No. ________________

IN THE SUPREME COURT OF THE STATE OF HAWAII

U.S. BANK N.A. IN ITS CAPACITY AS TRUSTEE FOR THE REGISTERED HOLDERS OF MASTR ASSET BACKED SECURITIES TRUST 2005-NC1, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-NC1,

Respondent/Plaintiff-Appellee,

vs.

JOSEPH KEAOULA MATTOS and CHANELLE LEOLA MENESES,

Petitioners/Defendants-Appellants,

and

CITIFINANCIAL, INC., ASSOCIATION OF APARTMENT OWNERS OF TERRAZZA/CORTEBELLA/LAS BRISIS/TIBURON, EWA BY GENTRY COMMUNITY ASSOCIATION,

and

JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; DOE ENTITIES 1-10; and DOE GOVERNMENTAL UNITS 1-10,

Defendants.

On Appeal from the Circuit Court of the First Circuit
(Civil No. 11-1-1539) (The Honorable Bert I. Ayabe Presiding)

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APPLICATION FOR WRIT OF CERTIORARI TO THE HAWAII SUPREME COURT TO REVIEW THE FEBRUARY 12, 2016 PUBLISHED OPINION AND THE MARCH 9, 2016 JUDGMENT ON APPEAL OF THE HAWAII INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

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A. Questions Presented

Did the ICA commit grave errors of fact and law, requiring reversal pursuant to HRS Section 602-59(b)(1), in its concluding that the Circuit Court properly granted summary judgment because no genuine issues of material fact existed, despite the fact that the standing of Respondent U.S. Bank, as Trustee, of a securitized trust as foreclosing mortgagee was in genuine dispute because there was evidence below that:

1. the two mortgage assignments to the securitized trust in the chain of U.S. Bank's alleged ownership of Petitioners' loan were "robo-signed" by persons with insufficient authority or personal knowledge as to what they swore to, and whose signatures differed among similar mortgage assignments that they had supposedly signed and/or notarized;

2. the two mortgage assignments to the securitized trust in the chain of U. S. Bank's alleged ownership of Petitioners' loan violated the securitized trust's governing instrument, known as its Pooling and Servicing Agreement, having been allegedly transferred more than two years and more than six years respectively after the cut-off date for placing mortgages in the securitized trust, accompanied by an allonge allegedly transferring their promissory note to the securitized trust more than three years after its cut-off date;

3. the two mortgage assignments to the securitized trust in the chain of U. S. Bank's alleged ownership of Petitioners' loan were unproven as supported only by hearsay declarations inadmissible pursuant to HRCP Rule 56(e) and Hawaii Evidence Rule 803(b)(3) as U.S. Bank's Declarants had no personal knowledge of how earlier business records had been compiled in addition to the two mortgage assignments having been invalid, *supra*.

B. Prior Proceedings

The ICA rejected Petitioner's appeal on February 12, 2016 from the granting of summary judgment against them on August 26, 2014, in a belated Published Opinion replacing an earlier Memorandum Opinion filed upon motion by U.S. Bank (Exhibit 1), and entered its Judgment on Appeal on March 9, 2016 (Exhibit 2).

This Petition is being filed within 60 days following the entry of the Judgment on Appeal, pursuant to Rule 40.1(a)(3) of the Hawaii Rules of Appellate Procedure.

C. Statement of the Case

Few case facts are recited in the ICA's Published Opinion because the ICA disregarded the underlying facts in most instances, although carefully set forth in Petitioners' Opening Brief (Exhibit "C").[1]

The ICA Published Opinion does not even bother to recite, for instance, that the Petitioner's loan was consummated with New Century Mortgage Corporation as their original lender in 2004, or to describe how U.S. Bank as Trustee of a securitized trust purportedly secured ownership of their loan.

The ICA chose instead to base its decision in Petitioners' case upon questionable propositions of law derived almost entirely from our United States District Court, reminiscent of that Court's now discredited misinterpretation of this Court's Ulrich decision,[2] rendering the Petitioners' arguments below, even if factually correct, irrelevant.

This Court in reviewing this Application for a Writ of Certiorari should focus its urgently needed attention on how Hawaii Circuit Courts have been adjudicating judicial foreclosures by similarly swallowing whole the mistaken interpretations of Hawaii law by our local federal court, examining Petitioners' facts in the same way that this Court has recently re-examined the handling of nonjudicial foreclosures in this State.[3]

The facts in this case for example, virtually ignored by the ICA in Petitioners' Appeal, contain just about every abuse found throughout securitized trust cases in the United States.

Admittedly, the American Legal System – our legislatures, our judiciaries, our law schools, our recording offices, and our legal profession – all were ill prepared for the

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[1] To complete the record here, the Answering Brief and the Reply Brief are also attached in Exhibit "B" and Exhibit "C" respectively.

[2] *See* Kondour Capital Corporation v. Matsuyoshi, 2015 WL 7443920, ___ P.3d ___ (1939).

[3] *See* Matsuyoshi, *supra*, and Santiago v. Tanaka, 2016 WL 207118, ___ P.3d ___ (2016).

huge flood of flawed securitized trust foreclosures that occurred after the start of the mortgage crisis in the summer of 2008, in particular creating a huge backlog in our courts.

The result early on was not only poorly reasoned case precedent adverse to borrowers often seen as wanting a free house as opposed to their challenging violations of the law, but as a result an institutional backlash occurring as well, our courts struggling to clear a seemingly ever growing backlog of foreclosure cases, particularly viewed as abhorrent to federal judges who have openly seen foreclosure disputes as more fitting for state court adjudication.

But with the advent of now more than 220 billion dollars in regulatory fines since 2008 assessed against major lenders for numerous mortgage abuses, and in particular the admission against interest of lenders that they have been submitting false documents in court for now nearly a decade, state appellate courts have begun to lead the way through a growing body of case law at the highest appellate levels shedding heretofore blind adherence to mostly federal precedents designed more to cut backlogs than to do justice.

Petitioners' case and the manner in which the ICA out-of-hand granted summary judgment in favor of U.S. Bank without bothering to examine their actual case facts, especially in the context of a HRCP Rule 56 summary adjudication no less where the actual facts were supposed to be viewed in a light most favorable to these Petitioners, is a text book example of gross error.

D. Reasons Why Certiorari Should Be Granted

First Grave Error of Fact and Law:
There Are Unresolved Issues of Material Fact in Genuine Dispute Concerning the Validity and Admissibility of the Robo-Signed Documents.

As a result of widely publicized and eventually opening admitted lender abuses in mortgage foreclosure cases nationwide, and in particular the widespread submission of false notes, false mortgages, false allonges, and false mortgage assignments in state and federal courts, fraudulently claiming ownership of mortgage loans, the Hawaii State Legislature joined the vast majority of jurisdictions in the United States with the passage

of HRS Section 667-17 effecting all ongoing judicial foreclosure cases, requiring "Attorney Affirmations" of loan ownership, explaining such need in these words, *ibid*:

> During and after August 2010, numerous and widespread insufficiencies in foreclosure filings in various courts around the nation were reported by major mortgage lenders and other authorities, including failure to review documents and files to establish standing and other foreclosure requisites; filing of notarized affidavits that falsely attest to such review and to other critical facts in the foreclosure process; and "robosignature" of documents.

See also HRS Section 667-18: "An attorney who files a complaint in a mortgage foreclosure action shall affirm in writing, under penalty of perjury, that to the best of the attorney's knowledge, information, and belief the allegations contained in the complaint are warranted by existing law and have evidentiary support."

In doing so, our State Legislature declared the enforcement in foreclosure proceedings of robo-signed documents against Hawaii public policy, yet that statute remains virtually ignored by lenders and their legal counsel alike who, when "complying" by filing sworn "Attorney Affirmations" in foreclosure cases in Hawaii, merely say that they were told that everything was valid by the loan servicer's representative, who in turn "verifies" with inadmissible double and triple hearsay the "validity" of the lender's documentation, as in this case by attesting to the preparation and accuracy of 2004 documents required for a judicial foreclosure without the affiants/declarants having any personal knowledge how that information was acquired and through what business procedures by prior lenders and prior loan servicers.

To ignore the above clear mandate of the Hawaii State Legislature as the ICA has done is to allow Hawaii homeowners to lose their homes based on fraudulent documents fraudulently recorded at the State Bureau of Conveyances and then somehow freely admitted into evidence and deified in our courts despite our strict rules of evidence.

The alarming foolishness of such an end run around Hawaii law and common sense can easily be seen when one experiences the increasing confessions in court proceedings of robo-signers who have no idea what they are signing, who sign as many as 500 documents a day, and who sign not even before a notary; *see*, *e.g.*, the April 24,

2016 national radio broadcast of *The Foreclosure Hour*, www.foreclosurehour.com and its accompanying sworn robo videos.

Second Grave Error of Fact and Law: **There Are Unresolved Issues of Material Fact in Genuine Dispute Concerning the Validity and Admissibility of Securitized Mortgage Assignments.**

Once again, the ICA decided Petitioners' Appeal refusing to consider the validity and admissibility of the very documents upon which its standing depends, concluding out-of-hand that borrowers have no standing to challenge the enforceability of mortgage assignments and even allonges that may even nevertheless violate a securitized trust's governing instruments ("noncompliance with a PSA does not render the assignment void" – Published Opinion, page 3).

State appellate courts, however, are beginning to take a different view, holding that noncompliance can render a mortgage assignment void within a PSA depending on the facts and the law of the State governing the PSA transactions, thus not subject to dismissal or summary adjudication on the type of record here.

Recently the California Supreme Court, for instance, in Yvanova v. New Century Mortgage Corporation, 62 Cal.4th 919, 938-940, 365 P.3d 845, 858-860, (2016), has unanimously gone the other way, reversing, not only expressing the view that a borrower indeed is harmed by such invalidity, denied by the ICA here, but specifically holding that borrowers have the right to question whether mortgage assignments are void in their securitized trusts:

> For these reasons, we conclude Glaski, supra, 218 Cal.App.4th 1079, 160 Cal.Rptr.3d 449, was correct to hold a wrongful foreclosure plaintiff has standing to claim the foreclosing entity's purported authority to order a trustee's sale was based on a void assignment of the note and deed of trust. Jenkins, supra, 216 Cal.App.4th 497, 156 Cal.Rptr.3d 912, spoke too broadly in holding a borrower lacks standing to challenge an assignment of the note and deed of trust to which the borrower was neither a party nor a third party beneficiary. Jenkins' rule may hold as to claimed defects that would make the assignment merely voidable, but not as to alleged defects rendering the assignment absolutely void.
>
> In embracing Glaski's rule that borrowers have standing to challenge assignments as void, but not as voidable, we join several courts around the nation. (Wilson v. HSBC Mortgage Servs., Inc., supra,

744 F.3d at p. 9; Reinagel, supra, 735 F.3d at pp. 224–225; Woods v. Wells Fargo Bank, N.A. (1st Cir.2013) 733 F.3d 349, 354; Culhane, supra, 708 F.3d at pp. 289–291; Miller v. Homecomings Financial, LLC, supra, 881 F.Supp.2d at pp. 831–832; Bank of America Nat. Assn. v. Bassman FBT, LLC, supra, 366 Ill.Dec. 936, 981 N.E.2d at pp. 7–8; Pike v. Deutsche Bank Nat. Trust Co. (2015) 168 N.H. 40, 121 A.3d 279, 281; Mruk v. Mortgage Elec. Registration Sys., Inc., supra, 82 A.3d at pp. 534–536; Dernier v. Mortgage Network, Inc. (2013) 195 Vt. 113, 87 A.3d 465, 473.) Indeed, as commentators on the issue have stated: "[C]ourts generally permit challenges to assignments if such challenges would prove that the assignments were void as opposed to voidable." (Zacks & Zacks, Not a Party: Challenging Mortgage Assignments (2014) 59 St. Louis U. L.J. 175, 180.)

In deciding the limited question on review, we are concerned only with prejudice in the sense of an injury sufficiently concrete and personal to provide standing, not with prejudice as a possible element of the wrongful foreclosure tort. (See fn. 4, ante.) As it relates to standing, we disagree with defendants' analysis of prejudice from an illegal foreclosure. A foreclosed-upon borrower clearly meets the general standard for standing to sue by showing an invasion of his or her legally protected interests (Angelucci v. Century Supper Club (2007) 41 Cal.4th 160, 175, 59 Cal.Rptr.3d 142, 158 P.3d 718)—the borrower has lost ownership to the home in an allegedly illegal trustee's sale. (See Culhane, supra, 708 F.3d at p. 289 [foreclosed—upon borrower has sufficient personal stake in action against foreclosing entity to meet federal standing requirement].) Moreover, the bank or other entity that ordered the foreclosure would not have done so absent the allegedly void assignment. Thus "[t]he identified harm—the foreclosure—can be traced directly to [the foreclosing entity's] exercise of the authority purportedly delegated by the assignment." (Culhane, at p. 290.)

The logic of defendants' no-prejudice argument implies that anyone, even a stranger to the debt, could declare a default and order a trustee's sale—and the borrower would be left with no recourse because, after all, he or she owed the debt to someone, though not to the foreclosing entity. This would be an "odd result" indeed. (Reinagel, supra, 735 F.3d at p. 225.) As a district court observed in rejecting the no-prejudice argument, "[b]anks are neither private attorneys general nor bounty hunters, armed with a roving commission to seek out defaulting homeowners and take away their homes in satisfaction of some other bank's deed of trust." (Miller v. Homecomings Financial, LLC (S.D.Tex.2012) 881 F.Supp.2d 825, 832.)

Defendants note correctly that a plaintiff in Yvanova's position, having suffered an allegedly unauthorized nonjudicial foreclosure of her home, need not now fear another creditor coming forward to collect the debt. The home can only be foreclosed once, and the trustee's sale extinguishes the debt. (Code Civ. Proc. § 580d; Dreyfuss v. Union Bank of California, supra, 24 Cal.4th at p. 411, 101 Cal.Rptr.2d 29, 11 P.3d 383.) But as the Attorney General points out in her amicus curiae brief, a holding that anyone may foreclose on a ***82 defaulting home loan borrower would multiply the risk for homeowners that they might face a foreclosure at some point in the life of their loans. The possibility that multiple parties could each foreclose at some time, that is, increases the borrower's overall risk of foreclosure.

Defendants suggest that to establish prejudice the plaintiff must allege and prove that the true beneficiary under the deed of trust would have refrained from foreclosing on the plaintiff's property. Whatever merit this rule would *939 have as to prejudice as an element of the wrongful foreclosure tort, it misstates the type of injury required for standing. A homeowner who has been foreclosed on by one with no right to do so has suffered an injurious invasion of his or her legal rights at the foreclosing entity's hands. No more is required for standing to sue. (Angelucci v. Century Supper Club, supra, 41 Cal.4th at p. 175, 59 Cal.Rptr.3d 142, 158 P.3d 718.)

Neither Caulfield v. Sanders (1861) 17 Cal. 569 nor Seidell v. Tuxedo Land Co. (1932) 216 Cal. 165, 13 P.2d 686, upon which defendants rely, holds or implies a home loan borrower may not challenge a foreclosure by alleging a void assignment. In the first of these cases, we held a debtor on a contract for printing and advertising could not defend against collection of the debt on the ground it had been assigned without proper consultation among the assigning partners and for nominal consideration: "It is of no consequence to the defendant, as it in no respect affects his liability, whether the transfer was made at one time or another, or with or without consideration, or by one or by all the members of the firm." (Caulfield v. Sanders, at p. 572.) In the second, we held landowners seeking to enjoin a foreclosure on a deed of trust to their land could not do so by challenging the validity of an assignment of the promissory note the deed of trust secured. (Seidell v. Tuxedo Land Co., at pp. 166, 169–170, 13 P.2d 686.) We explained that the assignment was made by an agent of the beneficiary, and that despite the landowner's claim the agent lacked authority for the assignment, the beneficiary "is not now complaining." (Id. at p. 170, 13 P.2d 686.) Neither decision discusses the distinction between

allegedly void and merely voidable, and neither negates a borrower's ability to challenge an assignment of his or her debt as void.

Third Grave Error of Fact and Law:
There Are Unresolved Issues of Material Fact in Genuine Dispute Concerning the Validity and Admissibility of Hearsay Declarations.

The ICA's next grave error is its conclusion that "in order to enforce a note and mortgage under Hawaii law, a creditor must be 'a person entitled to enforce' the note. One person entitled to enforce an instrument is a 'holder' of the instrument. A 'holder' is the 'person in possession of a negotiable instrument."

And next the ICA compounds that error by granting summary judgment upon finding that a hearsay declaration from a loan servicer for U.S. Bank can merely authenticate the note, the mortgage, the allonge, two mortgage assignments, and the loan general ledger even though admittedly he was not there when those documents were created, has no personal knowledge of their accuracy nor any firsthand familiarity with the preparation of those business records, not even by whom.

The ICA, first of all, has the law of negotiable instruments backwards, as a foreclosing mortgagee must prove that it is the holder of the negotiable instrument **and** that it is the one entitled to foreclosure. It does not become entitled to foreclosure just because it is in possession of the instrument.

As explained by In re Veal, 450 B.R. 897 (B.A.P. 9th Cir. 2011):

> In particular, the person obligated on the note—a "maker" in the argot of Article 320—must pay the obligation represented by the note to the "person entitled to enforce" it. UCC § 3–412. Further, if a maker pays a "person entitled to enforce" the note, the maker's obligations are discharged to the extent of the amount paid. UCC § 3–602(a). Put another way, if a maker makes a payment to a "person entitled to enforce," the obligation is satisfied on a dollar for dollar basis, and the maker never has to pay that amount again.
>
> If, however, the maker pays someone other than a "person entitled to enforce"—even if that person physically possesses the note the maker signed—the payment generally has no effect on the obligations under the note. The maker still owes the money to the "person entitled to

> enforce," and, at best, has only an action in restitution to recover the mistaken payment. See UCC § 3–418(b).

Thus, more is required than being fixated as the ICA was concerning who is the "holder". A foreclosing mortgagee must also prove that it has the right to enforcement of the note, the corollary of which is that a borrower has the right to disprove it or at least to show that there is a genuine dispute as to that right to prevent summary adjudication of that issue against the borrower.

See, e.g., Phoenix Funding, LLC v. Aurora Loan Services, LLC, 365 P.2d 8, 13 (N.M. App. 2015):

> Whether a party has standing to bring a claim is a legal question we review de novo. *Disabled Am. Veterans v. Lakeside Veterans Club, Inc.,* 2011–NMCA–099, ¶ 9, 150 N.M. 569, 263 P.3d 911. In order to establish standing to foreclose, plaintiffs must demonstrate that they had the right to enforce the note and the right to foreclose the mortgage at the time the foreclosure suit was filed. *Bank of N.Y. v. Romero,* 2014–NMSC–007, ¶ 17, 320 P.3d 1. The right to enforce the mortgage arises from the right to enforce the note, so the determinative inquiry is whether the plaintiff has established that it had the right to enforce the note at the time it filed suit. *Id.* ¶ 35.
>
> Under New Mexico's Uniform Commercial Code (UCC), a promissory note is a negotiable instrument, NMSA 1978, § 55–3–104(a), (b), (e) (1992), which can be enforced by (1) the holder of the instrument; (2) a holder who does not possess the instrument and has the rights of a holder; or (3) a person who does not possess the instrument, but is entitled to enforce it pursuant to certain provisions of the UCC. NMSA 1978, § 55–3–301 (1992); *Romero,* 2014–NMSC–007, ¶ 20, 320 P.3d 1 (same). The holder of the instrument is "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." NMSA 1978, § 55–1–201(b)(21)(A) (2005); *Romero,* 2014–NMSC–007, ¶ 21, 320 P.3d 1 (same). "Accordingly, a third party must prove both physical possession *and* the right to enforcement through either a proper indorsement or a transfer by negotiation." *Romero,* 2014–NMSC–007, ¶ 21, 320 P.3d 1 [emphasis in the original].

See also, Deutsche Bank National Trust Company, as Trustee for Morgan Stanley ABS Capital 1 Inc. Trust 2006-NC4 v. Johnston, 2016 WL 852521 *10, ___ P.3d ___ (N.M. 2016), for yet another requirement to foreclosure even by a holder with

the right to enforce the note, also not met here ("a foreclosing mortgage may satisfy pleading requirements by simply alleging that it is the holder of the note without attaching any additional documentary evidence, but when a defendant subsequently raises the defense that the plaintiff lacks standing to foreclosure, the plaintiff must then prove that it held the note *at the time of filing*" – emphasis in the original).

Nevertheless, the lower court and the ICA blocked any attempt in their defense for the Petitioners to dispute that U.S. Bank never had the right to enforce the note even if it were the holder, also however disputed, since the moving declaration was pure inadmissible hearsay not qualifying under the business records exception since the moving declarant had not personal knowledge of what was claimed to be true, including no personal knowledge of the business procedures of predecessor loan servicers and mortgagees.

How could he? The loan was made and serviced years before he came aboard. Nor does he therefore even claim to have had any personal knowledge and familiarity with the previous record-keeping system of his predecessors to explain how the records came into existence in the first place, and surely the attorney affirming his hearsay as to what he was told knew even less, yet he affirmed the validity of the records simply based on what he was told.

As the New Mexico Supreme Court, for example, reversing in Johnston, *supra*, just recently not surprising warned: "'falsification of necessary indorsements' appears to be a 'widespread' phenomenon" (citation omitted).

E. Conclusion

As previously explained, the American Legal System and all of its components, including the Hawaii Judiciary as well as the undersigned, at first were ill prepared for the legal problems that have arisen from the transformation from the traditional mortgage to the securitized mortgage – problems for example much more complex that those accompanying nonjudicial foreclosures.

My lenders today do not actually own any interest in the notes or mortgages for which they are foreclosing, unlike in prior decades. Thus, banks, if they still be called banks, are in fact acting on the bottom line and on self-interest, albeit in a roundabout and deceitful manner, they only interest in turnover and commissions, unrelated to

when once banks had a stake in working with borrowers to prevent foreclosure, Now loan servicers benefit by foreclosing.

As explained in Neglected Formalities in the Mortgage Assignment Process and the Resulting Effects on Residential Foreclosures, 83 Temp. L. Rev. 253, 258 (2010):

> This securitization process has completely shattered the traditional borrower-lender relationship. No longer are neighborhood savings and loans banks the ones holding the mortgage, servicing the mortgage, or making themselves available to discuss the mortgage. Rather, a mortgagor's contact for all payments and problems is generally the mortgage servicer—an entity interested only in the profits from servicing and the corresponding default fees. The mortgage servicer takes on all the responsibility for contact with the mortgagor and for collection of payments, which are then passed onto the investors. In return for handling these responsibilities, the servicers earn revenue in three ways:
>
> > First, they receive a fixed fee for each loan. Typical arrangements pay servicers between 0.25% and 0.50% of the note principal for each loan. Second, servicers earn "float" income from interest accrued between when consumers pay and when those funds are remitted to investors. Third, servicers often are permitted to retain all, or part, of any default fees, such as late charges, that consumers pay.
>
> Because servicers have neither a vested interest in the losses or gains associated with individual loans nor a vested interest in the communities where homes are located, servicers often act in their own best interest as opposed to the interests of either the mortgagor or the mortgagee.

Neglected Formalities, at 257-58 (2010) (internal citation omitted).

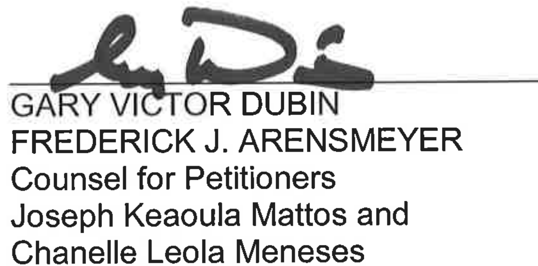
Succinctly put, "because servicers do not internalize the losses on a securitized loan, they may not behave optimally." *Id.*

For each and for all of the above reasons, this case gives this Court the basis for beginning as other State Supreme Courts have done to give direction to our lower courts regarding how to preserve the rule of law and adherence to our rules of evidence in securitized trust foreclosures.

Petitioners respectfully pray for a principled reversal of the ICA's February 12, 2016 Published Opinion and its March 9, 2016 Judgment on Appeal, and for the full

vindication of Petitioners' right to a trial on the merits of their claims, lest that Published Opinion cause untold harm to Hawaii homeowners.

DATED: Honolulu, Hawaii; May 9, 2016.



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