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**No. SCCQ-19-0000156**

IN THE SUPREME COURT OF THE STATE OF HAWAII

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| DW AINA LEA DEVELOPMENT, LLC,<br>Plaintiff-Appellant,<br><br>vs.<br><br>STATE OF HAWAII LAND USE COMMISSION, *et al.*,<br><br>Defendants-Appellees. | ) | ON CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT |

**BRIEF AMICUS CURIAE OF OWNERS' COUNSEL OF AMERICA IN SUPPORT OF PLAINTIFF-APPELLANT**


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## BRIEF AMICUS CURIAE OF OWNERS' COUNSEL OF AMERICA IN SUPPORT OF PLAINTIFF-APPELLANT

## QUESTION PRESENTED

"[W]hether an unconstitutional taking of private property without just compensation amounts to 'damage or injury to . . . property[?]'"

Order at 14, *DW Aina Lea Dev. v. Land Use Comm'n*, No. 17-16280 (9th Cir. Mar. 7, 2019)

## SUMMARY OF ARGUMENT

1. The answer to the question presented is *no*: a regulatory takings claim under the Hawaii Constitution[1] does not seek damages for injury to persons or property. Rather, the essential purpose of a takings claim is to compel the government to acknowledge it has taken or damaged private property and that it has an obligation to provide just compensation.

2. This Court has explained that the first step in analyzing whether any statute of limitations governs a claim is to determine "the nature of the claim." *Au v. Au*, 63 Haw. 210, 214, 626 P.2d 173, 177 (1981). In an inverse condemnation lawsuit asserting a regulatory taking,[2] a property owner seeks judicial confirmation that a

[1] The government is not only obligated to provide just compensation under the Hawaii Constitution when it takes property, but also when it *damages* property for public use. *See* Haw. Const. art. I, § 20 ("Private property shall not be taken or damaged for public use without just compensation."). After declining to include the "or damaged" provision in the 1950 constitutional convention, *see* 2 Proceedings of the Constitutional Convention of Hawaii, 1950, at 18 (1961), it was finally included after the 1968 constitutional convention. *See* 2 Proceedings of the Constitutional Convention of Hawaii of 1968, at 24–32 (1972). The addition of the "or damaged" clause was intended to recognize a right to compensation when public works affected use rights and drastically devalued property but did not physically invade or appropriate it. *See* Maureen Brady, *The Damaging Clauses*, 104 Va. L. Rev. 341, 361 (2018) ("From its origins in Illinois to its adoption by Hawaii nearly a century later, the primary evils against property that the damaging's clauses sought to remedy were externalities placed on owners by infrastructural growth.").

[2] The terms "inverse condemnation" and "regulatory taking" are often used interchangeably. While they have not been precisely defined under Hawaii law, generally inverse condemnation is the procedural tool by which a property owner sues the government or a private entity which has been delegated the power of eminent domain, asserting it has taken or damaged private property for public use by an exercise of a power other than the power of eminent domain,

regulation or other government action has gone "too far" in interfering with the owner's use of property, and thus is tantamount to a condemnation by eminent domain for which the government is obligated to provide compensation.[3]

3. As an obligation affirmatively expressed in the text of Article I, section 20, the government's duty to provide just compensation is not a creature of statute, regulation, contract, or tort duty, nor is it dependent on a legislative waiver of sovereign immunity.[4] Thus, when property is taken or damaged, the government's obligation to provide just compensation is self-executing: its categorical duty is to provide compensation which approximates the value a free market would attach to the taken or damaged property.[5]

4. No statute expressly limits regulatory takings or inverse condemnation claims. The most analogous claim is adverse possession (where a non-owner asserts an interest in, or ownership of, the property). The majority national rule is that an

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which results in either loss of economically beneficial use (regulatory taking), or a physical invasion of a property interest (physical taking). *See Briston v. Tilcon Minerals, Inc.*, 931 A.2d 237, 255 (Conn. 2007) ("Accordingly, an inverse condemnation action has been aptly described as an eminent domain proceeding initiated by the property owner rather than the condemnor.").

[3] *Hasegawa v. Maui Pineapple Co.*, 52 Haw. 327, 333-34, 475 P.2d 679, 683-84 (1970) ("The right of the State to exercise its police power and right of taxation in the public interest is limited by the constitutional principle that private property shall not be taken for public use without just compensation. . . . Thus, although the police power permits the State to regulate the use of an individual's property in order to protect the public health, safety and welfare, such regulation has its limits. If it goes too far it will be recognized as a 'taking' requiring the individual affected to receive just compensation. We find that HRS § 388-32 goes beyond the mere regulation of property and amounts to taking within the meaning of article I, section 18 of the Hawaii Constitution.") (citing *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (if a regulation "goes too far" it will be deemed a taking under the Fourteenth Amendment)).

[4] "The … right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner." *Knick v. Township of Scott*, 139 S. Ct. 2162, 2171 (2019) (Fifth Amendment takings claims).

[5] *City & County of Honolulu v. Int'l Air Svc. Co.*, 63 Haw. 322, 628 P.2d 192 (1981). *See also* Haw. Rev. Stat. § 101-23 (just compensation assessed for the property and any improvements taken or damaged); Haw. Rev. Stat. § 101-24 (compensation assessed on of date of summons).

owner must let the prescription period lapse (here, twenty years) without an assertion of her rights before she is deemed to have lost her property rights.[6]

5. By contrast, tort, contract, and other civil claims are exceedingly poor analogues. A takings claim does not seek "recovery of compensation for the damage or injury to persons or property," and therefore is not subject to the personal injury statute of limitations.[7] Importantly, the wrong being remedied in an inverse condemnation action is not the taking itself (because takings are not unlawful, only takings *without compensation*), and in a takings lawsuit the plaintiff must concede the government's action is valid. The wrong addressed by a takings claim is the withholding of compensation government has a constitutional obligation to provide.

## ARGUMENT

This brief makes two main points. First, we describe the precise nature of a regulatory takings claim and an action for inverse condemnation and why the claim does not seek recovery for "damage or injury to . . . property." Second, we highlight the majority rule that the adverse possession statute of limitations governs takings claims.

### I. An Inverse Condemnation Suit Asserting A Regulatory Taking Seeks To Compel The Government To Acknowledge It Has Taken Or Damaged Property, And Must Provide Just Compensation.

#### A. What Is A "Regulatory Taking?"

Regulatory takings jurisprudence is built on the principle that an exercise of

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[6] The other very analogous claim is a straight condemnation or taking under Hawaii's eminent domain statutes, which is not subject to any time limitations because the government may exercise eminent domain any time it chooses. Similarly, if it exercises eminent domain and does not provide compensation, the property's owner's right to be compensated never expires. *See* Kyle Graham, *The Continuing Violations Doctrine*, 43 Gonzaga L. Rev. 271, 280-81 (2007) ("a claim subject to [the continuing violation] approach will continue to build and absorb new wrongful acts for so long as the defendant perpetuates its misconduct"). Generally, the "misconduct" in a taking case is not the taking, but the withholding of compensation the government has an obligation to provide.

[7] *Cf. Au*, 63 Haw. at 216-217, 626 P.2d at 179 ("The nature of this claim is not the physical injury to property, rather it is the making of the fraudulent representations concerning the condition of the home which induced appellant to purchase it.").

governmental power that has dramatic effects on the use of private property is the functional equivalent of condemnation, giving rise to a self-executing government obligation to provide compensation. A takings claim to enforce the Hawaii Constitution asserts that action by an entity with condemnation power has so interfered with the economically beneficial uses of an interest in property that it is the equivalent of an exercise of eminent domain.[8] The only real difference between an inverse condemnation and a direct condemnation pursuant to Hawaii's eminent domain code (Haw. Rev. Stat. § 101-1, *et seq.*) is that in eminent domain, the government admits it is taking or damaging property and offers to pay or litigate the amount of just compensation. In an inverse condemnation, the plaintiff-owner must prove the government has taken or damaged property. After he does so, the compensation phase of the lawsuits are precisely the same. *See Briston*, 931 A.2d at 255 ("an inverse condemnation action has been aptly described as an eminent domain proceeding initiated by the property owner rather than the condemnor").

The U.S. Supreme Court has developed tests for determining whether a regulation results in a Fifth or Fourteenth Amendment taking. That analysis focuses on categorical takings, such as when a regulation deprives an owner of all economically beneficial uses of property, or deprives her of an essential attribute of private property ownership such as the right to exclude.[9] The Court also developed tests to deter-

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[8] *See Leone v. Cnty. of Maui*, 141 Haw. 68, 72, 404 P.3d 1257, 1261 (2017) (owners asserted regulatory takings claims under both Fourteenth Amendment and Hawaii Constitution), *cert. denied*, 139 S. Ct. 917 (2019). It does not matter what power the government is exercising—neither the Hawaii Constitution nor the Fifth Amendment mentions "eminent domain" or other government power—and the compensation imperative applies to *all* takings.

[9] *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005) ("government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be compensable under the Fifth Amendment."). Categorical takings are further broken down into distinct categories. Government actions that result in physical occupations, *see Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012) (purposeful government flooding); physical occupations permitted by government regulations, *see Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (government ordered owner to allow public to navigate on its marina); and regulations that result in a loss

mine when less-than-categorical property impacts also trigger the government's obligation to provide compensation.[10] But Hawaii's Just Compensation Clause expressly recognizes more rights than the Fifth Amendment's minimum requirements. *See* Haw. Const. art. I, § 20 ("Private property shall not be taken *or damaged* for public use without just compensation.") (emphasis added). *See* Maureen Brady, *Property's Ceiling: State Courts and the Expansion of Takings Clause Property*, 102 Va. L. Rev. 1167 (2016). The "or damaged" clause recognizes a right to compensation when public benefits affect use rights but do not physically invade or appropriate it. *See* Brady, *The Damaging Clauses*, 104 Va. L. Rev. at 361. Thus, in analyzing takings claims under the Hawaii Constitution, this Court is not bound to apply the U.S. Supreme Court's tests, but may adopt its own standards and establish rules for Hawaii regulatory takings that are clearer and more in accord with our constitution.

Other state courts take a variety of approaches. Some adopt the Fifth Amendment's takings standards as the tests under the state constitution.[11] Others assume

of all economically beneficial use of property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (categorical taking where regulation deprives owner of "all economically beneficial us[e]" of property).

[10] Regulations resulting in less than a total diminution of economically beneficial use or that do not deprive the owner of an essential attribute of property may nonetheless be takings if government action is so egregious or so interferes with the owner's investment-backed expectations that it requires compensation. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978). That test has been severely criticized by the legal academy, practicing bar, and the courts. *See*, *e.g.*, John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. Envtl. L. & Pol'y 171, 174-75 (2005) ("If the *Penn Central* test is to serve as more than legal decoration for judicial rulings based on intuition, it is imperative to clarify the meaning of *Penn Central*.").

[11] *See*, *e.g.*, *Labrayere v. Bohr Farms, LLC*, 458 S.W.3d 319, 335–36 (Mo. 2015) (Fisher, J, concurring) (because the "takings provisions in the Missouri Constitution are nearly identical to the federal takings protections embodied in the Fifth Amendment," the test under the state constitution is the same); *Gardner v. N.J. Pinelands Comm'n*, 593 A.2d 251 (N.J. 1991) (same tests); *Dunes West Golf Club, LLC v. Town of Mt. Pleasant*, 737 S.E.2d 280 (S.C. 2013) (same); *Phillips v. Montgomery Cty.*, 442 S.W.3d 233, 244 (Tenn. 2014) ("given the textual similarities" between state and federal constitutions, the tests are the same).

without deciding that the federal takings test is the same.[12] Others apply a takings test the U.S. Supreme Court has in part repudiated.[13] Others adopt the Supreme Court's takings test in theory but apply it differently.[14] A minority of states do not recognize regulatory takings under their state constitutions at all.[15] And some courts—finding the federal standards inadequate, confusing, or not compatible with their state constitution's purpose—chart a different course, applying their own standards for state constitutional law regulatory takings.[16]

This Court should not adopt the confusing and inadequate *Penn Central* test, but should conclude that to prove a regulatory taking or damaging under the Hawaii Constitution, a property owner must show (1) a substantial interference (2) with private property (3) which has destroyed or materially lessened its use or value, or (4) by which the owner's rights to its use and enjoyment is in any substantial degree

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[12] *See*, *e.g.*, *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 932 (Tex. 1998) ("we assume, without deciding, that the state and federal guarantees in respect to land-use constitutional claims are coextensive, and we will analyze the Mayhews' claims under the more familiar federal standards.").

[13] *See*, *e.g.*, *Landgate, Inc. v. Cal. Coastal Comm'n*, 953 P.2d 1188 (Cal. 1998) (a property owner may prove a regulatory taking by showing that government action results in a loss of all economically beneficial use, *or* that it does not advance a legitimate state interest); *Animas Valley Sand & Gravel, Inc. v. Bd. of Cnty. Comm'rs*, 38 P.3d 59 (Colo. 2001) (same).

[14] *See*, *e.g.*, *State of Florida v. Basford*, 119 So.2d 478, 481 (Fla. Dist. Ct. App. 2013) (applying *Penn Central* to "take into consideration everything"); *In re New Creek Bluebelt, Phase 3*, 65 N.Y.S.3d 552 (App. Div. 2017) (applying only two of the three *Penn Central* factors).

[15] *See*, *e.g.*, *Town of Gurley v. M & N Materials, Inc.*, 143 So.2d 1, 13 (Ala. 2012) (recognizing only physical invasion inverse condemnation claims; the Alabama Constitution "does not make compensable regulatory 'takings'").

[16] *See*, *e.g.*, *Ranch 57 v. Yuma*, 731 P.2d 113 (Ariz. Ct. App. 1986) (Arizona has a separate test under the Arizona Constitution than under the Fifth Amendment for determining regulatory takings); *Dep't of Soc. Svcs. v. City of New Orleans*, 676 So.2d 149, 154 (La. App. 1996) (taking when regulation destroys a "major portion" of the property's value); *America West Bank Members LC v. State of Utah*, 342 P.3d 224, 235-36 (Utah 2014) (a taking occurs "when there is any substantial interference with private property which destroys or materially lessens its value, or by which the owner's rights to its use and enjoyment is in any substantial degree abridged or destroyed").

abridged or destroyed. *See America West*, 342 P.3d at 235-36.

### B. Inverse Condemnation Remedy: An Action To Enforce Government's Self-Executing Obligation To Provide Compensation.

Whatever test this Court applies to analyze Hawaii constitutional takings or damaging claims, if there's been a taking the government has an affirmative obligation which flows directly from the text of article I, section 20 to provide compensation. Thus, if the government acknowledges it is taking or damaging property (eminent domain), or a court determines some other government action results in a taking or damaging (regulatory taking or inverse condemnation), the just compensation imperative is self-executing. *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 315 (1987) (The Fifth Amendment is not merely precatory but has a "self-executing character . . . with respect to compensation.").[17] That is important here because if the Commission took or damaged Aina Lea's property, Aina Lea has a right "to just compensation [that] could not be taken away by statute *or be qualified*" by a statutory provision. *See Jacobs*, 290 U.S. at 17 (emphasis added).

The point of article I, section 20's compensation imperative being "self-executing" is that it highlights the unique nature of an inverse condemnation claim. Strictly

[17] The Supreme Court reaffirmed the point in *Arkansas Game*, 568 U.S. at 31 ("'When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.'"). This recognition began with Justice Brennan who wrote, "[a]s soon as private property has been taken . . . the landowner has already suffered a constitutional violation, and the self-executing character of the constitutional provision with respect to compensation is triggered." *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting on other grounds). Six years later, this dissent was adopted by the majority in *First English*, 482 U.S. at 315, which held that just compensation must be provided once a taking has occurred, and that landowners are "entitled" to bring an action to require it. The Court also noted that Justice Brennan relied on *Jacobs v. United States*, 290 U.S. 13 (1933), "that claims for just compensation are grounded in the Constitution itself." *First English*, 482 U.S. at 315 (quoting *United States v. Clarke*, 445 U.S. 253, 257 (1980)); *see also First English*, 482 U.S. at 316 n.9 ("[I]t is the Constitution that dictates the remedy for interference with property rights amounting to a taking").

speaking, that claim is not one for "damages" as is often misstated. Rather, it is an action to compel the government to recognize that it has taken property and that, as a consequence, it must provide compensation.[18] That distinction is best illustrated by those states which separate the process into two stages. In Ohio, Pennsylvania, and Michigan, for example, a property owner who asserts that her property has been taken by regulation or other government action does not bring an "inverse condemnation" lawsuit demanding compensation. Instead, she seeks a writ of mandamus to compel the government to recognize it has taken property, and to order it to institute an eminent domain lawsuit to determine and provide just compensation.[19] Although other states—Hawaii included—compress this two-stage process into a single "inverse condemnation" lawsuit, the foundational principle is the same: a takings claim seeks judicial recognition the government has taken or damaged property, and that it must as a consequence provide just compensation.[20]

**II. The Most Analogous Claim: Adverse Possession.**

The Hawaii legislature has not adopted a statute expressly limiting the time to assert a regulatory takings or damaging claim, or to institute an inverse condemnation action. The absence of an express statute of limitations for a self-executing

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[18] Takings are not unconstitutional, only takings *without compensation*. *See*, *e.g.*, *Knick*, 139 S. Ct. at 2170 ("A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it."). Consequently, to succeed on its takings claim, Aina Lea must concede that the Commission's action was legitimate, because unconstitutional or otherwise illegal government actions cannot be the basis for compensation (property must be taken or damaged for public use).

[19] *See*, *e.g.*, *Moore v. City of Middletown*, 975 N.E.2d 977 (Ohio 2012); *R&J Holding Co. v. Redev. Auth. of Montgomery Cnty.*, 670 F.3d 420 (3d Cir. 2011) (applying Pennsylvania law).

[20] Thus, in a takings claim under the Hawaii Constitution, the plaintiff bears the burden of proving his property has been taken or damaged. If he does so, the obligation is then on the government to provide just compensation. This mirrors the process in a straight taking by eminent domain under chapter 101. *See Kobayashi* ex rel. *State v. Heirs of Kapahi*, 48 Haw. 101, 395 P.2d 932 (1964) (condemnor bears burden of proof of just compensation; this Court rejected the State's contention "that in an eminent domain case, the burden of proof of value is on the landowner").

constitutional obligation to provide compensation might suggest there isn't one.[21] Otherwise, we look for analogues among what are, at best, imperfect comparisons.[22]

### A. "A majority of courts that have considered the issue have applied the adverse possessions statute rather than the 'catch all' provision, to 'takings' claims."

The claim most analogous to an inverse condemnation or regulatory takings claim is adverse possession, where a non-owner asserts an interest in, or ownership of, the owner's property. Property owners are in much the same position in regulatory takings claims. Understanding whether property has been taken by regulation isn't a simple calculus (as detailed earlier), and often takes time. In contrast to physical takings where the government or the public occupies property, regulatory takings where the owner has not been physically dispossessed are not as obvious. *See*, *e.g.*, *Cobb v. City of Stockton*, 120 Cal. Rptr 3d 389, 395 (Cal. Ct. App. 2011) (takings claim accrued when government's occupation of property became adverse to owner by virtue of a court order). In a regulatory takings case, no one is physically occupying the

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[21] After all, there is no "expiration on the Takings Clause." *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001) ("Future generations, too, have a right to challenge unreasonable limitations on the use and value of land."). An unconstitutional government action—in takings, the failure to provide just compensation—cannot become constitutional by the mere passage of time, and the invasion is a "continuing violation" that accrues anew each day. *See*, *e.g.*, *Kerr v. City of South Bend*, 48 N.E.3d 348, 355 (Ind. Ct. App. 2015) (harm in physical invasion inverse condemnation claim is "continual," and "as such trigger new limitations periods each time they damage or interfere with the use and enjoyment of his property"). Moreover, there's no time expiration on government's duty to provide compensation for a taking: if there is a taking or damaging without contemporaneous compensation, the violation of the constitution continues unabated until compensation is provided. And finally, the mirror claim—a taking or condemnation under the power of eminent domain—is not subject to *any* statute of limitations. It is the exercise of a sovereign power to which nearly all private property is subject, and government's hands are generally not tied by time in the power to take, damage, and regulate property. The government chooses if and most importantly *when* it institutes a condemnation lawsuit and is not generally bound even by res judicata or other preclusion principles.

[22] Statutes of limitations do not limit a court's jurisdiction, nor must every claim be subject to a time limit. Expiration of the statute of limitations is a waivable defense, meaning the burden is on a defendant to assert it. *Kellberg v. Yuen*, 135 Haw. 236, 254, 349 P.3d 343, 361 (2015).

property, so an owner needs time to understand whether the government action infringed on a fundamental aspect of ownership, whether it *eliminated* her use of the property, or whether it merely *reduced* use. In the latter circumstance, a property owner needs even more time to understand such things as the impact of the action on her investment-backed expectations, the nature of the government action, and whether the property has any economically beneficial uses remaining. These are often not immediate or apparent. The same with adverse possession, where the legislature rejected an unnaturally short limitations period because the claim involves an understanding of intent and legal effects. *See*, *e.g*., *Smith v. Hamakua Mill Co*., 15 Haw. 648 (Terr. 1904) (possession must be hostile to owner's rights, and under claim of right).

Consequently, the majority national rule is that when an inverse condemnation claim is not governed by a specific statute of limitations, the adverse possession limitation period applies, not the "catch all."[23] *White Pine Lumber Co. v. Reno*, 801 P.2d 1370, 1371 (Nev. 1990) ("A majority of courts that have considered the issue have applied the adverse possessions statute rather than the 'catch all' provision, to 'takings' claims.") (footnote omitted). There, the court noted, "[p]erhaps the only broadly recognized general rule that may be extracted . . . involving [this issue] is the one that in absence of any specifically applicable statute of limitations . . . no statute of limitations short of the period required to obtain title by adverse possession . . . may bar the landowner's action . . . ."[24] The court explained the rationale:

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[23] *See* Robert Meltz, Dwight Merriam & Rick Frank, *The Takings Issue* 70 & n.3 (1998) ("Traditionally, courts found physical and regulatory takings claims subject to relatively lengthy (i.e., up to 10-year) statutes of limitations.") (citing *Millison v. Wilzack*, 551 A.2d 899 (Md. Ct. Spec. App. 1989); *Baker v. Burbank-Glendale-Pasadena Airport Auth*., 705 P.2d 866 (1985); Charles C. Marvel, Annotation, *State Statute of Limitations Applicable to Inverse Condemnation or Similar Proceedings by Landowner to Obtain Compensation*, 26 A.L.R.4th 68, 73 (1996)).

[24] *White Pine Lumber*, 801 P.2d at 1371 (citing *Difronzo v. Vil. of Port Sanilac*, 419 N.W.2d 756 (Mich. 1988) ("application to inverse condemnation actions of the fifteen year period found in the adverse possession limitation statute comports with the general rule in this country")). The Nevada court also relied upon *Frustuck v. City of Fairfax*, 28 Cal. Rptr. 357, 374-75 (1963) (owner's right of recovery grows out of title to the property, and thus should have right to bring

> We feel that had the "taker" in this case been a private party, the applicable limitations period would have been the one for acquiring title by adverse possession. The identity of the party doing the "taking" should not change this analysis, especially in light of the constitutional nature of appellant's claim.

*White Pine Lumber*, 801 P.2d at 1371. This applies to all takings claims and inverse condemnation actions. *See, e.g., City of N. Las Vegas v. 5th & Centennial, LLC*, 331 P.3d 896, 900 (Nev. 2014) (adverse possession statute of limitations governs precondemnation claims, a type of regulatory takings claim); *Krambeck v. Gretna*, 254 N.W.2d 691, 693-94 (Neb. 1977) (takings are constitutional claims, and the closest analogue is ten-year limitation of "action for recover of the title or possession of lands"); *Hallco Texas, Inc. v. McMullen Cnty.*, 221 S.W.3d 50, 74 (Tex. 2006) (regulatory takings claims governed by adverse possession statute of limitations). Consistent with the majority of states, this Court should hold that the adverse possessions statute of limitations governs Hawaii regulatory takings claims.

### B. Regulatory Takings' Square Peg Cannot Be Forced Into Tort's Round Hole.

An inverse condemnation lawsuit asserting a regulatory taking isn't a tort, nor is it an action to recover damages for injury to persons or property. A tort personal injury or property damage claim seeks recovery from a private party tortfeasor (or the government if sovereign immunity has been waived)[25] for an injury which result

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action until loss of title by adverse possession); *Ackerman v. Port Seattle*, 348 P.2d 664, 667 (Wash. 1960) (takings claims are of a constitutional magnitude, these claims cannot be cut off by the passage of time short of the government's acquiring title through adverse possession). *See also Rosenthal v. City of Crystal Lake*, 525 N.E.2d 1176, 1183 (Ill. Ct. App. 1988) (physical takings claim was subject to the adverse possession statute of limitations).

[25] Hawaii takings claims do not need a waiver of sovereign immunity as do tort claims against the State. *See* Haw. Rev. Stat. § 662-2. Similarly, takings claims against the federal government, for example, are not tort claims subject to the Federal Tort Claims Act. Nor has Hawaii adopted an analogue to a federal civil rights damages action under the Civil Rights Act of 1871 (the Ku Klux Klan Act, 42 U.S.C. § 1983). And this Court has not recognized a *Bivens*-like damage claim for Hawaii "constitutional torts."

from the tortfeasor's affirmative wrong, or his negligence. A takings claim, by contrast, is not concerned with intent, breach of a duty of care, culpability, or fault.[26] As the U.S. District Court for the District of Hawaii concluded when it held that a six-year limitations period governed a Fifth Amendment regulatory takings claim:

> This court, moreover, believes that a recovery of "just compensation" for the taking of property for public use cannot be construed to be a civil penalty for liquidated damages; nor can it be construed as a "new" or "enlarged" liability since the government's duty to pay arises under the Constitution as a direct consequence of its affirmative act of taking property for public use, and not from its failure to honor any antecedent debt or obligation.

*Sotomura v. Hawaii Cnty.*, 402 F. Supp. 95, 104 (D. Haw. 1975). The court's analysis shows why a tort claim for damages is an exceedingly poor analogy to regulatory takings.[27] For example, in *Chin Kee v. Kaeleku Sugar Co.*, 30 Haw. 17 (Terr. 1927), this Court applied the two-year limitations period under the predecessor statute to Haw. Rev. Stat. § 657-7 for "injury to persons or property." *Id.* at 19. The complaint sought damages for "forcible" (wrongful) entry. *Id.* at 20. By contrast, a claim seeking just compensation for a regulatory taking must concede the validity of the government's action (the action itself isn't wrongful or unlawful), and does not seek damages.[28]

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[26] Takings claims spread the cost of public benefits across the public, ensuring the burden is not focused on a single owner. As the U.S. Supreme Court held about the Fifth Amendment, the just compensation imperative is designed "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *See Armstrong v. United States*, 364 U.S. 40, 49 (1960). Tort damages, by contrast, are to determine fault, provide restitution, to determine rights, to punish the tortfeasor, and to deter retaliation. *Restatement (Second) of Torts* § 901 (1979).

[27] *Sotomura* involved Land Court property, and the District Court applied the six-year land court statute. Haw. Rev. Stat. § 501-212. That statute also acknowledges that takings claims are not tort claims, by recognizing that "[n]othing in this chapter shall be construed to deprive the plaintiff of any tort claim which the plaintiff may have against any person for loss or damage, or deprivation of land, or of any estate or interest therein." *Id.*

[28] A takings claimant seeks to compel the government to provide just compensation (not damages) to put him "in as good a position pecuniarily" as he would have been if the property had not been taken, not an award of damages. *United States v. Miller*, 317 U.S. 369 (1943); *City & County of Honolulu v. Bd. of Water Supply*, 36 Haw. 348, 350 (1943); *Terr. v. Honolulu Plantation*, 34 Haw. 859, 870 (Terr. 1939). The wrong which a regulatory takings claim under the

Finally, unlike a tort action where the tortfeasor has no choice about whether to undo the tort, in takings the government retains the option to undo its action or stop the owner's use. Although Aina Lea could have also sought the "builder's remedy,"[29] the State ultimately controls the outcome: although this Court earlier concluded that the Commission cannot reclassify Aina Lea's land, it can prevent the project by exercising eminent domain to condemn Aina Lea's rights and providing just compensation for the property at its highest and best use.

## CONCLUSION

This Court should adopt the majority rule that state law regulatory takings claims and inverse condemnation actions are subject to the adverse possession statute of limitations.

DATED: San Francisco, California October 14, 2019.

Respectfully submitted.

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Hawaii Constitution seeks to remedy isn't the fact that property has been taken or damaged, but rather the failure to provide compensation. A recent decision illustrates this principle. In *Guerin v. Fowler*, 899 F.3d 1112 (9th Cir. 2018), the court held that if proven, state officials' failure to pay daily interest allegedly skimmed from state-managed retirement accounts was a taking. The plaintiffs did not seek an award of damages, only equitable relief: an injunction ordering the officials to return the wrongly withheld money. The court rejected the state's contention that the plaintiffs "seek monetary damages," concluding "the [plaintiffs] actually seek an injunction ordering the [state] to return savings taken from them." *Id.* at 1120 ("Prospective injunctive relief of this sort is readily distinguishable from a compensatory damages award.").

[29] *Allen v. City & Cnty. of Honolulu*, 58 Haw. 432, 438-39, 571 P.2d 328, 331 (1977) (recognizing remedy of invalidation of the government action and permitting the development to proceed).

[*] Nicholas Ernst, who is in his final year at the University of Hawaii School of Law, assisted in researching and writing this brief.

**No. SCCQ-19-0000156**

IN THE SUPREME COURT OF THE STATE OF HAWAII

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|---|---|---|
| DW AINA LEA DEVELOPMENT, LLC,<br><br>Plaintiff-Appellant,<br><br>vs.<br><br>STATE OF HAWAII LAND USE COMMISSION, *et al.*,<br><br>Defendants-Appellees. | ) | ON CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT |

**CERTIFICATE OF SERVICE**

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