No. _____

21-5676

IN THE

SUPREME COURT OF THE UNITED STATES

PATSY N. SAKUMA - PETITIONER PRO SE
(Your name)

vs.

ORIGINAL

ASSOCIATION OF CONDOMINIUM HOME OWNERS –RESPONDENTS
OF TROPICS AT WAIKELE, BY ITS
BOARD OF DIRECTORS, ET. AL.

ON PETITION FOR WRIT OF CERTIORARI
TO THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

PETITION FOR WRIT OF CERTIORARI

PATSY N. SAKUMA
Petitioner Pro Se

1232 Makaloa Street # 7

Honolulu, HI 96814

808-454-3171

QUESTIONS PRESENTED

(1) Whether the Intermediate Court of Appeals for the State of Hawaii improperly applied mootness to dismiss the case by bypassing the federal question of whether it applied an impermissible offensive use of the collateral order doctrine to the foreclosure decree to preclude a collateral attack of jurisdiction from the order confirming sale?

(2) Whether the Intermediate Court of Appeals for the State of Hawaii improperly applied mootness to dismiss the case by bypassing the federal question of whether Petitioner's Fourteenth Amendment section rights of one due process and equal protection were violated by the cumulative effect of the Hawaii foreclosure proceeding, including the impermissible offensive application of the collateral order doctrine rule to the foreclosure decree to preclude a collateral attack of jurisdiction from the order confirming sale?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties in the proceeding in the court whose judgment is the subject of this petition is as follows:

1. Patsy N. Sakuma, Petitioner (Defendant-Appellant) Pro Se

2. Association of Condominium Homeowners Of Tropics At Waikele, by its board of directors (Association), Respondent (Plaintiff-Appellee)

3. First Hawaiian Bank (Bank), a Hawaii corporation, Respondent (Defendant-Appellee).

RELATED CASE(S)

USDC-Hawaii, 1:16-cv-00274-DKW-KJM (Open); 9C-16791; 9C-19-16615.
Complaint for federal civil RICO and conspiracy to commit civil RICO; state: damages, punitive damages, declaratory and injunctive relief, unfair deceptive acts or practices, state civil RICO, conversion, abuse of process, wrongful foreclosure, and unjust enrichment.

Patsy Naomi Sakuma v. Association of Apartment Owners of the Tropics at Waikele, Association of Condominium Home Owners of Tropics at Waikele, Milton M. Mootoka, Love Yamamoto & Motooka, LLC, Motooka Yamamoto & Revere, LLC, Porter McGuire Kiakona & Chow, LLP, First Hawaiian Bank, Watanabe Ing, LLP, James S. Kometani, Title Guaranty of Hawaii, Inc., Title Guaranty Escrow Services, Inc.
Status: Pending filing a petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit in No. 19-16615 from the May 22, 2021 Order denying hearing and hearing en banc. Automatic 60-day extension for total 150 days to file petition pursuant to the Court's July 19, 2021 Order due to the Covid 19 Pandemic. Petition new due date: on or before October 19, 2021 (Tues.).
Previous Rulings:
- October 28, 2016 Order Granting Various Defendants' Motions to Dismiss, alternatively for lack of jurisdiction based on the *Rooker-Feldman* doctrine and failure to state a plausible civil RICO claim; 2016 WL 6433.
- December 21, 2017 Memoradum, affirming 10/28/16 Order on different grounds, lack of jurisdiction based on *Rooker-Feldman* and alternatively, failure to state a plausible RICO claim. 9th Cir. No.16-16791; 707 Fed. Appx. 906 (Dec. 21, 2017).
- June 14, 2019 Order Denying Motion for Relief from Judgment and Order.
- July 30, 2019 EO denying leave to file reconsideration of 06/14/19 Order.

USDC-Hawaii; 1:08-cv-00502-HG-KSC (closed); 9C:16298; 9C-17448.

Independent Action to reopen the removed state collection action filed by Tropics (AOAO misnomer), 1RC-01-5514 based on further fraud by AOCH and its attorneys, and renumbered USDC-Haw. 1:02-cv-00147-HG-LEK. Complaint for further unlawful associational handicap retaliation and Temporary Restraining Order to enjoin the 2007 foreclosure proceeding in Circuit Court of the First Circuit of the State of Hawaii, Civ. No. 07-1748.

Patsy N. Sakuma v. Association of Condominium Home Owners of Tropics at Waikele, Honorable Circuit Judge Karen N. Blondin, and James S. Kometani, state court appointed foreclosure commissioner.

Rulings:

- January 13, 2009, Order Granting Honorable Karen N. Blondin's Motion to Dismiss based on absolute judicial immunity.
- June 3, 2009 Order denying Plaintiff's TRO based on mootness—Petitioner's Home has already been sold.
- October 5, 2010 Memorandum, affirming district court's dismissal of case based on mootness: appellant pro se's condominium was sold and there is no longer any controversy as to which relief could be granted. *See, Vill. of Gambell v. Babbitt*, 999 F.2d 403, 406 (9th Cir. 1993).

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Ap.08-10	March 22, 2016 Order Denying Recon. of Deemed Denial of June 7, 2012 Rule 59(e) Motion to Vacate June 10, 2008 Foreclosure Decree & May 29, 2012 Order Confirming Sale, Filed December 8, 2015.
Ap. 11-12:	November 30, 2015 Order of Deemed Denial of June 7, 2012 Rule 59(e) Motion entered.
Ap. 12.1-12.2	January 11, 2013 Order Denying January 7, 2013 Motion for Stay of Appeal, CAAP No. 12-0000870.
Ap. 12.3:	Jan. 24, 2012 Order Denying Mandamus Petition w/o Prejudice, SCPW 12-0001057.
Ap.12.4-12.8	July 18, 2012 Order Dismissing Appeal of Dec. 13, 2011 Rule 60(b) Motion, CAAP No. 12-0000145.
Ap. 12.9	October 16, 2012 Order Rejecting Application for Writ of Certiorari, SCWC No. 12-0000145.
Ap. 12.10:	August 3, 2011 Order Dismissing Appeal for Lack of Jurisdiction, CAAP No. 11-0000054.
Ap. 12.13	August 17, 2011 Order Denying Recon. of August 3, 2011 Order; Nov. 22, 2011Order Rejecting Application for Writ of Certiorari, SCWC 12-0000054.
Ap. 12.14-12.5	**January 11, 2013, Summary Disposition Order, dismissal, moot, 2015 Haw. App. LEXIS 377.
Ap. 13-20:	December 17, 2013 opinion, *Assn of Condominium Homeowners of Tropics at Waikele v. Sakuma*, 131 Haw. 254 (2013); dissent, J. Nakayama.
Ap. 21-26:	April 14, 2015 opinion, *Deutsche Bank v. Amasol*, 135 Haw. 357 (2015), (clarifying *AOCH ex rel. Bd. of Dir. v. Sakuma,* 131 Haw. 254 (2013).
Ap. 26.1*:	July 21, 2015 Summary Disposition Order: Dismissal, lack of jurisdiction, CAAP No.12-0000870; 136 Haw. App. 25, 356 P. 3d 1045.
Ap. 26.4*	November 6, 2015 Order Accepting Application For Cert., SCWC No. 12-0000870. 2015 WL 6835407.

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U.S. Constitution

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Hawaii Rules of Appellate Procedure

Hawaii Rules of Civil Procedure

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**: "N/A"

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix ~~01-03~~ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished. 148 Hawaii 471 ·,478 P.3d 296, 2020 WL 7421703.

The ~~opinion of~~ the Order Rejecting Application for Writ of Certiorari appears at Appendix ~~05~~ to the petition and is by the Hawaii Supreme Ct.

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished. 2021 WL 1784799

JURISDICTION

[ ] For cases from **federal courts:** "N/A"

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts:**

The date on which the highest state court decided my case was ~~Dec. 18,~~ 2020. A copy of that decision appears at Appendix 01-03.

[ ] A timely ~~petition for rehearing~~ Application for Writ of Certiorari was thereafter denied on the following date: ~~May 5, 2021~~, and a copy of the order denying ~~rehearing~~ appears at Appendix 05.

[X] An extension of time to file the petition for a writ of certiorari was granted to and including ~~Oct. 4/12, 2021~~ (date) on ~~July 19, Aug. 10~~ (date) in Application No. ___A Covid-19 Pandemic automatic 60-day ~~xx~~ 2021 extension letter from U.S.Supreme Court; Aug. 10, 2021 letter from Scott S. Harris, clerk by Michael Duggan.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

JURISDICTION CONTIUED

When the higher court declines to exercise its authority, the judgment of the intermediate court rather than the order of refusal by the higher court is the judgment reviewable under §1257(a). An example is *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719 (2018) and likewise here.

Under *Liner v. Jafco,* 375 U.S. 301,304 (1964), the Court stated that the question of mootness is itself a question of federal [constitutional] law upon which [the] Court must pronounce a final judgment and it is not bound by a state court ruling that a case has become moot. In *Liner* the federal question fell under the National Labor Relations Board, which preempted the state court's ruling. *Id.*

The majority the Court's decision *Michigan v. Long,* 463 U.S. 1032, 1041-1042 & n.7 (1983) created a presumption that federal law exists where a state court decision fairly appears to rest primarily on federal law, or interwoven with federal law or grounds, or when the adequacy and independence of any possible state law ground is ambiguous, from the face of the opinion. Under the plain statement rule the state need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and they do not compel the result that the state has reached. *Id.* at 1041.

Under *Michigan v. Long*'s presumption, the Court has jurisdiction here because the Summary Disposition Order heavily relied on federal law to find mootness, in its precedential case *Citibank v. Saje Ventures II, 7* Haw. App. 130, 133-134, 748 P. 2d 812, 815-816 (1988), was interwoven with federal law, out-of-

state law and the treatise 47 Am Jur. 2d Judicial Sales §§55, 59-61 (1969), and there was no plain statement included that federal law acted only as a guide and did not compel the court finding mootness here.

Saje relied heavily on the United States Court of Appeals for the Fifth Circuit's decision *Citibank N.A. v. Data Lease Fin. Corp.*, 645 F.2d 333, 336 (5th Cir. 1981) and cases from the Ninth, Eleventh and Third Circuit that follow the general rule that the rights of a good-faith purchaser to receive property acquired at a judicial sale cannot be affected by the reversal of an order ratifying the sale where a [supersedeas] bond has not been filed. The Court's decision *Mills v. Green*, 159 U.S. 651, 653 (1895) was cited as in accord. Further, in *Data Lease*, the Fifth Circuit cited all of this Court's decisions on the issue of the jurisdictional exception to mootness, which the Intermediate Court of Appeals bypassed.

The Court's decision *Rogers v. Alabama*, 192 U.S. 226, 230-31 (1904) provides that a state high court refusal to deal with the federal question is evasion and this Court has jurisdiction to review that state high court's decision. Under *Rogers v. Alabama*, the Court also has jurisdiction to review the Summary Disposition Order to determine if the Intermediate Court of Appeals bypassed any antecedent federal question to mootness.

The Court has jurisdiction to determine if mootness did not apply because other requested relief are unresolved, under the Court's decision *Powell v. McCormick*, 395 U.S. 486, 496 n. 8 (1969).

In *Chambers v. Mississippi,* 410 U.S. 284, 290 n.3 (1973), the Court found absent any statutory limitation, the constitutional issue was properly before the Court where in this criminal trial, a series of state court evidentiary rulings, cumulatively showed that the state court's refusal or failure to articulate a denial of the accused's 14th Amendment right of due process to a fair trial, even if the claim was not raised until the motion for a new trial and where no constitutional objections were made at trial.

In *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63,67 (1928), the Court stated that if the record as a whole shows either expressly or by clear intendment that the party brought the federal claim and the grounds for it to the attention of the state court with fair precision, the Court may review the federal claim.

Even if the Court does not have jurisdiction under *Michigan v. Long's* presumption, under *Chambers* and *Zimmerman,* the Court has or should have jurisdiction to determine if the cumulative effect of Hawaii judicial foreclosure proceeding violated Petitioner's 14th Amendment, section one rights of due process and equal protection rights under the United States Constitution.

The Court also has jurisdiction to determine if the Intermediate Court of Appeals misapplied **the law of the case** to conclude the appeal was moot. In *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 & n.3 (1982) (per curiam), the Court cited its decision *Browder v. Dir. Illinois Dept. of Corrections,* 434 U.S. 257, 264 (1978), that under the recently amended 1979 Federal Rules of Appellate Procedure, Rule 4(a)(4) an appeal filed before or even after a timely filed

Rule 59(e) tolling motion that is still pending is a nullity because it has been prematurely filed and has no effect. A new notice of appeal has to be timely filed to preserve the litigants' rights, under Fed. R. App. Proc. 4(a)(4) (1979), after a dispositional order to a Rule 59(e) motion is entered.

Under the Court's decision *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 815 (1988) citing *Arizona v. California*, 460 U.S. 605, 618 (1983)(dictum) that the law of the case "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. However, the law of the case does not apply if the initial decision is clearly erroneous and would work a manifest injustice; more importantly the law of the case does not bind the Court in reviewing decisions below. *Id.* at 817-818.

Under *Christianson* and *Masterpiece Cakeshop, Ltd.*, the Court should conclude that the Intermediate Court of Appeal erroneously concluded that the law of the case is its prior January 21, 2016 Summary Disposition Order, 2016 WL 299530, (Jan. 21, 2016)(SDO) when the Hawaii Supreme Court's November 1, 2016 Order Rejected Petitioner's Application for Writ of Certiorari, SCWC No. 12-0000870, 2016 WL 6804410 (Nov. 1, 2016), App. 1-3 & 5.

Under this Court's decision *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992), "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim, parties are not limited to the precise arguments they made below." (internal citation omitted).

Accordingly, under *Yee*, Petitioner may add to her previous argument below that the law of the case is not the 2016 Summary Disposition Order but the 2013 published decision in this case *Ass'n. of Condominium Homeowners at Tropics of Waikele v. Sakuma*, 131 Haw. 254, 318 P.3d 94 (2013) because under HRS §601-1 (2012) this portion of the 2012 appeal is not or should not be a nullity. The reasons are: 1) even if the 2012 appeal was filed while Petitioner's June 7, 2012 Rule 59(e) motion was still pending, the ruling that there is no final judgment from the order confirming sale because Petitioner's Rule 59(e) motion was still pending a final dispositional order is consistent with the 1979 amendment to FRAP Rule 4(a)(4) under *Griggs* and *Browder* that an appeal filed while a Rule 59(e) motion is pending is a nullity, 2) **the drafters of the 1979 amendments could not have anticipated it would take the trial court more than 3-1/2 years to enter a dispositional order to a Rule 59(e) tolling motion like here ,** and 3) the Hawaii Supreme Court had jurisdiction under Hawaii Revised Statute §601-1 (2012) to make any order necessary or appropriate in aid of its jurisdiction. *See,* 2015 WL 6835407, App. 26.4.

The Court, however, has or should have jurisdiction over this appeal under the Court's majority in *Stone v. Immigration and Naturalization Services*, 514 U.S. 386, 403 (1995). The majority in *Stone* held that a Rule 60(b) motions filed more than ten days after judgment do not affect the finality of judgment, either when filed before the appeal (no tolling), or afterwards (the appellate court jurisdiction is not divested because a Rule 60(b) does not affect a judgment's finality). App. 88-111.

First, under *Griggs*, Petitioner did not appeal to this Court the Intermediate Court of Appeal's January 21, 2016 Summary Disposition Order, App. 26.5-25.7.

Second, under *Stone*, Petitioner filed her 2015 Rule 60(b) motion or even if deemed a second Rule 59(e) motion, on December 8, 2015, which is more than ten (10) days from the May 29, 2012 Order. However, the motion was within the ten (10) day window that the order remained under the circuit court's jurisdiction under Haw. R. Civ. Proc. Rule 62(a)'s automatic stay of proceeding to enforce a judgment, App. 2. Under *Stone*, the pending Rule 59(e) motion in CAAP No. 12-0000870 or SCWC 12-0000870, did not divest the appellate court from jurisdiction in this appeal of Petitioner's December 8, 2015 Motion in CAAP No. 16-0000627 because the second Rule 59(e) motion is treated like a Rule 60(b) motion and a Rule 60(b) motion does not affect a judgment's finality and the appellate court had the option of merging the two appeals under *Stone*, 514 U.S. at 401.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

Fourteenth Amendment of the United States Constitution, §1, in pertinent part:

> ".... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive an person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Hawaii Revised Statutes

HRS §601-1(2012): Supreme Court, Jurisdiction, in pertinent part.
"The Supreme Court shall have jurisdiction and powers as follows: To make or issue any order or writ necessary or appropriate in aid of its jurisdiction."

HRS §604-5 (2014): District Courts, Civil Jurisdiction, in pertinent parts.
"...(b) The district courts shall try and determine all actions without a jury, subject to appeal according to law. Whenever a civil matter is triable of right by a jury and

trial by jury is demanded in the manner and within the time provided by the rules of court, the case shall be transferred to the circuit court. If the demand is made in the complaint and the matter is triable of right by a jury, the action may be commenced in the circuit court if the amount in controversy exceeds $5,000...

(d) The district courts shall not have cognizance of real actions, nor actions in which the title to real estate comes in question...."

HRS §602-57(2012). Courts of Appeal, Jurisdiction, in pertinent parts. Notwithstanding any other law to the contrary, the intermediate appellate court shall have jurisdiction, subject to transfer as provided in §602-58 or review on application for a writ of certiorari as provided in section §602-59:

...(3) To make or issue any order or writ necessary or appropriate in the aid of its jurisdiction, and in such case, any judge may issue a writ or an order to show cause returnable fore the court.

HRS §667-57(2016) Foreclosures; 667-51.1: Appeals, in pertinent parts.
(a) Without limiting the class of orders not specified in §652-2 from which appeals may also be taken, the following orders entered in a foreclosure case shall be final and appealable:

(1) A judgment entered on a decree of foreclosure, and if the judgment incorporates an order of sale or an adjudication of a movant's right to a deficiency judgment, or both, then the order of sale or the adjudication of liability for the deficiency judgment also shall be deemed final and appealable;

(2) A judgment entered on an order confirming the sale of the foreclosed property, if the circuit court expressly finds that no just reason for delay exists, and certifies the judgment as final pursuant to rule 54(b) of the Hawaii rules of civil procedure; and....

(b) An appeal shall be taken in the manner and within the time provided by the rules of court.

HISTORY: L. 2003, c89, Section 2. / Editor's note.

2003 Haw. Sess. Laws, Act 89, Section 3, further provides: "Nothing in this Act is intended to or shall be construed to limit appellate jurisdiction over matters properly brought before the appellate courts such as the supreme court's recognition of appellate jurisdiction over an order denying a motion brought under rule 60(b) of the Hawaii rules of civil procedure, as explained in the *Casey* decision cited in section 1 (*Beneficial Hawaiii, Inc. v. Casey*, 98 Haw. 159, 45 P.3d 339, 2002, Haw. LEXIS 219 (2002), or the doctrine that an appeal from a final judgment incorporates within its ambit all interlocutory orders and rulings leading to that final judgment.

This section became effective May 27, 2003.

CIRCUIT COURT RULE 7. Form of Motions.
"Rule 7. (b): Oppositions and reply. An opposing party may serve and file counter affidavits and any memorandum in opposition to the motion, which shall be served and filed not less than 8 days before the date set for hearing except as otherwise provided by the Hawaii Rules of Civil Procedure or ordered by the Court. ...Unless permitted by another rule or statute, no party may file any papers less than 3 days before the set for hearing unless otherwise ordered by the court."

STATEMENT OF THE CASE

The AOAO's breach of the federal settlement precipitated this foreclosure.

On August 24, 2005 After Petitioner Patsy N. Sakuma (Petitioner) wrote to the Association of Apartment Owners of the Tropics At Waikele (AOAO) through their attorney Milton M. Motooka (Motooka) of Love Yamamoto & Motooka, LLC (LYM) about their breach of the settlement of the related federal lawsuits. Petitioner requested reimbursement of $500.00 for her fees and expenses to regain entry for the City and County of Honolulu para-transit Handivan into the private driveway to her Tropics condominium home to pick up her handicap elderly wheelchair-bound mother when neighbors complained. App. 94-95. Petitioner started withholding her monthly homeowner (HOA)'s fees again when the AOAO failed to pay her. *Id.*

The Association's original attorneys recorded a fraudulent lien, filed and litigated a fraudulent collection and foreclosure suit against Petitioner.

In response, Motooka and a LYM associate attorney (collectively. Motooka Parties) sued Petitioner using the name of Tropics (AOAO without "the" before Tropics), not a misnomer, as plaintiff to collect her HOA fees in the state district court, Civ. No. 1RC05-1-6232. App. 27-39, 95. Petitioner claimed she was not served the summons and complaint. App. 95. A default judgment was entered against her for $4,999.00, in favor of Tropics, a copy of which she later obtained. App. 27, 95.

On April 21, 2005, Motooka recorded a Lien for Unpaid Assessment under the name Tropics against Petitioner's Tropics Home and had attached a legal description that was missing 26 exceptions to title, including the Bank's mortgage and all of AOAO's governing documents, which Petitioner realized in reading the Association's answering brief on first remand. App. 89, 122-1,132.2, 162.

The judgment was obtained by fraud and violating Petitioner's 14th Amendment due process rights under the U.S. Constitution.

On August 13, 2017, Motooka Parties filed a judicial foreclosure complaint naming still another entity the Association of Condominium Homeowners of Tropics at Waikele (Association), by its Board of Directors, as the plaintiff against Respondent First Hawaiian Bank (Bank) and Petitioner to collect Tropic's money judgment by foreclosing against her Tropics Home in the state first circuit court in Civ. No. 07-1487. App. 27-39.

The Complaint misrepresented that Petitioner was a resident of the city and county of Honolulu, Hawaii. App. 28.

Motooka Parties attached, as exhibits to the complaint, the recorded, 2005 Lien, a recorded lis pendens on behalf of Tropics, and an Exhibit A legal description of purportedly Petitioner's Tropics Home that was missing 26 exceptions to tile, including the Bank's mortgage, and all of AOAO's governing documents cited in the complaint, which Petitioner later argued. App. 37-39, 39.1-39.4.

Respondent First Hawaiian Bank (Bank) answered the Complaint. App. 40-48. The Bank denied Petitioner was a resident of Honolulu, Hawaii, stated she

resided in Los Angeles, California, and that the Complaint failed to state a claim against the Bank upon which relief can be granted. App.41-42.

Motooka Parties obtained an order to serve the Complaint by publication, after their certified mail receipt card pursuant to its order to serve by certified mail, was returned with a different signature. App. 2, 95,122 -122.1.

Petitioner did not answer the Complaint because she was not served and was unaware of the foreclosure action. App. 95, 156. A default judgment was entered against Petitioner. App. 53.

The Association moved for summary judgment, default judgment, judgment and an interlocutory decree of foreclosure and for a hearing. Petitioner only learned of the summary judgment motion when she received by U.S. mail the Bank's Statement of No Position, just over a week before the hearing. App. 95, 123, 156.

Petitioner did not receive the summary judgment motion until around April 23, 2008, less than 8 days before the hearing on April 30, 2008. App 95; 123. Petitioner also had to pay a premium to file her motion for continuance by express-overnight mail a motion, as an out-of-state defendant and due to conflicting hearing in Los Angeles, Petitioner was unable to attend the hearing because her motion for a continuance was denied. App. 49-50; 95.

On June 10, 2008, the Findings, Conclusions, Default Judgment, Summary Judgment, Interlocutory Foreclosure Decree, certified as final under Rule 54(b), ("Foreclosure Decree") were entered. App. 52-76.

On August 7, 2008, the Association filed a Motion for Approval of Commissioner to auction without open houses and/or for further instructions, which Petitioner did timely receive. App. 95, 123, 156.

On August 22, 2008, Petitioner filed an Amended Opposition to the motion for approval. Petitioner raised the claim of the Association's and Motooka Parties's unclean hands in not serving her the Complaint in federal court, which prevented her from removing the foreclosure suit to federal court under 28 U.S. C. §§1441 and 1446 like in the prior Federal Action and had relied on the missing recorded Amfac Certificate in the legal description of her Tropics Home. App. 222-224. The Amfac Certificate's covenant that the Waikele housing developers build at least ten (10) percent of housing for low-income and affordable homes for rent and purchase using government financing was also a covenant that required the Waikele new housing be built with accessible handicap designs, 28 CFR 35.151(a) & (c), under Title II of the Americans With Disabilities Act, 42 U.S.C. 12131 et seq., App. 139-140. Petitioner also asserted that all three exceptions to the Anti-Injunction Act, applied, 28 U.S. C. 28 U.S.C. §2283. App. 94-95; 99,101-102, 132-4 to 132-5, 133.

On September 23, 2008, the Circuit Court granted the Association's Motion for Approval. App. 62; 122.1-122.2.

On October 6, 2008 Petitioner timely filed a Reconsideration of the September 23, 2008 Order raising she had not been served or had any notice of the disputed certified U.S. Mail of the Summons and Complaint, adding the search

result of the U.S. Postal Office's tracking website showing no information on the disputed certified mail as fraud on the court. App. 95, 122-1, 125, 156.

Meanwhile, on November 12, 2008, the Commissioner at the auction sold her home to First Buyer. App. 95, 125.

On November 21, 2008, the Circuit Court entered its order denying Petitioner's October 6, 2008 reconsideration concluding she did not raise anything she could have raised earlier. App. 125.

On May 8, 2009, the Association moved for confirmation of the sale. Petitioner filed her opposition reiterating that the foreclosure decree was obtained by violating Petitioner's due process rights to receive service of the summons and complaint by never mailing it to her as claimed. The Association filed its Reply. App. 96, On Aug. 31, 2010, the Order Confirming Second Sale is entered. App. 212.

TRO Hearing Filed In Federal Court To Enjoin The 2007 Foreclosure

On June 2, 2009, Petitioner filed a Temporary Restraining Order in the federal court to enjoin the Association's Motion for Confirmation of First Sale in the U.S. District Court of the Hawaii District No. 1:08-cv-00274-HG-LEK. App. 95, 132.1. On June 3, 2009, the TRO was heard. The Association's attorney attended with the Commissioner and co-counsel for the AOAO. The TRO was denied. App. 95,128.

On June 4, 2009, the Association's hearing on its Motion for Confirmation of Sale was heard in the circuit court. Petitioner attended. First Buyer's sale was denied for being too low. Unbeknownst to Petition, at the adjournment, a recess

only occurred. A second auction was held. Petitioner's Tropics Home was sold to Steve Valot for $160,000.00. The second sale was confirmed at the hearing, but Petitioner had already left. App. 96,126-127.

On August 31, 2010, the Order Confirming Second Sale, Judgment, and Notice of Judgment were entered. App. 12.11.

On September 10, 2010, Petitioner filed her Rule 59(e) tolling motion to the August 31, 2010 Order Confirming Second Sale, based on further due process violations in the non-receipt of filings in enclosing only the Notice of Judgment, but not the August 31, 2009 Order Confirming Second Sale, with allegedly an inflated postage amount from the private meter markings on the mailing envelope, the unnoticed second auction sale, and other irregularities. App. 126-127.

Missed opportunity to overturn 3-1/2 years earlier ICA's calculation of the time to appeal from the automatic denial of a Rule 59(e) tolling motion.

On January 3, 2011, in a minute order the Circuit Court denied Petitioner's 2010 Reconsideration. App. 96. The Circuit Court stated that there was nothing that was presented that could have been brought in opposition to the original motion. App. 127, 156. On January 27, 2011, Petitioner filed her notice of appeal, as CAAP No. 11-0000054. App. 16, 128. Petitioner in her opening brief contended that she did not receive the filings in this action. *Id.* On August 3, 2011, before the answering brief was due, the Intermediate Court of Appeals entered an Order Dismissing Appeal for untimeliness based on HRAP 4(a)(1) and (a)(3)'s automatic denial as over 30 days from the 90-day deemed denial of her Rule 59(e) motion. 2011 Haw. App. LEXIS 830 (August 3, 2011).

On August 11, 2011, Petitioner filed a HRAP Rule 40 Reconsideration based on HRAP Rule 4(a)(5) that defines "entry" as entry by the clerk's office required under HRAP 4(a)(3) an entry of an order of the deemed denial of the Rule 59(e) motion. App. 211-221. On August 17, 2011, the Intermediate Court of Appeals denied her Reconsideration concluding they have not overlooked or misapprehended any points of law or fact, and therefore Petitioner's August 11, 2011 Reconsideration lacks merit. App 12.13, 2011 WL 3671865,

On November 3, 2011, Petitioner's opening brief is filed by overnight express mail after her request was denied to file it by facsimile to avoid being late by one business day. On November 22, 2011, the Hawaii Supreme Court entered it order rejecting the application for untimeliness and by separate order denied her request to file by facsimile by order dated the same day. App. 12.14; 2011 WL 5903865.

Second Appeal No. 12-0000145 dismissed for lack of jurisdiction due to circuit court's refusal to enter an order disposing theRule 59(e) motion.

The foreclosure continued while Petitioner's first appeal was being considered. On August 17, 2011, the Commissioner through the Association's new attorneys from Porter McGuire Kiakono & Chow, LLP filed a motion for instruction because the second buyer requested to withdraw his bid due to the delay in closing. App. 96. The Commissioner again failed to add the unit number of Petitioner's adress so Petitioner did not receive it in time to attend the hearing and auction. App. 129. The Commissioner also used a bad address for Petitioner and she did not receive his subsequent report. On November 28, 2011 the Circuit Court entered its

Order Granting Second Buyers' Withdrawal and directed the Commissioner to re-auction Petitioner's Tropics Home. *Id.*

On December 7, 2011, Petitioner filed a Motion to Vacate the action because of continuing fraud in the non-mailing of the Motion for Instruction and subsequent report by the Commissioner, the clerk telling Petitioner she only needed to file one copy and then later two and entered them on the later date so her motion was not a "tolling" motion. App. 128.

On July 18, 2012, the Intermediate Court of Appeals dismissed the appeal for lack of jurisdiction because the Circuit Court had not yet entered a final, appealable order to her Rule 60(b) motion and so her appeal was premature. App. 12.4-8; 130.

On October 16, 2012, the Hawaii Supreme Court's order rejected Petitioner's 2016 Application for Writ of Certiorari in SCWC 12-0000145 of her 2011 Rule 60(b) motion to vacate. App. 12.9; 130.

Commissioner's Quitclaim Apartment Deed and Distribution premature since there was no final judgment due to the pending Rule 59(e) motion.

On February 1, 2012, AOCH and PMKC moved to confirm the third-sale. App. 66-82. On February 10, 2012 Bank filed a statement of position. App.71,179. That same day, Petitioner filed her Opposition reiterating the irregularities and non-receipt of the mailed commissioner's report and his August 17, 2011 motion because he omitted Petitioner's unit number of her address, which he re-mailed after the third auction. On February 13, 2012, Petitioner filed a motion for continuance, for work conflict and out-of-state status. App. 95, 123.

On February 23, 2012, the hearing on AOCH's motion to confirm third sale was held. Petitioner did not attend because she was unable since the Circuit Court denied her Motion for Continuance. App.95,123. The Bank asked that the sale be subject to bank's mortgage. App. 70. The third sale was confirmed. App. 95, 123. The minutes of the hearing stated Petitioner's Motion for Continuance was denied. *Id.* Third Buyers were present. App. 68. The Circuit Court then reopened the auction. The winning bid was $233,000.00 to Third Buyers, subject to bank's mortgage. App. 68, 70.

On May 29, 2012, the Circuit Court entered the Order Confirming Third Sale, Judgment, Judgment for Possession and Writ of Possession. App. 66-87,130, 180.

On June 7, 2012, Petitioner filed her Rule 59(e) tolling motion contending the third sale should be voided due to violations of her 14th Amendment section one of the U.S. Constitution's due process and equal protection rights due to irregularities in the third sale, being served only the notice of judgment of the May 29, 2012 order confirming sale, App. 97, 137, in retaliation for asserting her associational handicap rights under the Fair Housing Amendment Act, 42 U.S.C. 3601 et seq. and Title II of the ADA,42 U.S. C. 12131 et seq. and contesting the constitutionality of the local circuit rule 7(b), App. 254, due to the delay inter-state U.S. mail in leaving only four (4), not eight (8) effective days to file an objection. App. 145-146; 26.1-26.4.

On July 2, 2012 recorded Commissioner's Quitclaim Apartment Deed, App. 229-239, transferring Petitioner's Tropics Home only to two of the three Third

Buyers and attaching a legal description that added back the missing 26 exceptions to title, alleging additional fraud on the court for the Hawaii Supreme Court to consider. App. 132.2, 156.

On July 2, 2012, the Circuit Judge allowed the Commissioner and escrow to distribute the funds from the third sale, allow the withholding either to without the $129,746.89 surplus without entering a dispositional order to Petitioner's Rule 59(e) motion, without rejecting the Commissioner's certificate of service of his Distribution Statement showing a bad address for Petitioner, and without any accounting to Petitioner, the Circuit Court, or the Hawaii Supreme Court order to show cause hearing, without any invoices from unknown attorney under the Association line item showing $39,440.74 or citing any statutory authority for withholding the surplus,. App. 83-87; 130.

2012 Appeal filed while Petitioner's Rule 59(e) motion was still pending.

Sometime in mid-October, 2012, Third Buyers forcibly removed Petitioner's siblings-tenants from Petitioner's Tropics Home, while her June 7, 2012 Rule 59(e) motion was still pending. App. 175-176. On October 16, 2012, Petitioner filed a third appeal, CAAP No. 12-0000870. In her notice of appeal, she stated that there was no final order entered in her June 7, 2012 Rule 59(e) motion, but she just received a call from Honolulu that her siblings had been forcible removed whom she later found out were sheriffs and that she is still contesting the foreclosure of that home. App. 97. Petitioner asserted appellate jurisdiction base on the court's inherent authority to review the appeal to discern if they had jurisdiction, under

HRS §602-57 and the *Forgay* doctrine allowing for the immediate appeal to foreclosed litigants when irreparable harm has resulted from a court's order. App. 97, 121.1-2.

Petitioner's 2012 Motion to Stay, Mandamus Petition Are Denied.

On January 11, 2013, the Intermediate Court of Appeals denied Petitioner's Motion for Stay of Appeal in CAAP No. 12-0000870. App.12.1-2. On January 24, 2012 the Hawaii Supreme Court denied Petitioner's mandamus petition without prejudice for the Honorable Circuit Judge to enter a final judgment in her June 7, 2012 Rule 59(e) motion and December 13, 2011 Rule 60(b) motion to vacate, stating while Petitioner is entitled to a ruling on the motions, she was not entitled to an extraordinary writ at this time because she did not lack an alternative means to redress the alleged wrong. App. 12.3; 2012 WL 6929416.

2012 Appeal initially dismissed like 2011 appeal for missing appeal deadline under HRAP 4(a)(3)'s automatic denial of Rule 59(e) motion.

On January 11, 2013, the Intermediate Court of Appeals entered an order dismissing appeal for lack of jurisdiction for untimeliness since the appeal in CAAP No. 12-0000870 was not filed within the thirty day appeal deadline after the ninety-day automatic "deemed denial" of the filing of the June 7, 2012 Rule 59(e) motion under Haw. R. App. Proc. Rule 4(a)(3) and 4(a)(1), which was due on September 5, 2012. App. 16; 2013 WL 150175 at *1 (Haw. App. Jan. 11, 2013)(order).

On March 15, 2013, pursuant to leave, Petitioner filed her Amended, third Application for Writ of Certiorari, which the Hawaii Supreme Court decided in a published opinion reported at 131 Haw. 254, 318 P. 3d 94 (2013), App.13-20. The

majority of the Hawaii Supreme Court concluded it had jurisdiction because no final order had ever been entered on Petitioner's June 7, 2012 Rule 59(e) motion. J. Nakayama dissenting disagreed and that Haw. R. App. Proc. 4(a)(1) and (a)(3) were jurisdictional and nonwaivable. App. 17-20. The Hawaii Supreme Court vacated the judgment on appeal and remanded to the Intermediate Court of Appeals for further review consistent with the opinion.131 Haw.at255,318 P.3dat97.

First Remand, the ICA again dismisses appeal as moot like in 2013.

In her 2014 briefs on first remand, Petitioner contended new allegations of fraud in filing the foreclosure under a false name and that the Association did not exist so it lacked standing. App. 131,140-142. Further Petitioner contended a total want of subject-matter jurisdiction of the circuit court due to the missing 26 exceptions to title in the legal description and that only the state district court, if at all, had jurisdiction, based on the exclusive dollar amount jurisdiction of all matters under $5,000 under HRS §604-5 (2014). App. 133, 145-148.

On July 21, 2015, the Intermediate Court of Appeals entered a Summary Disposition Order, dismissing the case as moot. 2015 Haw. App. LEXIS 377, 136 Haw. 25, 356 P.3d 1045 (2015); App. 26.1-26.3. The Intermediate Court of Appeals again concluded it could not provide her with adequate relief for the same reasons in its 2013 SDO and dismissed the appeal as moot and Petitioner's contentions otherwise were meritless, relying on the same case *Citibank v. Saje Ventures, II. Id.*

On September 28, 2015, Petitioner filed her fourth application for writ of certiorari on first remand. In her 2015 Application, since over two (2) years had

passed and still there was no final order to her June 7, 2012 Rule 59(e) motion, Petitioner alleged new fraud on the court to the Hawaii Supreme Court by submitting into the record: 1) in the recorded July 2, 2012 Commissioner's Quitclaim Apartment Deed, App. 229-239, showing the switched legal description adding back the 26 missing exceptions to title, 2) a second recorded July 2, 2012 Quitclaim Apartment Deed that same day between a third buyer and the two buyers listed in the Order Confirming Third Sale, App. 240-251, and three buyers in the Distribution Statement, App. 85, and 3) the public record from the Division of Real Property Assessment web search, App. 227, showing the payment of $1000 by third buyer to the other two buyers in recording a second quitclaim apartment deed.

The 2015 Order Accepting Application ordered the ministerial act of an entry of the automatic "deemed denial."

On November 6, 2015, the Hawaii Supreme Court, bypassed the new fraud allegations and entered its Order Accepting Application for Writ of Certiorari for a second remand, in SCWC 12-0000870, of temporary remand to the Circuit Court to order only the ministerial act of entering an order of its 2012 "deemed denial" of Petitioner's Rule 59(e) motion. *See*, 2015 WL 6835407, App. 26.4.

On January 21, 2016, on second remand in CAAP No. 12-0000870, without ordering any further briefing, the Intermediate Court of Appeals sua sponte entered its Summary Disposition Order denying Petitioner's purported reconsideration of the November 30, 2015 Order. App. 26.5-26.6. On February 16, 2016, the Association filed a Second Motion for Fees and Costs. On February 25, 2016, Petitioner filed an opposition. On April 20, 2016, the Intermediate Court of Appeals

entered its Order Granting In Part and Denying In Part the Association's Fee Request.

On September 21, 2016, Petitioner filed her Application for Writ of Certiorari contesting the April 2016 Fee Order and reasserting her claims in her 2015 Application for Writ of Certiorari. On November 1, 2016, the Hawaii Supreme Court in SCWC 12-0000870 entered its Order Rejecting Application of Writ of Certiorari filed by Petitioner on September 21, 2016. App. 26.7; 2016 WL 6804410.

The Order Confirming Third Sale Became Final 3-1/2 Years Later.

On November 30, 2015, on temporary remand from the Intermediate Court of Appeals, the Circuit Court finally entered its order of its 2012 deemed denial of Petitioner's Rule 59(e) motion. App. 11-12. On December 8, 2015, Petitioner filed a second Rule 59(e) motion or Rule 60(b)(4) and 60(b)(fraud on the court) motion. App. 9. On March 22, 2016, the Circuit Court entered its order denying Petitioner's December 8, 2015 Motion to Reconsider the November 30, 2015 Order, App.8-10. The circuit court judge noted no oppositions by opposing counsel were filed. App. 8-10. On August 15, 2016 the circuit court entered its order denying Petitioner's April 1, 2016 reconsideration stating the record and files were reviewed and good cause appearing were the reasons for the denial. App. 6-7.

A Four Year Delay In Entering Summary Disposition Order Dismissing Current 2016 Appeal For The Same Reason Of Mootness As In 2013.

On September 16, 2016, Petitioner filed a notice of appeal, CAAP No. 16-0000627, from the August 15, 2016 Order denying reconsideration of the March 22, 2016 Order denying Petitioner's December 8, 2015 Reconsideration to vacate the

November 30, 2015 Order entering the 2012 deemed denial of Petitioner's June 7, 2012 Rule 59(e) motion. In Petitioner's Reply Brief to the Association's Answering Brief, she attached to the appendices four (4) other liens or lis pendens of other AOAO homeowners that were recorded using the same false name of Tropics and the same legal description missing the 26 exceptions to title. In the appendix to Petitioner's Reply Brief to Bank's Answering Brief she attached a Lis Pendens of another AOAO homeowner showing AOAO, not Tropics as the lienholder, but with the same missing 26 exceptions title in its legal description, all which were recorded in the state official records in the Bureau of Conveyances.

About two years after filing her September 16, 2016 Notice of Appeal, on February 6, 2019, the Intermediate Court of Appeal's staff attorney, Randall A. Pinal, replied to Petitioner's inquiry that the court would issue a decision when it has completed its review of her appeal. App. 112.

On December 18, 2020, the Intermediate Court of Appeals dismissed the appeal as moot citing the same cases to conclude again that Petitioner's contentions were meritless. App 2-3. On May 4, 2021 the Hawaii Supreme Court entered its Order Rejecting Application for Writ of Certiorari. App. 5.

REASONS FOR GRANTING THE PETITION

The Summary Disposition Order conflicts with the Court's decision *Kalb v. Feuerstein*, 308 U.S. 433, 439-440 (1940) that allowed a collateral attack of subject-matter jurisdiction in the rare instance based on debtor's petition for relief was

pending in bankruptcy court, which court had exclusive jurisdiction, and under the federal statute affirmatively divested the foreclosure court from jurisdiction.

The Summary Disposition Order conflicts with the Court's decision *Pacific R. Co. of Mo. v. Missouri Pacific R. Co.*, 111 U.S. 505 (1864) holding that a subsequent suit brought to reverse for fraud the foreclosure decree before the court which made the prior judgment is a continuation of the former suit on the question of jurisdiction, so the challenge is a direct attack on the judgment.

The Court's decision *Traveler's Indemn.Co. v. Bailey*, 557 U.S. 137, 148, n. 6 (2009), noted that *Kalb*, and the Court's decision *U.S. v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 514 (1940) were rare situation where subject-matter jurisdiction may be collateral attacked. Further that the Restatement (Second) of Judgments, Section 12 p. 115 (1980), describing three instances where subject-matter jurisdiction may be collaterally attacked. See, *Traveler's Indemn.Co.*, 557 U.S. at 148 & n. 6.

The Summary Disposition Order also conflicts with exception one of the Restatement (Second) of Judgments Section 12 p. 115 (1980) to allow a collateral attack on judgment: " The subject matter of the action taken while the case was exclusively with the bankruptcy court was plainly beyond the [foreclosing]court's jurisdiction that its entertaining the action was a manifest abuse of authority."

In *Mortgage Electronic Registration System, Inc. v. Wise*, 130 Haw. 11, 17, 304 P.3d 1192, 1198 (2013), the Hawaii Supreme Court explained that the Hawaii judicial foreclosure proceeding is treated as two separate proceedings for res

judicata purposes: 1) the first, the foreclosure decree that incorporates an Order of Sale and is certified a final judgment under HRCP 54(b), and 2) all other orders.

The Summary Disposition Order also conflicts with the Court's decision *Behrens v. Pelletier,* 516 U.S. 299 (1996) allowing two appeals, at successive stages of the litigation, from an order denying the collateral order of a "qualified-immunity" defense. Under the Court's leading case, *Cohen v. Beneficial Industrial Loan, Corp.*, 337 U.S. 541, 546 (1949), collateral orders are a small class of pre-judgment orders that fall into a category of final orders in that they finally determine claims of right separable from, and collateral to, rights asserted in the underlying action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

The Summary Disposition Order can only be correct to bar this Court's decisions *Kalb* and *U.S. Fidelity & Guaranty Co.,* the Restatement 2d on Judgments' allowing a collateral attack of subject-matter jurisdiction, and bar a direct attack of the foreclosure decree based on fraud under this Court decision *Pacific R. Co. of Mo.* brought in the same court that issued the decree, if the Intermediate Court of Appeals applied an impermissible offensive use of the collateral order doctrine. The reason is one of the elements of a collateral order is that it is unreviewable if not appealed on direct review within 30 days of its entry under *Cohen,* 377 U.S at 542. Therefore, the question of whether the collateral order doctrine maybe be offensively applied against a foreclosed defendant to bar her

collateral attack of a foreclosure decree incorporating an order of sale from her appeal of the later order confirming sale is the antecedent question as to whether this appeal is moot.

The Hawaii Supreme Court in *Beneficial Hawaii Inc. v. Casey,* 98 Haw. 159, 45 P.3d 359 (2002) prospectively concluded that an interlocutory foreclosure decree that incorporates an order of sale and is certified under Rule 54(b) as a final judgment is non-reviewable if a party later challenges the foreclosure decree that incorporates an order of sale after its initial 30-day appeal period from subsequent orders in the foreclosure proceeding. The Casey court also stated that a party must appeal an order denying a Rule 60(b)(1)-(3) motion within 30-days after its entry. *See, Casey,* 98 Haw. at 166, 45 P. 3d at 366.

The 2003 Hawaii Legislature explained the *Casey* decision in their goal to carve out the special appellate jurisdiction HRS §667-57 (2016) for foreclosures because *Casey* apparently could be read but should not be read as eliminating the appellate court's power to consider a Rule 60(b) motion for relief or to consider the doctrine of merger of interlocutory orders into the final order in the foreclosure context because a collateral order by its own definition is unreviewable after final judgment in the underlying action. *See, infra,* Statutory Provisions Section.

The Court has jurisdiction to review the Intermediate Court of Appeals' bypassing of this antecedent question of the offensive use of the collateral order doctrine against a foreclosed defendant to collaterally attack the foreclosure decree that incorporates an order of sale from the later order confirming sale under *Rogers*

v. Alabama because the antecedent question to mootness itself became a federal question under the presumption of *Michigan v. Long,* 453 U.S. at 1043.

The Hawaii Supreme Court in *Casey* primarily if not exclusively relied on federal law, rather than an independent and adequate state law, to reach its legal conclusion that it could **prospectively** apply the collateral order doctrine offensively to the foreclosure decree against Petitioner as the defendant in the underlying foreclosure because she did not appeal the foreclosure decree. The reason is *Casey* relied on *International Sav. and Loan Ass'n, Ltd. v. Woods*, 69 Haw. 11, 15, 20, 731 P.2d 151, 154, 157 (1987). *Woods,* in turn, relied exclusively on the Court's decisions:

1) *Cohen v. Beneficial Industrial Loan Co.*, 377 U.S. 542 (1949) as followed in the Hawaii Supreme Court decision *MDG Supply Inc. v. Ellis*, 51 Haw. 480, 481-482, 463 P.2d 530, 532 (1969) to conclude a foreclosure decree that incorporates an order of sale within the decree is a final order, for appellate jurisdiction based on the collateral order doctrine, even if there are other orders to be decided in Hawaii's bifurcated judicial foreclosure proceeding;

2) The Hawaii Supreme Court in *MDG Supply Inc.,* 51 Haw. 375, 463 P. 2d 525 (1969), reh'g denied, 51 Haw. 479, 463 P.2d 525 (1969), cert. denied, 400 U.S. 868 (1970) had also followed the reasoning for finality in this Court's decisions *Forgay v. Conrad,* 47 U.S. (6 How.) 2001 (1848) allowing appellate review even when there is no final judgment but where irreparable harm to the foreclosed on defendants would result if appeal is denied to dispute a decree to set aside the

defendants' deed as fraudulent transfers and order of immediate transfer of the property and slaves to the equivalent of today the trustee in bankruptcy, *Woods,* 69 Haw. 69 at 16, 731 P.2d at 155; and

3) *Whiting v. The Bank of the United States,* 38 U.S. (13 Pet.) 6 (1839) that a decree foreclosing a mortgage and directing the sale of the mortgaged premises was a final decree and that the pending return and confirmation of sale were merely incidents to enforce the judgment so the defendant did not have to wait to the end of the proceeding to appeal.

In *Woods,* 69 Haw. at 15, 731 P.2d at 154, the Hawaii Supreme Court correctly applied the collateral order defensively to the defendants Woods to allow their appeal and to deny International Savings' objection that the circuit court's order of summary judgment and order to foreclose on the mortgage, were not final because there were still pending multiple claims based on the multiple parties in the action that would render any pending order not merely enforcing the judgment.

However, the *Woods* Court in prospectively stating that a litigant who "would like to challenge the validity of a decree of foreclosure and an order for the sale of the foreclosed property in a multiple-party or multiple-issue setting must seek a certification of finality pursuant to Rule 54(b). He will be deemed to have waived his right to appeal the trial court's action if he does not seek review when any injury allegedly caused by the court's judgment and order may still be repaired...." applied an offensive use of the collateral order doctrine.

The Summary Disposition Order therefore conflicts with this Court's decision *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 375 (1981) that the collateral order doctrine applied in the Court's decisions: 1) *Cohen v. Beneficial Industrial Loan, Corp.*, 337 U.S. 541, 546 (1949)(circuit order reversing the trial court's order refusing to apply a state statute requiring the posting of security to cover the costs to defend a shareholder's derivative lawsuit); 2) *Whiting v. Bank of the United States*, 13 Pet. 6, 15 (1839) and 3) 3) *Forgay v. Conrad*, 6 How. 201, 203 (1846).

The Court's later decision *Ashcroft v. Iqbal*, 556 U.S. 662,671-675 (2009) held that it had jurisdiction because an order denying a qualified immunity defense is a collateral order and is immediately appealable by the defendants—high-ranking government officials, even if intertwined with the merit question because it turns on a question of law—whether the order was a collateral order.

This Court should grant the Writ to resolve the important question of whether the collateral order doctrine in the context of foreclosures may only be applied defensively or if it may be offensively applied because the collateral order doctrine question is the antecedent federal question under *Michigan and Long,* which the Intermediate Court of Appeals and the Hawaii Supreme bypassed to reach the legal conclusion of the initial federal question under *Michigan v. Long*, as to whether this case is moot and that Petitioner's contentions that mootness have no merit, because the Court is the ultimate judge of mootness of a federal question under *Rogers v. Alabama.*

If the Court accepts this Writ, the Court would be able to announce a bright-line rule of finality of a foreclosure decree as a collateral order if only used by defendants in a foreclosure suit. This is consistent with the Court's decision *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988) to have bright-line rules of appellate jurisdiction.

The Court may apply its decision *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. 603 (7 Cranch) (1813), to overturn outright the inadequacy of state of Hawaii's highest court's interpretation of state property law in *Beneficial of Hawaii Inc. v. Casey,* 98 Hawaii 159, 164-165, 45 P. 3d 359, 364-365 (2002), if it concludes *Casey* misconstrued Hawaii property law on the collateral order doctrine in applying it offensively. The reason is the Hawaii Supreme Court's prior decision applied the collateral order doctrine to a foreclosure decree only defensively in *MDG Supply Inc, v. Diversified Investments, Inc.*, 51 Haw. 375, 463 P.2d 525 (1969), reh'g denied 51 Haw. 479, 463 P.2d 524 (1969), cert. denied, 400 U.S. 568 (1991).

The new Harvard University's 2021 State of Nation's Housing Report stated that as of March 2021, 2.1 million homeowners are still behind on the mortgages after deducting the millions other homeowners who have started repaying or some even up to date with their lenders. App. 224-226. With the moratorium on foreclosures and evictions that has ended on July 31, 2021, 8 million households face foreclosure or evictions.

In light of the potential tidal wave of foreclosure actions in the state and federal court system due to the ending of the Covid-19 Pandemic moratoriums on

mortgage foreclosures and evictions, if the Court accepts the Writ, the Court could help litigants and the lower courts better determine when a collateral order applies in the foreclosure context. This is because it is like a one-way street—only defendants could use the collateral order doctrine to appeal in foreclosure suits.

In answering this federal question, the Court in effect would be answering the question whether *Mohawk Industries, Inc. v. Carpenter,* 558 U.S. 100 (2009) effectively overturned the *Forgay* doctrine, which was raised by the majority of the United States Court of Appeals for the Seventh Circuit in *HSBC Bank USA, NA v. Townsend,* 793 F.3d 771, 780 (7th Cir. 2015) but left it for another day. The answer should be clear. *Mohawk* was not a foreclosure suit so *Mohawk* did not overturn the *Forgay* doctrine.

The Court should accept the Writ also to decide the important federal question of whether the Intermediate Court of Appeals and the Hawaii Supreme Court bypassed the important federal question of whether the cumulative effect of the state foreclosure proceeding in this case have violated Petitioner's due process rights and equal protection rights under the 14th Amendment, §1 of the U.S. Constitution by:

1) The state courts' refusal to review of Petitioner's jurisdictional objections to collaterally attack the circuit court's total want of jurisdiction under the foreclosure decree from subsequent orders under Rule 59(e) or Rule 60(b) and holding a disposition of her motions in limbo for over 3-1/2 years precluding an appeal to this Court, because there was no final judgment or final order to her June 7, 2012 Rule

59(e) motion for relief from the May 29, 2012 order confirming sale and prior foreclosure decree's order of sale and her prior December 13, 2011 Rule 60(b) motion for void judgments and fraud on the court until November 15, 2015:

• Taking almost 3-1/2 years to require the Intermediate Court to temporarily remand to the circuit court to enter a dispositional order to Petitioner's timely Rule 59(e) tolling motion pursuant to the Hawaii Supreme Court's November 6, 2015 Order Accepting Petitioner's Application for Writ of Certiorari, on Second Remand, App. 26.4, 2015 WL 6835407;

• The July 18, 2012 Intermediate Court of Appeal's Order Dismissing Appeal in CAAP No. 12-0000145 for lack of jurisdiction because there was no dispositional order to Petitioner's 2011 Amended Rule 60(b) Motion to Vacate, App. 12.5-12.8, 2012 WL 2924102;

• The October 16, 2012 Order rejecting an application for writ of certiorari to the Intermediate Court of Appeals to reverse the July 18, 2012 Order Dismissing Appeal for lack of jurisdiction, under Petitioner's undisposed of Rule 60(b) motion, SCWC No. 12-0000145, App. 12.9, 2012 WL 4893713;

• The January 24, 2012, Hawaii Supreme Court Order denying Petitioner's November 30, 2012 Application for Mandamus Relief without prejudice, 2012 WL 6929416, App. 12.3, even after three (3) years the Circuit Court still had not entered a disposition order to Petitioner's Amended December 13, 2011 Rule 60(b) Motion or June 7, 2012 Rule 59(e) tolling motion;

• In *Deutsche Bank Nat.l Trust Co. v. Amasol.* 135 Haw. 357, 358-359, 351 P.3d 584, 585-586 (2015), App. 21-26, clarifying the published decision in this case, 131 Haw. 254, 318 P. 3d 95 (2013) because there was no dispositional order entered to the Rule 60(b) motion and the same applied in *Amasol.* Only the Rule 59(e) motions were properly before the Court in both of these cases;

• *PennyMac Corp. v. Godinez,* 148 Haw. 323, 474 P. 3d 264, n. 7 (2020), the Supreme Court admitted that the Intermediate Court of Appeals had been erroneously dismissing appeals to a timely filed Rule 60(b) motion in foreclosure actions based on res judicata: *Bank of America v. Panzo,* CAAP 14-881356, 2017 WL 1194002; *NationStar Mortgage v. Boonstra,* CAAP No. 18-0000583 (6/12/19);

2) The validity of service of process by the Association's and its attorneys', and the state court appointed foreclosure Commissioner, *infra, see, Mathews v. Eldridge,* 424 U.S. 319, 333 (1976); and

3) The adequacy of the other foreclosure procedures regarding:

• A 3-1/2 year delay in correcting the calculation of the appeal due date from a HRAP Rule 4(a)(3) deemed denial of a Rule 59(e) motion for relief from the 2010 Order Confirming Second Sale, when if corrected in 2011, by accepting Petitioner's 2011 Reconsideration of 2011 SDO dismissing appeal as untimely, App. 211-221, 2011 WL 3671965, App.12.13, **it could have vacated the foreclosure action and void the foreclosure decree when there was no final order confirming sale**; App. 12.13, 2011 WL 3671965, App. 211-221; 2011 WL 4893713; Dec. 1, 2011 Hawaii Supreme Court Order rejecting filing by facsimile;

• The repeated denial of a continuance to Petitioner an out-of-state defendant to attend the important hearings in this foreclosure case, App. 49-51 (05/15/08 Order Denying M. for Conti. of 04/30/08 SJ Hearing);

• Not requiring the circuit judge to approve the Commissioner's Quitclaim Apartment Deed as part of the Motion and Order for Confirmation of Sale to avoid fraud on a party and the court by officers of the court; App. 227-229-239; 240-250;

• Allowing the circuit judge's unilateral decision, without comment or oversight by the Intermediate Court of Appeals or Hawaii Supreme Court, to withhold the $129, 746.59 foreclosure surplus in an unknown escrow without prior notice or opportunity for another hearing since July 2, 2012 to the present, over nine (9) years without any accounting; App. 85.

CONCLUSION

The petition for certiorari review should be granted.

Respectfully submitted,

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Dated: September 10, 2021