No. _____

In The
Supreme Court of the United States

MAUNALUA BAY BEACH OHANA 28,
MAUNALUA BAY BEACH OHANA 29,
MAUNALUA BAY BEACH OHANA 38,
Hawai`i non-profit corporations, individual and
on behalf of all others similarly situated,

Petitioners,

v.

STATE OF HAWAI`I,

Respondent.

On Petition For Writ Of Certiorari To The Intermediate Court Of Appeals Of The State Of Hawai`i

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

For nearly 115 years, littoral owners in Hawai`i held riparian rights to accretion and direct ocean access because their oceanward boundaries moved as beaches accreted and eroded. In 2003, Hawai`i adopted a statute – Act 73 – that, effective immediately, changed both existing and future oceanfront accretions throughout the state into "public lands." Act 73 fixed oceanfront boundaries forever and, as a result, littoral owners lost both existing accretion and their riparian rights. In 2010, the Hawai`i Intermediate Court of Appeals ruled that the State owed just compensation only for accretion that existed in 2003. However, it held riparian rights to a shoreline boundary and future accretion could be taken for free because littoral owners' riparian rights were only contingent interests in future accretion so they were not "property" for takings purposes. That holding directly conflicts with this Court's decisions regarding the nature of riparian rights.

The question presented here is:

> Since this Court has recognized riparian rights are vested property interests, can Hawai`i take those rights, including future accretion, without paying just compensation?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioners are: Maunalua Bay Beach Ohana Nos. 28, 29 and 38, individually and as representatives of a certified class that includes all private beachfront owners in the State of Hawai`i. The Petitioners are non-profit corporations, organized and doing business in Hawai`i. Their members are owners of oceanfront land on the Island of Oahu in the State of Hawai`i.

The State of Hawai`i is the sole respondent.

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PETITION FOR A WRIT OF CERTIORARI

Maunalua Bay Beach Ohana Nos. 28, 29, and 38 (the "Owners") petition for a Writ of Certiorari to review a final judgment of the State of Hawai`i Intermediate Court of Appeals, which the Hawai`i Supreme Court refused to review.

OPINIONS BELOW

The decision of the Hawai`i Intermediate Court of Appeals is published at *Maunalua Bay Beach Ohana 28 v. State of Hawai`i,* 122 Haw. 34, 222 P.3d 441 (2009). The decision of the Hawai`i Supreme Court rejecting the parties' cross-petitions for certiorari (with two justices dissenting) is published at 2010 Haw. LEXIS 119 (June 9, 2010).

JURISDICTION

The Hawai`i Supreme Court's order declining review was issued on June 9, 2010. This Court has jurisdiction under 28 U.S.C. § 1257, which authorizes it to review "[f]inal judgments or decrees rendered by the highest court of a State . . . where any . . . right . . . is specially set up or claimed under the Constitution . . . of . . . the United States."

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, 5th Amendment: " . . . nor shall private property be taken for public use without just compensation."

U.S. Constitution, 14th Amendment: " . . . nor shall any State deprive any persons of . . . property without due process of law."

STATUTORY PROVISIONS INVOLVED

Act 73 of the Hawai`i Legislature, the relevant portions of which were codified in Hawai`i Revised Statutes ("H.R.S.") §§ 171-2, 501-33, and 669-1(e). The Act, and the relevant sections amended by the Act are reprinted in their entirety at App. 106-16.

STATEMENT OF THE CASE

ACCRETION IN HAWAI`I, 1889-2003

Since 1889 – shortly after the Kingdom of Hawai`i first allowed private land ownership – Hawai`i has recognized littoral owners' right to any accretion that occurs along the shoreline.[1] This

[1] Hawai`i has a relatively unique definition of "shoreline." Unlike states such as Florida that define the shoreline based upon high tide lines, in Hawai`i – based upon pre-annexation Hawaiian custom – the shoreline is located at "the upper reaches of the wash of the waves, other than storm and seismic

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principle became firmly fixed in Hawaiian common law based upon numerous decisions of the Hawai`i Supreme Court. *See, e.g., Halstead v. Gay*, 7 Haw. 587 (1889) (accretion belongs to upland owner and the shoreline boundary moves without regard to metes and bounds established in deeds); *In re Sanborn,* 57 Haw. 585, 562 P.2d 771 (1977) (metes and bounds in title documents are only prima facie descriptions and regardless what they show, the seaward boundary is at the "shoreline" as actually marked by the upper reaches of the waves). Over time, as the court below recognized, it became indisputable that the boundary between the upland owners' property and the State of Hawai`i's submerged lands "ambulated" as sand came and went. *Id.*

Prior to May 2003, after accretion formed a littoral owner could either take no action or pursue litigation to establish record title to the accreted area based upon a "shoreline certification."[2] But, as the

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waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or the upper limit of debris left by the wash of the waves." H.R.S. § 205A-1. In all other respects, Hawai`i law regarding accretion is based upon English common law. *See* H.R.S. § 1-1. Texas also provides public rights up to the line of vegetation.

This definition does not affect the significance of the question presented here, which involves the question whether interests in an ambulatory shoreline that encompasses future accretion are "property." That issue is independent of the criteria used to define the location of the "shoreline."

[2] A landowner can file either a quiet title action (H.R.S. Chapter 669) or a registration petition in the Land Court, which

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Hawai`i court held (App. 61, 65), littoral owners who took no action still owned the accreted area because the legal boundary moved as the shoreline shifted.

ACT 73: BY *IPSE DIXIT* PRIVATE LANDS BECOME PUBLIC AND RIPARIAN RIGHTS DISAPPEAR

In 2002, the Hawai`i legislature responded to pleas to expand the public beaches. However, instead of funding a renourishment project that would move the shoreline seaward, as was at issue in *Beach Nourishment*, the legislature chose a quicker course. It simply passed a bill declaring that, with limited exceptions, the State's "public lands" would henceforth include all existing and future accretion that had not already been "not otherwise awarded" to a private owner though legal proceedings. The bill explicitly prohibited private owners from seeking to establish recorded title to existing or future accretion unless legal proceedings were then underway or the landowner was only seeking to "regain title to the restored portion" of a parcel that had previously eroded. This meant the recorded metes and bounds of beachfront properties – going back to when the land first passed from the Hawaiian monarchy into private

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administers the Torrens title system (H.R.S. Chapter 501). *See, e.g.,* Land Court Rule 26 (state land surveyor shall "check the accretion and/or erosion on the ground and report to the court on the accuracy of the survey).

hands during the 1800s – set the permanent shoreward boundaries, regardless how much accretion had occurred in the intervening decades.

The then-governor vetoed the bill based upon concerns about its constitutionality. Statement of Objections to House Bill No. 2266 by Benjamin J. Cayetano, Governor of Hawai`i, April 26, 2002.

After a new governor was elected, the proposed legislation resurfaced. This time it passed, becoming "Act 73" in May 2003. Without providing any compensation to affected landowners, the Act:

- Turned virtually all existing unregistered and unrecorded accretion into public lands; and
- Fixed littoral owners' shoreward boundaries, thereby eliminating their riparian right to maintain shoreline access as future accretion occurred.

Restricting beachfront owners to fixed boundaries was not part of any plan to develop the State's submerged lands, any plan to improve navigation, or any regulatory scheme involving public resources. It was simply a plan to create bigger public beaches by changing past and future accretion into public land.

THE PROCEEDINGS BELOW

After Act 73 took effect, a class action was filed to obtain just compensation or, alternatively, an injunction against implementation of Act 73. The latter request was based upon a Hawai`i Supreme Court decision (*Allen v. Honolulu*, 58 Haw. 432, 571 P.2d 328 (1977)) that appeared to forbid judicially mandated monetary compensation in inverse condemnation actions.

After the class was certified to include all private beachfront owners, the parties filed cross motions for summary judgment because there were no disputed material facts. The class members' motion was granted; the state's motion was denied. The trial court held Act 73 effected a "taking" and enjoined enforcement of Act 73 unless and until the State compensated the private owners for their existing accretion and their interest in future accretion.

The State appealed. The Hawai`i Intermediate Court of Appeals ("ICA") affirmed in part and reversed in part. It affirmed the trial court's judgment that Act 73 "took" accretion that existed when it took effect and remanded for a trial on whether and to what extent the Owners are entitled to damages.

The ICA reversed the trial court's determination that Act 73 took landowners' rights, as riparian owners, to have their boundaries continue to move and encompass future accretion. (App. 66).

In reversing, the ICA did not dispute that prior to Act 73 the Owners' seaward boundaries were tied directly to the movement of the shoreline and that any accretion automatically belonged to them – that was the basis on which it held Act 73 took all then-existing accretion. However, the ICA held that the fixing of an immoveable boundary – and the resulting loss of future accretion – entailed no taking because landowners had only a contingent future interest in future accretion, and that, it said, is not "property" for constitutional purposes.[3]

The Owners unsuccessfully requested reconsideration from the ICA. App. 68-69. Then, both the Owners and the State timely petitioned for certiorari from the Hawai`i Supreme Court. The State argued landowners suffered no taking because the trial court and the ICA had both erred in deciding that Act 73 took existing unrecorded accretion. The Owners argued that the State had taken more than the ICA acknowledged.

The Hawai`i Supreme Court rejected both petitions on June 9, 2010 (App. 70-105), just 8 days before this Court's decision in *Beach Renourishment*. Under that court's rules (Haw. R. App. Proc. 40(a)), it was

[3] In reaching this decision, the ICA ignored a number of other cases holding that boundary-fixing statutes violated the property rights of riparian owners. *See* note 9, *infra.*

not possible to ask for reconsideration based upon *Beach Renourishment*.

THE FEDERAL ISSUES WERE PRESENTED BELOW

The Owners' arguments to the trial court, the ICA and the Supreme Court were based upon federal cases. The ICA decision was based upon this Court's decisions. *See, e.g.,* App. at 18, 56, and 60-65.[4] And the two Hawai`i Supreme Court justices, who wanted to take certiorari, relied on this Court's decisions, as well. App. at 94-100.[5]

[4] The ICA remanded for trial on the issue whether the Petitioners actually suffered the loss of any existing accretion (App. at 66), but that issue does not affect whether the riparian rights to an ambulatory boundary and future accretion were taken without just compensation.

[5] *Cf. Kentucky v. Stincer*, 482 U.S. 730, 735 n. 7 (1987) (viewing decision of state supreme court predicated on federal decisions as presenting federal question, not separate, adequate, and independent state grounds). Here, there can be no independent state ground to justify taking riparian rights without compensation. If anything, Art. I, §19 of the Hawai`i constitution, with its prohibition against both injuring **and** taking without just compensation, would support more compensation, not less. *See also Knutson v. City of Fargo,* 600 F.3d 992, 997 (8th Cir. 2010) (where state and federal "takings clauses" were nearly identical, such that state courts look to both state and federal cases, the issue of violating the federal constitution was necessarily litigated in an inverse condemnation action).

REASONS FOR GRANTING THIS PETITION

A. The Hawai`i Decision And Others Like It Which Deny Any "Property" Interest In Riparian Rights To Future Accretion Are Clearly Contrary To This Court's Past Decisions Regarding The Property Rights Of Littoral Owners

The Hawai`i court – like others before it – disregarded an elemental principle of takings law As this Court's decisions in *County of St. Clair v. Lovingston,* 90 U.S. 46 (1874), and *Stop the Beach Renourishment v. Florida Department of Env. Prot.*, 130 S.Ct. 2592 (2010) ("*Beach Renourishment*"), made clear, riparian rights[6] – even if they are characterized as contingent future interests – are property that cannot be taken without just compensation.

For over 114 years, littoral owners in Hawai`i enjoyed the benefit of accretion and the burden of erosion. Nothing in Hawai`i law impeded movement of the seaward boundary in response to natural forces or limited littoral owners' rights to hold future accretion. Act 73, however, took it all: the existing accretion and the moveable boundary that guarantees shoreline ownership.

In *Lovingston*, this Court analyzed longstanding common law rules and several of its own prior

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[6] "Riparianness also encompasses the vested right to future alluvion, which is an 'essential attribute of the original property.'" *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 326 (1973) (quoting *County of St. Clair v. Lovingston*, 90 U.S. 46 (1874).

decisions, in stating it was "well settled at common law that accretion belongs to the upland owner." 90 U.S. at 68. Further, "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 [accretion] rests in the law of nature. . . . "

In *Beach Renourishment,* the plurality opinion recapped basic principles of takings jurisprudence. Without contradiction in the concurring opinions, the plurality noted that the parties disputed the nature of littoral owners' interest in accretion. The Petitioner characterized it as an easement; Florida dismissed it as a "contingent future interest," which was not "property." *Beach Renourishment,* 130 S.Ct. at 2601; *Brief of Respondent Florida Department of Environmental Protection,* at 49-50.

The plurality opinion summarily dismissed this disagreement as having no substance because the "Takings Clause . . . applies as fully to the taking of a landowner's riparian rights as it does to the taking of an estate in land." *Beach Renourishment,* 130 S.Ct. at 2601. On that basis, it was unnecessary to be concerned with whether the right to future accretion is only contingent future interest, as Florida argued. *Id.* at 2601, n. 5.

The Hawai`i decision is based upon a directly contrary view of this critical issue. The Hawai`i court parsed the Owners' rights into vested interests (the accretion that existed when Act 73 was adopted) and their "contingent interest" in ownership of future

accretion that a beachfront owner would own if boundaries were not fixed by Act 73. The former had to be paid for; the latter could be taken for free because it was not "vested." App. at 57, 65.

Although *Beach Renourishment* upheld Florida's beach expansion program, nothing about that decision supports the decision below. To the contrary, although the background principle of avulsion supported Florida's actions, it is indisputable that principle does not apply here (since the State of Hawai`i was doing nothing to change the configuration of the beach – it was merely redrawing and fixing the boundary to its liking). In truth, there is nothing in Hawai`i law or otherwise that permits naked boundary changes that serve only to convert private land into public property without just compensation.

Lucas v. South Carolina Coastal Counsel, 505 U.S. 1003 (1992) is also contrary to the Hawai`i decision in this case. In *Lucas*, the state restricted use of littoral land in a manner that constituted a "taking" because the regulatory scheme was excessively restrictive. Here, the state abandoned all pretense of regulation in favor of simply appropriating title.

Nothing in this Court's jurisprudence supports Act 73 or the Hawai`i decision on this issue. To the contrary, this Court made it clear – even before *Beach Renourishment*, that contingent future interests are property, such as those taken by Act 73, cannot be taken without compensation.

For example, in *Babbitt v. Youpee,* 519 U.S. 234, 245 (1977), this Court invalidated, on takings grounds, a statute in which Congress that small interests in Indian land would escheat to the tribe and could not be passed to heirs by descent or devise – even though interests would come into existence (if at all) only in the future. Similarly, when the Florida legislature claimed ownership of interest that might be earned in the future on monies litigants deposited in court, this Court found the statute effected a taking, even though the interest had not yet been earned. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 and 164 (1980) ("[A] State, by *ipse dixit*, may not transform private property into public property without compensation.")

Ignoring these cases, the Hawai`i Court offered several arguments to support its decision that riparian rights can be taken without compensation. Principally, it relied on the Ninth Circuit's 1907 decision in *Western Pacific Ry. Co. v. Southern Pac. Co.,* 151 F. 376, 398-99 (9th Cir. 1907) ("*Western Pacific*"). But, *Western Pacific* and similar cases that give no value to riparian rights[7] cannot be reconciled with this Court's precedents.

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[7] The Hawai'i court and the Ninth Circuit are not the only courts that have disregarded *Lovingston* to hold that the riparian interest in future accretion is not legally protected "property." *See, e.g., Parmalee v. T.L. Herbert & Sons*, 13 Tenn. App. 101 (1930) (it is "absurd" to suggest riparian owner can recover damages for something that is not yet his); *Eisenbach v. Hatfield,* 2 Wash. 236, 26 P. 539 (1891) (riparian owner cannot have

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The decision below and these other cases simply give no weight to *Lovingston*, where, as noted above, this Court unanimously stated (consistently with *Beach Renourishment*) 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." 90 U.S. 46, 68-69.

Not all courts have refused to give any credence to *Lovingston*. *See, e.g., Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Assoc., Ltd.,* 512 So.2d 934, 937 (Fla. 1987) (citing *Lovingston* for the principle that riparian right to future alluvion is a vested right and "an inherent and essential attribute of the original property"); *State v. Gill*, 259 Ala. 177, 66 So.2d 141 (1953) (upland owner held entitled to accretion created as a result of government dredging). And, recently, the impropriety of disregarding *Lovingston* was confirmed by the Ninth Circuit in *United States v. Milner,* 583 F.3d 1174, 1186 (9th Cir. 2009), cert. denied *sub nom. Sharp v. United States,* 130 S.Ct. 3273 (2010) (right to accretion is a vested right that "rests in the law of nature"; citing *Lovingston*).

Most importantly, the continuing validity of *Lovingston* underlies the plurality's summary rejection of Florida's argument in *Beach Renourishment* to

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a "present vested right" to that which does not exist). *See also* note 8, *infra*.

the effect there was no "taking" because riparian rights to future accretion and direct ocean access are merely "contingent future interests." 130 S.Ct. at 2601, n. 5. Were it otherwise, this threshold "property" issue could not have been so quickly rejected. *Id.*

Second, *Western Pacific* did not involve the naked appropriation riparian rights; it involved the development of filled land, not unlike the project at issue in *Beach Renourishment.*[8] This case is different. Hawai`i was not asserting any right to develop its submerged land; it was redrawing the boundary for its own gain.[9]

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[8] The Hawai`i court relied on two other cases which cannot sustain its decision. *Cohen v. United States,* 162 F. 364 (C.C. N.D. 1908) involved the diversion of a creek in connection with public harbor improvements which ended a pattern of accretion without affecting the landowners' rights. *Latourette v. United States,* 150 F.Supp. 123 (D. Ore. 1957) involved the alleged adverse effects of a government jetty that was built in aid of navigation. These two cases reflect the unremarkable and undisputed principle – reaffirmed in *Beach Renourishment* – that every littoral owner's rights are subject to the government's correlative right to develop its 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. United States,* 166 U.S. 269 (1897). This is not such a case.

[9] A number of state courts have assessed the validity of schemes in which states have tried to substitute fixed boundaries for ambulatory boundaries affecting riparian property. In every such case, the state court has held that the new boundaries took private property or constituted an unlawful exercise of police power. *See, e.g., Purdie v. Attorney General,* 143 N.H. 661,

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Third, and perhaps most importantly, the dicta in *Western Pacific*, to the effect that "the right to future possible accretion could be divested by legislative action," (151 F. at 299; quoted by the ICA at 122 Haw. 53, 222 P.3d at 460) cannot be reconciled with this Court's decisions in *Babbitt* (rejecting legislation taking contingent future interests in tribal property), *Webb's Fabulous Pharmacies* (invalidating legislation taking contingent interest in future interest), and *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001), where this Court rejected the notion that the State can use prospective legislation to take property without compensation merely because property owners are on "notice" of onerous land use regulations.

Riparian rights to accretion and an "ambulatory boundary," were – until Act 73 – firmly established in Hawai`i law until 2003. They were one of the indisputable attributes of littoral land ownership. And, as Justice Thurgood Marshall explained:

> 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

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666-67, 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, 211-12 (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, 140-41 (Mich. 1932) (state cannot impair the rights of a riparian owner by obstructing his access to the water).

> demonstrate that there are limits on governmental authority to abolish "core" common-law rights, including rights against trespass, at lease with 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). Riparian rights are precisely this type of "core" property interest because, as recognized in *Lovingston* (as well as Hawai`i cases, such as *Halstead v. Gay, supra*) the right to accretion has long been settled as an incident of littoral land ownership.

The Hawai`i court also relied on Art. XI, § 1 of the 1979 Constitution which says the State "shall conserve and protect Hawai`i's natural beauty and all natural resources . . . [which] are held in trust by the State for the benefit of the people." This provision, the ICA held (122 Haw. at 54, 222 P.3d at 461), undermines littoral owners' property by diminishing "any expectation that oceanfront owners in Hawai`i had and may have in future accretions to their property." *Id.* The respondents in *Beach Replenishment* made the same argument without success. Brief of Respondent Florida Department of Env. Protection at 48-53.

This is exactly the kind of appropriation by legislative *ipse dixit* the Court condemned in *Webb's* and *Palazzolo*. Whatever obligations the State may have to protect public resources, they do not allow eliminating longstanding riparian ownership of

future accretion merely by giving notice that it desires to protect natural resources. No principle of Hawai`i law supported the notion that private lands and riparian rights can become public at the legislature's whim.

This case does not in any way involve the State merely regulating oceanfront property or implementing any "background principles" of state law, such as the doctrine of avulsion, which was dispositive in *Beach Renourishment*. Through legislation – separate and apart from the conversion of accretion to "public lands" – the State of Hawai`i has restricted development of accreted land by placing it in the conservation district (H.R.S. § 501-33), imposing setbacks to conserve open space (H.R.S. § 205A-2), and restricting potential development (*see* H.R.S. § 183-45, which prohibits structures, dredging, grading and other use "which . . . may interfere with the future natural course of the beach"). Petitioners have never complained about those restrictions; they are only seeking to halt the outright appropriation effected by Act 73.

B. The Hawai`i Court Has Done What *Lovingston* And *Beach Renourishment* Forbid: Denying Compensation Through An Unfounded Disregard Of Established State Law

Whether viewed through the plurality's lens of the takings clause or Justice Kennedy's view of the due process clause, the Hawai`i court has done

exactly what *Beach Renourishment* forbids. Instead of honoring indisputable incidents of riparian ownership, the Hawai`i court – without any supporting precedent – effectively eliminated the right to an ambulatory boundary and accretion for the purpose of avoiding the duty to pay compensation. In short, the court below effectively eliminated an established property right by dismissing riparianness as too speculative to be worthy of constitutional protection. This is exactly the type of unprincipled judicial denial of established property rights which was condemned in *Beach Renourishment,* albeit under different rationales.[10] Specifically, both the plurality opinion and Justices Kennedy and Sotomayor said that such rights cannot be extinguished without some remedy. 130 S.Ct. at 2602 ("If a legislature *or a court* declares what was once an established right of private property no longer exists, it has taken that property.") (Scalia, J.) (emphasis in original); 130 S.Ct. 2614 (Kennedy, J., concurring).

This case presents the opportunity for the Court – with a full complement of Justices – to resolve the issues relating to the constitutional basis for challenging judicial "takings" that were not resolved in

[10] The concern expressed by Justice Kennedy (130 S.Ct. at 2616) about the propriety of a federal court requiring a state to "pay owners for takings caused by a judicial decision," is not present here. The requirement for compensation has already been determined by the Hawai`i court (122 Haw. at 57, 222 P.3d. at 464). App. at 66. The only question is what "property" the State must pay for.

Beach Renourishment. Regardless which constitutional theory prevails, the Hawai`i decision is inconsistent with this Court's past rulings because a century of riparian rights have been extinguished without compensation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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