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Accretions: Cato Institute jumps into Hawaii beach 'takings' case

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If Only Hawaii's Government Were as Beautiful as Its Beaches

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Throughout history, people have fought over beaches, including in the legal arena. In the latest case in which Cato has filed an amicus brief, a state has once again redefined property rights to take possession of highly-valued beachfront property.

In 2003, Hawaii passed Act 73, which took past and future title to accretions (the slow build-up of sediment on beaches) from landowners and gave it to the State, changing a 120-year-old rule. While waterlines are unpredictable, the original rule — common to most waterfront jurisdictions — helped establish legal consistency. Indeed, without such a rule, beachfront property becomes beachview property in just a few years.

In response to Act 73, homeowners sued the state, claiming that the law violated the Takings Clause of the Fifth Amendment or, in the alternative, the Due Process Clauses of the Fifth and Fourteenth Amendments. The state appellate court held that compensation was owed only for the accretions that had accumulated before Act 73's enactment because the right to subsequent accretions had not "vested" (the legal term for when an expectation becomes an actual property right). Hawaii's Supreme Court declined to review that ruling, so the property owners asked the U.S. Supreme Court to do so.

Cato, joined by the Pacific Legal Foundation, filed a brief supporting that petition and argues that the appellate court's decision was contrary to long-standing definitions of waterfront property rights. Our brief highlights the increasing need for the Court to establish and enforce a judicial takings doctrine.

More and more states are using backdoor tricks — like legislative "guidelines" and judicial creativity — to take property in violation of constitutional rights: This Hawaii case is distressingly similar to last term's *Stop the Beach* (in which Cato also filed a brief). In that case, Florida took property by adding sand to the beach and then laying claim to the newly created land — in essence asserting that property that was *defined* by contact with the water (in technical terms, "littoral" or "riparian") had no right to contact the water. The Court ruled that while Florida's actions did not rise to the level of a judicial taking, a large enough departure from established common-law rules could constitute a constitutional violation.

In this latest brief, we highlight both the largeness of Hawaii's departure from established law and the spate of such actions in recent years — which circumstance calls out for Supreme Court review. The case is *Maunalua Bay Beach Ohana 28 v. Hawaii* and the Court will decide later this fall whether to take it up.

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