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

PETITIONERS-PLAINTIFFS-APPELLEES' RESPONSE TO BRIEF OF AMICUS CURIAE HAWAII'S THOUSAND FRIENDS FILED MAY 13, 2010

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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 ("Petitioners") respectfully submit this Response to the *Brief of Amicus Curiae Hawaii's Thousand Friends.*

I. INTRODUCTION

In urging the Court to deny Petitioners' *Application for Writ of Certiorari,* HTF asks this Court to ignore 100 years of Hawai'i common law. Its arguments are not supported by the Hawai'i law, Federal law, or the law in most jurisdictions in the United States. Specifically, HTF's analysis is flawed because:

- Oceanfront landowners' vested right to an ambulatory boundary that encompass any future accretion has been well-established in Hawai`i for over 100 years and is not a matter of first impression for this Court;

- It is the State's prerogative to expand the public beaches above the "shoreline" pursuant to the Public Trust Doctrine or any other public purpose, but it may not do so by taking private property rights without paying for them; and

- The right to enjoy private property without illegal interference from the government is a right enjoyed by all the citizens of Hawai`i. When the rights of one group of property owners are threatened, so too are those of all citizens, and attorneys' fees are appropriate.

Citing *Branca v. Makuakane,* 13 Haw. 499, 500 (1901), HTF argues that the property rights of Hawai`i landowners vested under, and were defined by, the *Mahele* or the law in effect whenever a parcel first transferred to private hands. But, HTF does not - - and cannot - - explain how this limits the Petitioners' right to an ambulatory boundary as described in their deeds.[1] Because the littoral owners' right to an ambulatory boundary is well-established in Hawai`i, as set forth in their Application, the Maunalua Parties respectfully submit that their request for *certiorari* review of the *Maunalua Bay Beach 'Ohana 28, et al. v. State of Hawai`i,* 122 Hawai`i 34, 222 P.3d 441 (2009) ("*Maunalua Bay*") is well-supported in applicable law and should be granted.

II. ARGUMENT

A. Hawai`i Case Law Addresses the Constitutionality of Boundary Changing Laws Like Act 73; the Issue of "Future Accretion" is Not one of First Impression

Questions about ownership of "future accretion" are not new; the concept has been considered (and the right thereto upheld) in several Hawai`i cases considering the rights of

[1] Petitioners are private landowners in Hawai`i whose deeds describe a seaward boundary that runs "*ma ke kai*", "*ma ahakai*", or "along the shoreline" because the boundary changes with the upper wash of the waves over time. (ROA II: 74-77.)

oceanfront owners. It is far from a matter of "first impression" for this Court. Much like the ICA, HTF ignores the cases that address the constitutionality of boundary changing laws like Act 73. HTF – like the ICA – simply ignores the fact that the right to enjoy accretion which may (or may not) exist in the future. All of this Court's prior decisions regarding accretion recognize that littoral owners' have an ambulatory boundary defined by the shoreline. *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). All of these cases recognize the vested right to an ambulatory boundary. If a boundary is ambulatory, it necessarily means the right to enjoy any accretion which may occur in the future is vested.

HTF also ignores the cases that directly address this issue. As explained in the Maunalua Parties' Application, every other court presented with the question whether government can change a moveable shoreline boundary to one that is fixed has said "no." HTF noticeably omits any reference to the recent Ninth Circuit decision in *U.S. v. Milner,* 583 F.3d 1190 (9th Cir. 2009) *cert. denied subnom Sharp v. United States,* No. 09-820 on May 17, 2010 (http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/09-820.htm)("*Milner*"). 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).

Milner and the other cases rejecting "boundary-fixing" make clear that beachfront owners have a right to maintain their waterfront boundaries. *See also 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) ("[f]reezing 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).

HTF cites two cases to support its argument that littoral landowners have "no right whatsoever" to shoreline accretions, but those cases are grounded in principles never recognized in Hawai`i. *Zeller v. Southern Yacht Club,* 34 La.Ann. 837 (1882) was decided under Louisiana law which prescribes different accretion rules for rivers and streams than for lakes and the sea. Because plaintiff's land abutted a lake, and not a stream, she was not entitled to claim the accreted land under Louisiana law. *Ker & Company v. Couden,* 223 U.S. 268, 32 S.Ct. 284 (1912) was not even decided under any law of the United States. Rather, that case applied the law of the Philippines (*vis à vis* the declaration of the Spanish Law of Waters of 1866) to hold

that land formed gradually in the Philippine Islands belongs to the government, not the abutting landowner. As *Halstead v. Gay* makes clear, that has never been the law in Hawai'i.

As explained in the Maunalua Parties' Application (and ignored by HTF), the three cases relied upon by the ICA[2] - - *Western Pacific, Cohen,* and *Latourette* - - are inapplicable to this case. HTF makes no effort to counter the detailed analysis offered in the Maunalua Parties' Application. All of these cases affirm the undisputed principle that every littoral owner's rights are subject to the government's right to develop its adjoining submerged lands and take action to promote navigation and commerce, even where doing so blocks riparian access or interferes with future accretion. *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* concerned the diversion of a creek in connection with public harbor improvements which ended a pattern of accretion without affecting landowners' rights. *Latourette* involved the alleged adverse effects of a government jetty that was build to aid navigation.

The ICA and HTF also 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 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).

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[2] The ICA relied on three cases in particular to support its theory that there is no vested right to "future" accretion: *Western Pacific Ry. Co. v. Southern Pac. Co.,* 151 F. 376, 398-399 (9th Cir. 1907) ("*Western Pacific*"); *Cohen v. United States,* 162 F. 364, 370 (C.C. N.D. 1908) ("*Cohen*"); and *Latourette v. United States,* 150 F.Supp. 123, 126 (D. Ore. 1957) ("*Latourette*").

Act 73 was not intended to promote navigation or develop the State's submerged lands. The sole purpose of Act 73 was to change long-established ambulatory boundaries to ones that are fixed in order to expand the State-owned beaches at the expense of littoral owners. For this reason, Act 73 effected a taking of both existing and future accretion, and certiorari review by this Court is appropriate.

B. The Public Trust Doctrine Does Not Authorize Unconstitutional Takings of Private Property without Compensation

No one disputes that private property may be affected by regulations that limit its use. Reasonable regulations, however, do not translate into a change of land boundaries merely because the State thinks it would be advantageous to do so. HTF's argument that *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001) is inapplicable pursuant to *King v. Oahu Railway & Land Co.,* 11 Haw. 717 (1899) has no merit. First, *King v. Oahu Railway & Land* concerns the principle that the government holds ***navigable waters*** in trust for the public benefit. It does not discuss accretion rights or the Public Trust Doctrine as it was adopted in 1978. Second, as explained in Petitioners' Application, the U.S. Supreme Court in *Palazzolo* directly rejected "notice" as a defense to "takings". *Palazzolo* makes clear that even those who buy land after an uncompensated taking still have the right to compensation.

HTF's argument that the Public Trust Doctrine in Hawai`i originated with *King v. Oahu Railway & Land,* and not the 1978 Constitution is irrelevant because, the law regarding seaward boundaries and property rights was recognized in *Halstead v. Gay,* 7 Haw. 587 (1889) (establishing beachfront owners' vested rights in ambulatory boundaries ***before*** *King v. Oahu Railway & Land,* the adoption of the Hawai`i Constitution adoption in 1978, and the adoption of H.R.S. § 1-1 in 1892). Later-adopted laws do not weaken Petitioners' property rights. *Id*; *Palazzolo,* 533 U.S. at 628 (a State may not, "by *ipse dixit*", transform private property into

public property without compensation). *See also Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1030 (1992). Since *Halstead,* 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.

Expansion of the public beach and parks is, understandably, a desirable goal for many in Hawai`i. But it is not a goal which the State may exact from a select group of citizens without compensation. *Certiorari* review is appropriate, and Petitioners' Application should be granted.

C. The Maunalua Parties' Effort Vindicated a Public Right and their Request for Attorneys' Fees was Proper

The private attorney general doctrine allows courts, in their discretion, to award attorneys' fees to plaintiffs who have vindicated important public rights, considering the following basic factors: (1) the strength or societal importance of the public policy vindicated, (2) the necessity for private enforcement and the burden on the plaintiffs, and (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, all elements are plainly met.

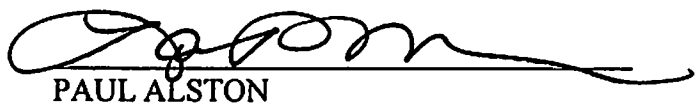
The right to prevent land from being taken without compensation is a cornerstone of the United States Constitution and is, without question, a matter of great societal importance. HTF may have a differing opinion on the "value" of the public right protected by the underlying ICA decision finding that Act 73 effected a taking of private property without public compensation, but Petitioners are no less deserving than members of HTF or other groups that

favor beach access. The ICA's affirmation that a taking occurred not only benefits all private oceanfront property owners in the State of Hawai`i, but also affirms the rights of all citizens to enjoy private property without unreasonable government interference, and constitutes a result that would not have been obtained but for the initiative and expense incurred by Petitioners in bringing this action.

III. CONCLUSION

For the foregoing reasons, Petitioners respectfully maintain that the positions stated by HTF are without merit, and certiorari review should be granted pursuant to Petitioners' Application for a Writ of Certiorari.

DATED: Honolulu, Hawai`i, May 18, 2010.



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