* 583 F.3d at 1190.

The Ninth Circuit explained that "both the tideland owner and the upland owner have a right to an ambulatory boundary, and each has a vested right in the potential gains that accrue from the movement of the boundary line." The *Milner* court said that littoral owners' rights to future accretion are vested and "rest in the law of nature." Specifically:

> **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 rest in the law of nature. It is the same with that of the owner of a tree to its fruits, and the owner of flocks and herds to their natural increase. The right is a natural, not civil one. The maxim 'qui sentit onus debet sentire commodum' ['he who enjoys the benefit ought to also bear the burdens'] lies at its foundation. The owner takes the chances of injury and the 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.

583 F.3d at 1187-1188 (emphasis provided).

As *Milner* and the other cases rejecting "boundary-fixing" make clear, beachfront owners have a right to maintain their waterfront boundary. This right does ***not*** mean the State cannot

develop the submerged lands in ways that block future accretion. To the contrary, beachfront owners' rights are unquestionably subject to the State's rights to use its land for public benefit.[5] Here, however, nothing like that applies to Act 73, under which the State sought only to fix the common boundary and shift it landward of the ambulating "shoreline" for its own gain and without just compensation. Therefore, the ICA gravely erred and its decision must be reversed. In fact, Act 73 did "take" littoral owners' property interest in an ambulatory seaward boundary and future accretion.

---

[5] Petitioners also do not dispute that their property may be affected by regulations which limit its use. Reasonable regulations, however, do not translate into a change of land boundaries, *i.e.,* upland owners' boundaries cannot be fixed merely because the State thinks it would be advantageous to do so. The ICA's suggestion that the Hawai`i State Constitution "diminishes" littoral owners expectation interest in future accretion is both wrong and legally irrelevant. It is wrong because the U.S. Supreme Court directly rejected "notice" as a defense to "takings" in *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001). *Palazzolo* makes clear that even those who buy land after an uncompensated taking still have the right to compensation. The 1978 Constitution is irrelevant because, as the ICA recognized in its extensive analysis of the common law (*Maunalua,* 122 Hawai`i at 36-46, 222 P.3d at 444-453), the law regarding seaward boundaries and property rights ***predated*** the adoption of the Hawai`i State Constitution in 1978. *Halstead v. Gay,* 7 Haw. 587 (1889) (establishing beachfront owners' vested rights in ambulatory boundaries well ***before*** the current Hawai`i State Constitution adoption in 1978 and the 1982 adoption of H.R.S. § 1-1). Later-adopted laws do not weaken Petitioners' property rights. *Id. See also Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1030 (1992). Since the nineteenth century, property owners have enjoyed an ambulatory boundary marked by the ocean's edge. That accretion right has been (and, in the words of *Milner,* remains) "an inherent and essential attribute of the original property." *Milner,* 583 F.3d at 1187. In assessing the landowners vested rights, the fact that Hawai`i chose to constitutionalize a "public trust" in 1978 cannot affect pre-existing land boundaries.

Damon v. Tsutsui, 31 Haw. 678, 693 (1930), relied by the ICA, actually supports Petitioners' position. In *Damon,* the court affirmed that those with vested fishing rights established in the manner prescribed by law could not lose those rights without just compensation. "Vested rights" were defined to exist when "the right to enjoyment, present or prospective, has become the property of some particular person..." *Id.,* 31 Haw. at 693. Those who took no steps to establish their vested rights could only rely on statutory rights, which were deemed not vested. It is indisputable that there are no vested rights in the continued existence of a statute. *Id. See also United States v. Darusmont,* 449 U.S. 292, 298 (1981) (holding there is no vested right in the rate of taxation which may be changed by Congress). This case is nothing like *Tsutsui.* Here, it is beyond question that littoral owners had – and have – vested rights in the shoreline boundary prescribed in their grants and deeds.

B. The ICA Gravely Erred in Misstating the Record regarding Petitioners' Ownership Rights in Existing Accreted Lands

In its opinion, the ICA incorrectly observed: "Plaintiffs have not alleged specific accretions for which the State has taken from them by the enactment of Act 73 and, more damagingly, have not alleged that any accreted land even exists... ."

This statement is contrary to the record in several ways. First, Petitioners' pretrial statement contains precisely the allegations which the ICA believed were missing in the record. In the pretrial statement (which under the Rules of the Circuit Courts of the State of Hawai`i, Rule 12(b)(1) is to contain a statement of all claims), Petitioners stated:

> Plaintiffs expect that the evidence in this case will largely go to issues of damage, *i.e.,* evidence regarding the amount and value of land taken by the State and the resulting damage to the remaining property held by Plaintiffs. Issues of liability are largely questions of law for this Court, but Plaintiffs intend to present evidence showing their status as owners of oceanfront property and the historical accretion rights attendant thereto.

(ROA II: 177-178.) Second, Petitioners advised the Court that witnesses would testify to "... the historical existence ... of accreted land adjacent to their individual parcels and/or the present existence of accreted land adjacent to their individual parcels." (ROA II: 178-179.)

Third, even more support for the existing accretion claim is in the briefing on the State's *Motion for Summary Judgment* (ROA I: 289-294). In Petitioners' *Memorandum in Opposition to Defendant State of Hawai`i's Motion for Summary Judgment,* (ROA II: 19-47), they stated, with appropriate evidentiary support, that:

> **Each Plaintiff owns land which is appurtenant to accreted shorefront land.** In 1988 or thereabouts, Plaintiffs' members purchased the Bishop Estate's leased fee interest in the mauka lands appurtenant to the land described in Document Nos. 2005-090884, 2005-090885, and 2005-090886 recorded in the Bureau of Conveyances (hereinafter, the "Makai Land") [emphasis added; footnote omitted].[6]

Indeed, the conveyance documents for the Makai Land (ROA I: 141-258) provided that the Makai Land was conveyed to Petitioners "...TOGETHER WITH all accreted lands and all rights with respect thereto, including the right to assert the existence of such lands."

---

[6] This statement was supported by the sworn discovery responses submitted in support of the Opposition. (ROA I: 274-285.)

In short, it is simply untrue that Petitioners "never asserted" ownership of existing accretion taken by Act 73. Measurement of the precise boundaries of the accreted land remains for trial, but there is no doubt that Petitioners have been, and are, seeking compensation for the taking of existing accretion.

C. The ICA Majority Gravely Erred in Criticizing Class Certification, When the Propriety of Certification Was Not Before the Court and Never Briefed or Argued

The Class Certification Order was not appealed and was not before the ICA (*see* H.R.S. § 641-2). Nevertheless, the ICA majority (over objection by C.J. Nakamura)[7] inappropriately criticized the appropriateness of class certification. *Maunalua,* 122 Hawai`i at 55-56, 222 P.3d at 462-463. Specifically, the majority judges stated that they "have questions about whether the class certification was proper." (Opinion at 37.)

Class certification rulings are subject to reversal ***only*** if the certification ruling was an abuse of discretion. *Life of the Land v. Land Use Commission,* 63 Haw. 166, 623 P.2d 431 (1981). Trial courts have broad discretion in deciding whether to certify a class that is "normally undisturbed on appeal." *Id.* at 180, 623 P.2d at 443. Nevertheless, the majority judges said they had "concerns" about class certification without acknowledging the correct standard of review, much less identifying any abuse of the trial court's discretion.

It is "well-settled that all unchallenged conclusions by the circuit court are considered binding upon this [C]ourt." *Alvarez Family Trust v. AOAO Kaanapali Alii,* 121 Hawai`i 474, 467, 489, 221 P.3d 452, 489 (2009), *citing Wong v. Cayetano,* 111 Hawai`i 462, 479, 143 P.3d 1,

---

[7] The dissenting opinion in *Maunalua* correctly recognized that the majority's discussion of class certification was improper. *See Concurring and Dissenting Opinion by Nakamura, C.J.,* 122 Hawai`i at 57 ("...the circuit court's Class Certification Order was not appealed, and the appropriate remedy for any uncompensated taking effected by Act 73 was not before this Court. I would not address and do not express any view on matters that were not before us").

18 (2006). Absent plain error,[8] it is inappropriate for a reviewing court to consider *sua sponte* an issue not raised on appeal without notice to the parties. *Alvarez,* 121 Hawai`i at 490-491, 221 P.3d at 468-469. *Cf C. Miller Chevrolet, Inc. v. Willoughby Hills,* 313 N.E.2d 400, 403 (Ohio 1974) (fairness dictates that courts should give the parties notice and an opportunity to brief an issue the court plans to consider *sua sponte*).

Perhaps more importantly, even if the issue were before the Court (which it was not) there was no cause for the ICA to question the propriety of class certification. There is ample authority for class certification in inverse condemnation cases. *Moore v. United States,* 41 Ct.Cl. 394, 297-299 (1998); *Mattoon v. City of Norman,* 633 P.2d 735 (Okla. 1981); *Seven Hills v. Bentley,* 848 So.2d 345, 353 (Fla. App. 1st Dist. 2003); *Ario v. Metro. Airports Comm'n,* 367 N.W.2d 509, 513 (Minn. 1985). Class actions are proper in such cases because the landowners' damages are formulaic and easily calculated (square footage of accretion multiplied by a regionally-determined fair market value).[9] This rule has been applied by the U.S. Court of Federal Claims to allow certification in a State-wide class action inverse condemnation action involving potentially more than 2,000 members. The case involved landowners who sought damages based upon the government's decision to impose a recreational 225 mile-long trail across their lands. The Court found the need for calculation of individual damage awards was no

---

[8] Here, the ICA did not apply the "plain error" rule before considering the issue of class certification. That rule requires the court to consider the following before it may notice a "plain error" not presented for review: (1) whether the issue requires additional facts, (2) whether the issue's resolution will affect the integrity of the trial court's findings, and (3) whether the issue is of great public import. *Alvarez,* 111 Hawai`i at 490, 221 P.3d at 468. The ICA made no such determinations here and the record would not permit it to do so.

[9] "It uniformly has been held that differences among the members [of a class] as to the amount of damages incurred does not mean that a class action would be inappropriate." 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE, § 1781 (2d ed. 1986) (collecting cases); *Bogosian v. Gulf Oil Corp.,* 561 F.2d 434, 456 (3d Cir. 1977) (where proving damages is a mechanical task, "the necessity for calculation of damages on an individual basis should not preclude class determination when the common issues which determine liability predominate"); *Brown v. Pro Football, Inc.,* 146 F.R.D. 1 (D.D.C. 1992) (damages formula based on individual contracts entered into by various plaintiffs held adequate to calculate antitrust damages); *In re Polypropylene Carpet Antitrust Litig.,* 996 F.Supp. 18 (N.D. Ga. 1997) (permitting class certification in an antitrust price-fixing case where the plaintiffs proposed to use regression analysis to estimate class members' damages).

impediment to certification because the process "should be relatively formulaic." *Moore, supra.* The parallels to this case are obvious. At worst, in this case the damages calculations may be based upon regional subclasses (*e.g.,* Leeward Oahu, North Shore, Windward Oahu, etc.).

There is every indication the Circuit Court carefully considered and applied the elements of HRCP Rule 23 after extensive briefing and argument (ROA II: 74-81), and the ICA's criticism of the Class Certification Order was improper and a grievous error.

D. The ICA Grievously Erred and Disregarded This Court's Decisions in Denying Petitioners' Request for Attorneys' Fees Under the Private Attorney General Doctrine

On February 4, 2010, Petitioners timely filed their *Request for Attorneys' Fees and Costs* with the ICA (the "Request for Fees"). Petitioners are entitled to fees under HRAP Rule 39(b) as a prevailing party under the private attorney general doctrine. Although a portion of the Circuit Court's order granting summary judgment had been vacated by the ICA opinion, Petitioners are nevertheless prevailing parties on the central issue: Act 73 effected an unconstitutional taking of private property without compensation. And, as this Court recently explained, the private attorney general doctrine:

> ...is an equitable rule that allows courts in their discretion to award [attorneys'] fees to plaintiffs who have vindicated important public rights. Courts applying this doctrine consider three basic factors: (1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, [sic] (3) the number of people standing to benefit from the decision.

*Sierra Club v. State of Hawai`i,* 120 Hawai`i 181, 218, 202 P.3d 1226, 1263 (2009), *citing Maui Tomorrow v. BLNR,* 110 Hawai`i 234, 244, 131 P.3d 517, 527 (2006). Here, Petitioners had no choice but to pursue litigation to challenge the State's attempted taking of property without just compensation by Act 73. The right to possession and use of land without unlawful government interference is a cornerstone of the United States Constitution and is without question of great societal importance. The ICA's affirmation that a taking occurred benefits ***all*** private oceanfront property owners in the State of Hawai`i and constitutes a result that would not have been obtained but for the initiative and expense incurred by Petitioners in bringing this action.

Despite the clear applicability of the private attorney general doctrine under the facts of this case, the ICA summarily denied Petitioners' Request for Fees in its order dated March 9, 2010. Because it was within the ICA's discretion to remand the Request for Fees back to the trial

court for determination (H.R.S. § 641-2), the ICA grievously erred by not awarding fees or, at a minimum, denying the Request for Fees without prejudice so that Petitioners could renew their request on remand. Accordingly, Petitioners respectfully request that this Court either award fees or recognize Petitioners' entitlement and direct the ICA to enter an appropriate order preserving Petitioners' right to pursue attorneys' fees at the conclusion of this litigation before the trial court below.

V. CONCLUSION

For the reasons stated above, Petitioners respectfully request this Court grant certiorari, void the ICA's Opinion insofar as it included the errors described herein (but not otherwise), and correct each of the errors described herein.

DATED: Honolulu, Hawai`i, APR 22 2010.

PAUL ALSTON
LAURA P. MORITZ
Attorneys for Petitioners-Plaintiffs-Appellees