No. _____

In the
Supreme Court of the United States

AMANDA D. TUCKER,
Petitioner,

vs.

LCP-MAUI, LLC,
a Florida limited liability company,
Respondent.

On Petition for Writ of Certiorari to the
Hawaii Supreme Court and the Hawaii
Intermediate Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a State's judge-made common law foreclosure practice violate Due Process of Law that calculates the amount of deficiency judgments after confirmation of a forced auction sale by merely mathematically subtracting the net proceeds of a judicial foreclosure from the amount owed to a foreclosing plaintiff regardless of any evidence of the true value of the foreclosed property at sale confirmation, resulting in widespread forfeiture of otherwise trillions of dollars of surplus equity of tens of millions of homeowners nationally, inconsistent with Justice Douglas' admonition in *Gelfert v, National City Bank of New York,* 313 U.S. 221, 232-233 (1941), that "[m]ortgagees are constitutionally entitled to no more than payment in full"?

LIST OF ALL PARTIES AND CORPORATE DISCLOSURE STATEMENT

A. Parties Listed in Caption of Petition Participating in the Hawaii Appeal

1. Amanda D. Tucker, a physician, resident of Hawaii at the time the foreclosure complaint was filed below, and a resident of Colorado at the time this Petition is being filed; and

2. LCP-Maui, LLC, a Florida limited liability company at all times referenced herein.

B. Parties Not Participating in the Hawaii Appeal

1. United States of America;

2. Director of Taxation, State of Hawaii;

3. Vic Zapien; and

4. Dustin P. Meuse.

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CAAP-15-0000109
142 Haw. 149 | 414 P.3d 201 | 2018 WL 1082855
February 28, 2018

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PETITION FOR WRIT OF CERTIORARI

I. JURISDICTIONAL STATEMENT

This Court has jurisdiction to review this *Petition for a Writ of Certiorari*, timely filed electronically and by U.S. Mail on September 6, 2018, within ninety days of the denial of certiorari review by the Supreme Court of the State of Hawaii on June 8, 2018 of the Hawaii Intermediate Court of Appeals affirmation of the decision of the Second Circuit Court of the State of Hawaii on January 29, 2015, pursuant to Section 1257(a) of Title 28 of the United States Code and Supreme Court Rules 10(c) and 13(1).

II. AUTHORITATIVE PROVISIONS

The decisions being challenged concern the interpretation and application of the Fifth Amendment to the United States Constitution, the text of which is set forth in Appendix E.

III. STATEMENT OF THE CASE

Petitioner owned eight Maui properties, owing supposedly over $7,000,000 including interest at the time of sale confirmation. Over objection, the sale of all eight properties was confirmed. The result was an order and a deficiency judgment entered on January 29, 2015 in the amount of $1,293,835.69, based entirely upon mechanically subtracting the net sales proceeds for all eight properties from the total amount claimed owed, after which Dr. Tucker filed a timely notice of appeal.

In opposing that mechanical method of determining a

foreclosure deficiency judgment, Petitioner requested that the lower court first determine the fair market value of each of the eight properties and use that in its calculations of any deficiency judgment instead of the net forced sale proceeds, but was completely ignored.

Petitioner in that regard was not challenging the forced sale price at which the properties were sold at auction, but instead what was challenging the actual market value of the properties at that time for the sole purpose of calculating any deficiency judgment.

Her foreclosing plaintiff had supposedly secured her properties from an assignment from the FDIC for a substantial price discount following the receivership of her original lender, and Respondent thereafter sued Petitioner for not the discounted prices, but the face amount of all of her mortgages combined after a public sale was conducted, newspaper advertised in tiny print on three consecutive Sundays.

IV. LEGAL ARGUMENT SUPPORTING WRIT

A. Hawaii Deficiency Judgments Are Forfeitures

During the Great Depression, Hawaii Courts like courts in most other jurisdictions grappled with the perceived unfairness of forcing a foreclosure auction sale in a down economy. Ultimately, a common law practice was adopted whereby an upset sale price was set at a judicially determined value and the bidding at auction began at that price.

The Hawaii Supreme Court in 1933 in *Wodehouse v. Hawaiian Trust Co.,* 32 Haw. 835, 852-853 (1933), announced what were thought to be the appropriate procedures for selling properties at a foreclosure sale and subsequently ratification at confirmation, as follows:

> In determining what an upset price, if any, should be, or, at a later stage of the case,

> whether a sale should be confirmed, it is the value at the time of foreclosure and not the value at the time of the execution of the mortgage which is to be ascertained; and by value is meant what the property will bring at public auction or private sale (as may be authorized or required by the terms of the mortgage itself) after due publication of notice and after a reasonable time sufficient to permit efforts to interest all reasonably available prospective bidders.

Hawaii appellate courts since 1933 have interpreted *Wodehouse* to mean that "[t]he lower court's authority to confirm a judicial sale is a matter of equitable discretion" and "[i]f the highest bid is so grossly inadequate as to shock the conscience, the court should refuse to confirm." *Hoge v. Kane*, 4 Haw. App. 533, 540, 670 P.2d 36, 40 (1983).

The reasoning behind this rule was based partly on ensuring that neither party would get a windfall, and partly upon upholding the stability of judicial sales. See *Hoge v. Kane*, 4 Haw. App. 533, 540, 670 P.2d 36, 40 (1983), hence thought fair to all sides.

Meanwhile, the fair or true value of a property for the completely separate purpose of awarding a deficiency judgment after confirmation of sale is a totally different issue however, tied not to the auction price, but thereafter, after confirmation of sale to the market value of the property in determining the loss if any to the foreclosing plaintiff.

For example, assuming that a property with a market value of $2 million having a $1.5 million mortgage sold at a forced three-week newspaper auction sale for a $1.5 million credit bid by a foreclosing plaintiff, no others bidding against the lender for a variety of frequent reasons, the foreclosing plaintiff would get the property plus a $.5 million monetary deficiency judgment against the foreclosed borrower who in turn would lose a like amount of equity.

Hawaii Courts, as most State courts until recently, have matter-of-factly merely routinely assumed when determining and enforcing foreclosure deficiency judgments that the confirmed sale price minus the net proceeds of sale controls and mathematically determines by subtraction the monetary deficiency amount awarded a foreclosing plaintiff without taking into account and considering the evidence of true market value at time of sale confirmation, again not for the purpose of confirming the forced auction sale, but for the second and separate purpose of calculating thereafter the true loss of the foreclosing plaintiff as well as alternatively any surplus equity rightfully the property of the foreclosed borrower.

That judge-made procedure, however, completely ignores reality -- that due especially to the recent housing market collapse still plaguing areas of the country, foreclosing plaintiffs have the ability, for instance, to credit bid for much more than the property is usually worth, thus scarring away and effectively depressing competition due to such unused credit bidding ability and thus to in effect "rig" auction sales, enabling foreclosing plaintiffs to recover property at less than true market value, while at the same time using their artificial auction sales price to secure a windfall profit over and above what is actually owed, even double or triple recoveries, by adding onto its below-market purchase a sizeable deficiency judgment, or even worse, to wipe out a foreclosed borrower's surplus equity in the property.

By the practice of "flipping" the property after an auction sale, that is, selling the property for true market value thereafter, a foreclosing plaintiff makes, often within a few months, more than what it was actually owed, and especially more than what it had even loaned or paid for any interim loan assignment to it as in Petitioner's case, or to sell to friends and relatives at below market prices, sometimes being assigned by or to it by the original foreclosing plaintiff for a substantial discount, as in Petitioner's case assigned by the federal government at a steep discount not offered to the

borrower, a double unfairness, during the foreclosure process itself.

The result is frequently that borrowers are penalized beyond what their foreclosing plaintiff actually lost and subject to confiscatory monetary judgments as well as forfeiture or their properties and their equity therein, without a hearing to determine their foreclosing plaintiff's actual loss and thus their actual liability or any surplus equity of theirs.

Ironically, the very forfeiture unfairness that English Courts of Equity, in instituting the equitable requirement of holding public auctions, sought to remedy so as to save equity for English homeowners otherwise historically victimized by a mortgagee's contractual rights of entry and a total loss of their equity, which procedures State courts at first routinely adopted without legislation as judge-made procedures, as did Hawaii Courts, has rather than protecting against forfeitures has now resulted in forfeitures becoming the standard consequence of judicial foreclosure auctions today, including in Hawaii.

Those judge-made procedures, unthinkingly rubber-stamping a mere mechanical calculation, increasingly produced a harsh and unfair forfeiture, harming this Nation's mortgage borrowers and overall economy as well by selectively depressing local real estate markets through the automatic lowering of comparable sales based upon artificially lower foreclosure forced sale prices.

B. A Majority of States Now Reject Such Forfeitures

At first, State courts historically blindly allowed foreclosing plaintiffs windfall profits often through bloated deficiency judgments, concluding that otherwise it would be an unconstitutional impairment of capital and interference with the right to contract under Article I, Section 10, Clause 1 of the United States Constitution, viewing money exclusively, and not property, to be what lenders had bargained for in the event of default.

In 1941, this Court however in *Gelfert v, National City Bank of New York,* 313 U.S. 221 (1941), finally gave authoritative approval to the constitutionality of States seeking to prevent "sacrificial prices" by their regulating the amount of deficiency judgments either by statute or by the exercise of judicial equity jurisdiction.

Today, many State Legislatures have passed anti-confiscatory deficiency statutes, requiring that after a foreclosure auction their State courts must hold a separate evidentiary hearing to determine the "fair value," or "true value" as some jurisdictions call it, of the foreclosed property which is not necessarily the "auction price" even for instance if the "auction price" does not "shock the conscience of the court," a distinction however as shown in Petitioner's case still nonetheless completely overlooked by Hawaii Courts.

And more recently, many State courts have shown equitable initiative by not waiting for their State Legislatures to pass anti-deficiency statutes protecting borrowers from what they have concluded is gross unfairness and confiscatory forfeiture procedures, especially when those forfeiture procedures are judge-made in their jurisdictions, but have acted on their own to correct obvious injustices; e.g.:

In *Pearman v. West Point National Bank*, 887 S.W.2d 366, 368 (Ky. Ct. App. 1994), the Kentucky Court of Appeals on its own refused to allow a mortgagee to recover any deficiency judgment whatsoever where a foreclosing mortgagee that had purchased the property at two-thirds of its actual value was awarded a large deficiency judgment, and then contracted to sell the property for slightly more than the amount of money it had in the property while seeking nevertheless to enforce its deficiency award, that court concluding that the foreclosing plaintiff breached the covenant of good faith and fair dealing implied within every mortgage contract, the breach resulting in non-enforcement of the deficiency.

The same result occurred at the initiative of the Colorado Court of Appeals in *First National Bank of Southeast Denver v. Blanding*, 885 P.2d 324 (Colo. Ct. App. 1994) (lack of good faith bid by a mortgage holder requires full adjustment of the deficiency amount).

In *Wansley v. First National Bank of Vicksburg*, 566 So.2d 1218, 1224 (Miss. 1990), the Mississippi Supreme Court held that a foreclosing mortgagee must show more than just a difference between the net sale proceeds and the amount of the indebtedness to be entitled to a deficiency judgment, but must affirmatively show the property's true value was insufficient to satisfy what the mortgagee had in the property, which requires both a prior determination of adequacy of auction price after confirmation, as well as true value of the property for deficiency purposes after confirmation.

Whereas, while an inadequate winning bid price may not be enough to defeat an auction sale, it is considered nevertheless grounds for denying even in its entirety a request for a subsequent deficiency judgment today in many other jurisdictions on various equitable ground; *see,* e.g.:

In re Slizyk, 2006 WL 2506489 (Bankr. M.D. Fla.) ("the amount for which mortgaged property sells at during a properly conducted sale is neither conclusive as to the value of the property nor the right to a deficiency judgment");

Barnard v. First National Bank of Okaloosa County, 482 So.2d 534 (Fla. 1986);

Savers Federal Savings & Loan Association v. Sandcastle Beach Joint Venture, 498 So.2d 519 (Fla. 1986).

Hawaii is now said to be in the minority of States with confiscatory deficiency judgment procedures, *Sostaric v. Marshall*, 234 W. Va. 449, 766 S.E.2d 396 (2014). In West Virginia the State courts thereafter overturned those judge-

made deficiency procedures, only to have its State legislature subsequently limit its ruling.

C. Forfeitures in Hawaii Are Especially Alarming

Hawaii courts have completely failed to address such fundamental unfairness in judicial foreclosure deficiencies, fostering and shielding from view an unregulated and heretofore unexamined low visibility, multi-million dollar thieves market in effect where foreclosing plaintiffs are allowed, *albeit* officially encouraged, to steal money from otherwise defenseless and highly vulnerable borrowers in many heretofore unseen ways.

The results often are the extraction of double or even triple recoveries at times, through government guarantees against loss based on the face value of mortgages even though sold by, for instance, the FDIC or other government agencies, often to insiders, at a steep discount, or from nonrecourse insurance when in securitized trusts, while forcing homeowners into otherwise unnecessary bankruptcy filings, some borrowers ironically entitled instead to surplus awards upon flipping were the true market value of their foreclosed properties considered, confiscatory procedures that might draw envy from the Mafia.

The resulting, additional unfair financial pressure on families foreclosed on due to such confiscatory procedures have been especially troubling for homeowners in States like Hawaii given large homeless populations.

Courts to the contrary have long recognized the special importance to the welfare of society of protecting a family's "single most important asset," its residence, not only from an economic point of view, but also for its inherent social values, as its location often determines where children go to school, where families worship, where borrowers vote, where family and friends reside, and where the elderly spend their remaining years, in the absence of which, especially as a result of unfair foreclosure deficiency judgments, borrowers

may become dependent on public housing and welfare, if available, and parental control may be lost to drug use and drug trafficking, and marriages often break up as a result, and where suicides can result; see Sawada v. Endo, 57 Haw. 608, 616, 561 P.2d 1291 (1977).

This has truly become a national crisis, the very kind of emergency invisibly eating away at the democratic fabric of this Nation by destroying our middle class whose wealth has traditionally resided in their homes, triggering the largest transfer of wealth in American history to a relatively few with insider connections to either related government agencies or investment banks.

Inconsistently, practically every American jurisdiction, including Hawaii, has nevertheless inconsistently always formally in their case law abhorred forfeitures elsewhere, yet of the very kind happening almost every day in our foreclosure courts,

For example, while applying good faith and fair dealing requirements to nonjudicial foreclosure auctions in Hawaii, our courts nevertheless, as in Petitioner's case, have inadvertently left such unfair and bad faith confiscatory judge-made procedures in judicial foreclosures unregulated, despite groundbreaking decisions elsewhere, for example, in *Kondaur Capital Corp. v. Matsuyoshi*, 136 Haw. 227, 361 P.3d 454 (2015) (requiring evidence of good faith fair market valuation at nonjudicial foreclosure auctions), and *Santiago v. Tanaka*, 137 Haw. 137, 366 P.3d 612 (2015) (abhorring forfeitures of equity at nonjudicial foreclosure sales).

Importantly, such Hawaii judge-made protections ironically are even more important in judicial as opposed to nonjudicial foreclosures, for in nonjudicial foreclosures, now enjoying such protections for instance in Hawaii and elsewhere, there are no deficiency judgments generally permitted, while safeguarding surpluses.

D. Deficiency Forfeitures Violate Due Process

There is a serious split in State jurisdictions today over foreclosure deficiency judgment forfeitures, with a reported bare majority of States now rejecting Hawaii's mechanical foreclosure deficiency judgment approach for awarding deficiency judgments without a hearing to determine a foreclosing plaintiff's actual loss, calling it "grossly unfair" and "confiscatory" and "abusive" and a "forfeiture" and an "unconscionable windfall" and "unjust enrichment."

But how can a forfeiture procedure with all such openly negative harshness, such as Hawaii's judge-made calculus, not also trigger unconstitutional deprivations of Due Process, amply supported by a virtual mountain of supporting federal case law precedents in this Court for nearly half a century.

For example, *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972), this Court held that one paramount purpose of the Due Process Clause and the requirement of an adequate hearing is "to protect [a person's] use and possession of property from arbitrary encroachment -- to minimize substantively unfair or mistaken deprivations of property."

This Court, moreover, has recognized that there may be procedures set up to return wrongfully taken property, or provide damages for the taking, but "no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred." *Id.* at 82.

A timely hearing before property is taken from an individual is a fundamental bedrock principle of Due Process; *see, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319 (1976).

The well-known test announced in Eldridge determines the adequacy of a pre-deprivation process by balancing "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the

probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* at 335.

The Hawaii Courts' judge-made deficiency judgment determination procedures still used in approximately one-half of the States clearly are deficient on all three of those grounds.

When this framework is applied to the Hawaii Courts' procedures for determining deficiency amounts following confirmation of sale, it is obvious that Due Process has been and is being extensively violated without conducting a separate actual loss and fair value hearing as one-half of States now do.

The private interest that is affected is an individual's money, the most literal and unassailable of all the definitions of "property" expressly grafted onto the Due Process Clause.

Moreover, as described above, there is no procedure provided or allowed in Hawaii to challenge, at a subsequent evidentiary hearing after confirmation of sale, the value of property received by a foreclosing plaintiff bidding at its own auction or the foreclosing plaintiff's actual loss.

This opens the door to the type of multifaceted fraudulent abuses that have become standard industry practice nationwide and Hawaii is no exception, with Hawaii courts finding themselves blindly looking the other way, allowing themselves to become collection agencies for crooks as in Petitioner's case.

A foreclosing plaintiff can easily sell the rights to foreclose to a third party, and frequently does, which then low balls its bidding at the auction, thereby obtaining property at a steep discount, exactly what happened in Petitioner's case following a sweetheart deal from the FDIC.

Following such mortgage assignment, the same third party continuingly the foreclosure proceedings can then obtain a deficiency judgment based on the original debt, rather than the amount paid to acquire the debt or the true value of the property transferred to it or to a related party of its.

The way this process is applied clearly deprives individuals of their money with no hearing at all to determine the fairness of the amount taken, and no procedure to rectify that unfairness.

The risk of deprivations of Due Process through such procedures as in Hawaii is therefore unacceptably great.

Similarly, there is obvious value in a hearing to determine the fairness of the deficiency amount based upon at least the fair value of property received versus the actual loss if any to the foreclosing plaintiff, whereas the often stated concern regarding sanctity of judicial sales would not be affected by this type of evidentiary hearing, not involving re-opening of auctions.

The resulting violation of Due Process is not only procedural, but substantive as well. "Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years . . . the Clause has been understood to contain a substantive component as well, one 'barring certain government actions regardless of the fairness of the procedures used to implement them.'" *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992) (citing *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

The application of substantive due process has been the source of much debate in federal courts. The former Justice Scalia, while a Judge of the Court of Appeals for the Third Circuit, explained that there are two types of state action that may be challenged under this theory, legislative and non-

legislative acts. *Nicholas v. Pennsylvania State University,* 227 F.3d 133, 142 (3d Cir. 2000):

> To summarize: when a plaintiff challenges the validity of a legislative act, substantive due process typically demands that the act be rationally related to some legitimate government purpose. In contrast, when a plaintiff challenges a non-legislative state action (such as an adverse employment decision), we must look, as a threshold matter, to whether the property interest being deprived is "fundamental" under the Constitution. If it is, then substantive due process protects the plaintiff from arbitrary or irrational deprivation, regardless of the adequacy of procedures used.

In the mortgage foreclosure context, this Court has recognized that allowing a foreclosing entity to collect a double recovery is constitutionally impermissible, warning that "[m]ortgagees are constitutionally entitled to no more than payment in full." *Gelfert*, 313 U.S. at 233. (Emphasis added). That says it all.

Addressing deficiency judgments, this Court in *Gelfert* further noted that "[t]he 'fair and reasonable market value' of the property has an obvious and direct relevancy to a determination of the amount of the mortgagee's prospective loss," *id.* at 234.

Concerning the process of determining a deficiency judgment, especially during times of economic depression, this Court concluded, although the question here was not directly before it, *id.* at 232-233:

> And so far as mortgage foreclosures are concerned numerous devices have been employed to safeguard mortgagors from sales which will or may result in mortgagees

> collecting more than their due . . . . Underlying that change has been the realization that the price which property commands at a forced sale may be hardly even a rough measure of its value. The paralysis of real estate markets during periods of depression, the wide discrepancy between the money value of property to the mortgagee and the cash price which that property would receive at a forced sale, the fact that the price realized at such a sale may be a far cry from the price at which the property would be sold to a willing buyer by a willing seller reflect the considerations which have motivated departures from the theory that competitive bidding in this field amply protects the debtor.

It is constitutionally unfair and a violation of Due Process for a mortgagee to be able to suppress auction sale prices and then recover more than it should in the form of a deficiency judgment.

A mortgagee should not recover more than it is owed by taking advantage of outdated procedures, originally intended ironically by English Courts of Equity to protect borrowers and not to punish them.

The disparity between market value and a forced sale price has been recognized in numerous cases over the years, but has nothing to do with how a deficiency judgment should be determined after a confirmed sale.

Even in 1994, when the real estate market was not nearly as depressed as it has now been, this Court held:

> [M]arket value, as it is commonly understood, has no applicability in the forced-sale context; indeed, it is the very antithesis of forced-sale value. "The market value of . . . a piece of property is the price which it might be

> expected to bring if offered for sale in a fair market; not the price which might be obtained on a sale at public auction or a sale forced by the necessities of the owner, but such a price as would be fixed by negotiation and mutual agreement, after ample time to find a purchaser, as between a vendor who is willing (but not compelled) to sell and a purchaser who desires to buy but is not compelled to take the particular . . . piece of property." Black's Law Dictionary 971 (6th ed. 1990). In short, "fair market value" presumes market conditions that, by definition, simply do not obtain in the context of a forced sale.

BFP v. Resolution Trust Corp., 511 U.S. 531, 537-38 (1994).

In Petitioner's case below, the Hawaii appellate courts as well as trial and appellate courts in most other States have seemingly looked for every way to avoid the due process issues inherent in foreclosure forfeitures, unable and unwilling to admit that for a century they have wronged homeowners, which consistent with the requirements of this Court's Rule 14.1(g)(i), Petitioner argued the due process issues directly below throughout the Hawaii trial level and appellate proceedings, as follows:

1. Argued below in opposition to motion for determination of deficiency amount for the December 10, 2014 hearing, Memorandum in Opposition, Civil No. 12-1-0462(3), pages 2, 10, 14, *et seq.*, dated December 2, 2014;

2. Argued below in Opening Brief, CAAP-15-0000109, pages 1, 12, 15, *et seq.*, dated July 10, 2015; acknowledged by the Hawaii Intermediate Court of Appeals in its February 28, 2018 summary disposition order set forth in Appendix C, page 2 ("Tucker contends that the circuit court erred by denying her procedural and substantive due process rights under the Hawaii State Constitution and the United States Constitution by depriving her of property without an

evidentiary hearing to determine the fair market value of her property at the time of the confirmation sale" in setting the deficiency amount).

3. Argued below in Reply Brief, CAAP-15-0000109, pages 1, et seq., dated September 14, 2015.

The Hawaii Intermediate Court of Appeals, for instance nevertheless, in order to completely avoid the Due Process issues contended that the Petitioner failed to include the deficiency forfeiture issue in her first appeal from the summary judgment challenging the July 29, 2015 "Conclusion of Law No. 4," while contesting her foreclosure summary judgment, the lower court having in its summary judgment order granting her foreclosing plaintiff the right to a deficiency judgment based on "the difference between the amount owed to LCP-Maui under the Notes and Mortgages, and the foreclosure sale proceeds applied thereto."

Yet nowhere in the lower court's prior summary judgment motion papers or hearing thereon below was that deficiency judgment calculation even discussed, briefed, ruled on, or even addressed (*per* the Official Transcript for December 18, 2013), just slipped adroitly into the lower court's conclusions.

While it is true that Conclusions of Law No. 4 was entered by the lower court ("LCP-Maui is entitled to a deficiency judgment under the Notes and Mortgages for the difference between the amount owed to LCP-Maui under the Notes and Mortgages, and the foreclosure sale proceeds applied thereto"), it was prepared by LCP-Maui and merely rubber-stamped verbatim by the lower court without even one syllable or one punctuation mark being changed.

Such "adopted findings of fact and conclusions of law" – when lower courts merely swallow whole proposed findings and conclusions prepared by prevailing parties as was done here -- have always been subject to great mistrust as explained by this Court in *United States v. El Paso Natural*

Gas Co., 376 U.S. 651, 656-657 and fn. 4 (1964) (rubber stamping adopted findings "has been denounced by every court of appeals save one" as "an abandonment of the duty and trust" placed in judges).

Such mechanically "adopted findings of fact and conclusions of law" are furthermore considered contrary to sound judicial policy, causing disrespect for the judiciary as explained by the United States Court of Appeals for the Ninth Circuit in *Photo Electronics Corp. v. England*, 581 F.2d 772, 776-777 (9th Cir. 1978) ("wholesale adoption of the prevailing party's proposed findings complicates the problems of appellate review. . . . [It raises] the possibility that there was insufficient independent evaluation of the evidence and may cause the losing party to believe that his position has not been given the consideration it deserves. These concerns have caused us to call for more careful scrutiny of adopted findings . . . . We scrutinize adopted findings by conducting a painstaking review of the lower court proceedings and the evidence").

Moreover, it is only the right to a deficiency judgment if included within a foreclosure decree that must be appealed at that time, whereas the actual amount of any deficiency remains appealable after the entry of the amount of the deficiency which is what Petitioner did.

It is only upon a determination of the amount of a deficiency, if any, that the method used becomes relevant, germane, and appealable.

Petitioner here is not challenging LCP-Maui's right to a deficiency judgment, but challenging the constitutionality of the method by which her deficiencies were calculated after summary judgment was awarded against her.

And here we are dealing with a constitutional procedural and substantive due process right protected by both the Hawaii and United States Constitutions, immune from such uninformed waiver in Hawaii and elsewhere; *Brown v.*

Thompson, 91 Haw. 1, 979 P.2d 586 (1999).

V. CONCLUSION

The federal due process issues raised in this Petition are of grave national importance and concern, and like so many other situations where large groups of our citizens have remained for decades as an unprotected victimized class, here one hundred million United States homeowners and their families threatened with various forms of forfeiture abuse almost daily, only this Court unlike any other government institution has sufficient authority and responsibility under the Constitution of the United States to effectively do something about it in the promotion of the general welfare.

Respectfully submitted,

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Honolulu, Hawaii
September 6, 2018