No. _____

In the

Supreme Court of the United States

MICHAEL J. FUCHS and
KE KAILANI DEVELOPMENT LLC,

Petitioners,

v.

KE KAILANI PARTNERS, LLC,

Respondent.

On Petition for a Writ of Certiorari to the Hawaii Supreme Court, the Hawaii Intermediate Court of Appeals, and the First Circuit Court of the State of Hawaii

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Resolving the conflict in the decisions, equally divided, among state courts, and between state and federal courts, concerning one of the most fundamental due process issues in constitutional law, the requirement of a neutral and impartial decision maker: Is a presiding state judge, discovered to have an undisclosed stock ownership interest in an adverse party, refusing nevertheless to recuse himself, in violation of judicial ethics and a disqualified jurist, based upon an objective standard of the appearance of partiality, and his or her decisions required to be set aside?

2. Resolving the conflict in the decisions, equally divided, among state courts, and between federal courts in their exercise of diversity jurisdiction: Is it a violation of due process of law as an unconstitutional forfeiture of property rights for a state or federal court to award a foreclosing mortgagee a deficiency judgment calculated solely by subtracting the net proceeds of a forced auction sale from the amount owed, without the court conducting an evidentiary hearing after sale confirmation to first determine the fair value of a foreclosed property?

3. Is it a violation of due process and equal protection, when a right to appeal is expressly provided by state law, for a state appellate court nevertheless to deny the right to appeal based solely upon a filed notice of appeal delayed solely due to a malfunction in that state's authorized electronic appellate filing system?

LIST OF ALL PARTIES AND CORPORATE DISCLOSURE STATEMENT

A. Parties Listed in Caption of Petition

1. Michael J. Fuchs, a New York resident;
2. Ke Kailani Development LLC, a Hawaii limited liability company, owned by Michael J. Fuchs, its sole Member; and
3. Ke Kailani Partners, LLC, a Hawaii limited liability company, owned by Hawaii Renaissance Builders, LLC, a Delaware limited liability company, owned by Hunt ELP, LTD. and Hunt Companies, Inc. which owns Hunt ELP, LTD, Texas companies.

B. Parties Not Participating in Appeal Below (Corporate Affiliations Unknown)

1. Director of Finance, Real Property Division, County of Hawaii;
2. Ke Kailani Community Association;
3. Association of Villa Owners of Ke Kailani;
4. Mauna Lani Resort Association;
5. Bank of Hawaii;
6. Central Pacific Bank;
7. Finance Factors, Limited;
8. Mary Miles Morrison, Trustee;
9. Benjamin R. Jacobson;
10. Robert Batinovich;
11. Stephen B. And Susan L. Metter;
12. Harry and Brenda Mittelman;
13. Utaly, LLC;
14. Gordon E. And Betty I. Moore, Trustees;
15. Roy and Rosann Tanaka;
16. Michael G. And Linda E. Muhonen;
17. Michael O. Hale;
18. Barry and Carolyn Shames, Trustees;
19. Katonah Development LLC;
20. David R. And He Gin Ruch; and
21. Northern Trust Corporation.

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PETITION FOR WRIT OF CERTIORARI

A. JURISDICTIONAL STATEMENT

This Court has jurisdiction to review this *Petition for a Writ of Certiorari*, timely filed by U.S. Mail, postmarked on or before December 5, 2016, thus filed within ninety days of the September 6, 2016 Hawaii Supreme Court Order rejecting Petitioners' application for writ of certiorari to the Intermediate Court of Appeals which affirmed the orders and judgments of the Hawaii First Circuit Court being challenged in this *Petition*.

This Court has jurisdiction to review this *Petition* and the aforesaid September 6, 2016 Hawaii Supreme Court Order, pursuant to Section 1254(1) of Title 28 and Supreme Court Rules 10(b), (c) and 13(1).

And, to the extent appropriate, pursuant to Supreme Court Rule 13(1), this Court is respectfully requested to review the orders and judgments of the Hawaii lower courts that were subject to discretionary review by the aforesaid September 6, 2016 Hawaii Supreme Court Order.

B. AUTHORITATIVE PROVISIONS

The decisions being challenged concern the interpretation and application of the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, the text of which are set forth in Appendix #29 accompanying this *Petition*.

C. STATEMENT OF THE CASE

Michael Fuchs, a New York resident and former Home Box Office and Time Warner Music CEO, vacationing in Hawaii, fell in love with the Islands, in 2005 financing a spectacular $100,000,000 luxury development, investing $30,000,000 through his company Ke Kailani Development LLC (KKD), borrowing $70,000,000 more from three local banks headed by Bank of Hawaii (BOH), which short term commercial loans Fuchs personally guaranteed.

Before completion, having repaid all but less than $24,000,000, the 2008 mortgage crisis making refinancing his matured loans impossible, a foreclosure summary judgment was granted against Petitioners in 2010 (Appendix #1, #2).

Thereafter, threatened with a deficiency judgment, Fuchs entered into a sales agreement with a Texas company, Hawaii Renaissance Builders, LLC (HRB), introduced by his former transactions attorney, Ed Case, now HRB's attorney.

HRB agreed to buy the notes from BOH, which it eventually did, for a discounted $17,500,000, to cancel the foreclosure sale and cancel Fuchs' guaranties, Fuchs at first to pay HRB nothing, then eventually $1,500,000.

Two back-to-back escrows were opened, one for purchase of the mortgage loans, the second to transfer title to HRB.

HRB, assisted by Case, double-crossed Fuchs by purchasing the loans from BOH as agreed, but cancelling the escrow for the property's purchase while taking an assignment of Fuchs' guaranties.

HRB then substituted its newly-formed Ke

Kailani Partners, LLC (KKP) for BOH in the foreclosure action, and proceeded to conduct an auction sale, then moving for a $21,594,668.55 deficiency judgment against Petitioners.

1
Objective Appearances of Partiality Challenged as Violating Due Process of Law

Petitioners, before sale confirmation filed a new lawsuit against HRB, KKP, and Case's law firm for breach of contract and fraud, which was assigned to the same judge presiding over their foreclosure case, Bert Ayabe, who promptly dismissed Petitioners' new case (Appendix #3, #4).

Prior to dismissal of Petitioners' new case, Fuchs filed a moving declaration to disqualify Judge Ayabe in both the foreclosure action and the new lawsuit (Appendix #5, #6).

In his disqualifying declarations Fuchs claimed, *inter alia*, Judge Ayabe had two material appearances of impropriety ("appearances of partiality" is the preferred term used in this *Petition*):

Judge Ayabe's Wife and her law firm had previously done legal work for two defendants in the foreclosure case adverse to Petitioners, and Judge Ayabe had given political campaign contributions to Case, a law school classmate of his, a material witness in both cases upon whose testimony Judge Ayabe would be making credibility assessments, who Judge Ayabe described as his friend.

The Court should note Hawaii is a small State with a legal community of only a few thousand attorneys, only a few hundred of whom regularly appear in court, and that Judge Ayabe has for more

than a decade been the judge to whom all Honolulu foreclosure cases are assigned.

Judge Ayabe refused to disqualify himself, self-servingly denying some of Fuchs' specific factual allegations without documentation, denying the rest based upon lack of knowledge; *see Transcript of Proceedings* for December 20, 2011, page 21:

> [M]uch of the argument raised by counsel is not true. The Court was – the Court is not aware of his wife, Gail, doing any work for the parties in this case. She may have done work for the developer back in the 1990s. . . . The last time her law firm may have done work on the property was back in 2003.
>
> *****
>
> Regarding Ed Case, he is a classmate and I have supported him in the past in his political campaign . . . . I would consider Ed Case . . . to be friends. . . . I have not spoken to any of these people . . . . regarding any of the factual matters in this case and for these reasons the Court denies the motion for recusal.

Judge Ayabe proceeded to enter an Order denying disqualification in both cases (Appendix #7). He also dismissed the new lawsuit (Appendix #3, $4) even though Petitioners amended their new Complaint prior to the written dismissal having been entered, which pursuant to Hawaii law nullified the dismissal which Judge Ayabe ignored, leaving the new lawsuit however in place.

Less than four months later, Fuchs' counsel discovered that Judge Ayabe had filed a required

certified Financial Disclosure Statement with the Hawaii Supreme Court stating he owned "at least $25,000 but less than $50,000" of BOH stock (Appendix #8).

Fuchs' counsel immediately wrote Judge Ayabe, pursuant to Hawaii law requiring requests for recusal or disqualification be timely made "as soon as the disqualifying facts become known," *In re Estate of Damon*, 119 Haw. 500, 511, 199 P.3d 89 (2008), requesting recusal (Appendix #9).

Judge Ayabe called a status conference (*see Transcript* (Appendix #10), acknowledging that owning "600 shares" in Fuchs' foreclosing mortgagee raised "serious allegations," but that the stock he said was in a custodial account held for his daughter, offering no documentation and abruptly walking out of the courtroom refusing to answer questions.

And, although his further acknowledging that "a federal statute" and "some other jurisdictions may follow this strict standard, but Hawaii does not," he applied a subjective standard, stating that "the Court believes it has been fair and impartial throughout this case and feels that it can remain to do so," and that he considered his BOH stock ownership "de minimis," *Transcript*, Appendix #10, even though Petitioners submitted an uncontested expert banking report concluding the outcome of the foreclosure case could have an adverse impact on BOH's stock value (Sarsfield Report).

Following the status conference, Fuchs' formally again moved to disqualify Judge Ayabe (Appendix #11), based, *inter alia*, upon various judicial ethics codes and "the Due Process Clause contained . . . in the Fifth and Fourteenth Amendments to the United States Constitution."

Fuchs challenged Judge Ayabe for (1) failure to disclose his stock ownership and other conflicts, (2) failure to apply an objective standard, what a reasonable party would conclude, (3) failure to recuse himself, and (4) failure to set aside his prior decisions.

Judge Ayabe denied the disqualification motion (Appendix #12).

Judge Ayabe also denied consolidation of the foreclosure case with Petitioners' new case, confirmed the auction sale to KKP based on its unchallenged credit bid of $10,000,000 and granted a deficiency judgment for $21,594,668.55 (Appendix #13, #14), and abruptly withdrew from presiding over the new lawsuit which was then assigned to Judge Gary Chang, who then dismissed the Amended Complaint in that case in its entirety.

2
Deficiencies in Hawaii Deficiency Judgments Challenged as Violating Due Process of Law

Even though there is no Hawaii case law controlling the process for determining deficiency amounts a borrower owes to a foreclosing mortgagee after a confirmed judicial sale, the ancient practice has been for Hawaii courts robotically without legislative direction to equate the confirmed auction price with the value of the property obtained.

Thus, in Hawaii, as in about half the States, the net proceeds of sale are mechanically subtracted from the amount of debt owed and a deficiency judgment issued for the difference, unless the auction price is said to "shock the conscience of the Court."

This unwritten judge-made Hawaii procedure

ignores the reality that, due especially to the present housing market collapse, mortgagees have the ability to credit bid for much more than a property is usually worth, effectively depressing competition and thus "rigging" auction sales.

That enables foreclosing mortgagees in Hawaii to recover property at less than fair market value, using that artificial, confirmed auction sale price to secure a windfall profit over and above what is actually owed by adding onto its below-market purchase a sizeable deficiency judgment plus securing title.

And, by immediately flipping the property, the foreclosing mortgagee can make more than what was actually owed or more importantly, more than what it had loaned or paid for a loan assignment.

For instance, KKP proceeded to credit bid $10,000,000 at the auction sale, no one else competitively bidding due to KKP's potential credit bid exceeding $25,000,000 looming over the auction.

KKP then secured a contrived deficiency judgment following confirmation of sale against Petitioners for $21,594,668.55, based upon the shortfall between what was owed and the net sale proceeds, calculated without taking into account the fair value of the property.

Thus, for an investment of $17,500,000 only months before, KKP by being able to rig the subsequent auction sale, credit bidding only $10,000,000, in effect whatever amount it wanted to bid, getting title to the property plus an artificially inflated April 23, 2012 $21,594,668.55 money judgment against Petitioners, increasing at a rate of 10% annually (Appendix #13, #14).

3

Unpublished Appellate Improprieties Challenged as Violating Due Process of Law And Equal Protection of the Laws

Petitioners filed two separate notices of appeal, challenging, *inter alia*, Judge Ayabe's refusal to recuse himself in both the foreclosure case and Petitioners' new case, from the deficiency judgment by Judge Ayabe in the foreclosure case, from the dismissal of Petitioners' new case by Judge Chang who refused to set aside Judge Ayabe's order in that case, and from Judge Ayabe's refusal to consolidate the two cases.

First, regarding the two state court appeals both in part based on Judge Ayabe's appearances of partiality, their appeals seemed on the merits on solid ground as a matter of Hawaii law.

For nearly one hundred years the Hawaii Supreme Court has held any stock ownership in a party automatically requires disqualification, *Thomson v. McGonagle*, 33 Haw. 565 (1935) ("it is settled that a stockholder of a corporation has a 'pecuniary interest' in an action in which the corporation is interested in its individual capacity . . . and it follows that Mr. Justice Peters is disqualified to sit in this cause").

The Hawaii Supreme Court, furthermore, had held even small stock holdings require disqualification:

In *Carey v. The Discount Corp., Ltd.,* 35 Haw. 811, 813 (1941), the Hawaii Supreme Court disqualified a judge based on his wife's ownership of stock in a bank, which in turn owned stock in the corporate defendant, which in turn could diminish the dividends paid to the judge's wife.

The Hawaii Supreme Court explained its decision in *Carey*: "If the bank were a party to the within cause the justice would unquestionably be disqualified." *Id.* at 814, further holding: "The degree to which the income payable to Mrs. Peters will be affected may be very small. Plaintiff-appellant characterizes it as trivial and microscopic. But the degree of interest is immaterial. Any interest however small has been held sufficient to render a judge disqualified." *Id.* at 813.

Indeed, the Hawaii Supreme Court has held arbitrators strictly responsible and subject to automatic reversal for incomplete conflict disclosures, *Nordic PCL Construction, Inc. v. LPIHGC, LLC*, 136 Haw. 29, 358 P.3d 1 (2015); *Noel Madamba Construction LLC v. Romero*, 137 Haw. 1, 364 P.3d 518 (2015) (surely judges should not be held to lesser ethical disclosure standards than arbitrators).

The Hawaii Supreme Court has furthermore long recognized that "[d]ue process requires an impartial tribunal" and "the cold neutrality of an impartial judge," *Peters v. Jamieson*, 48 Haw. 247, 255, 262, 387 P.2d 575 (1964) (disqualifying the presiding judge based on the totality of his conduct).

Here, in the record of the confirmation of sale proceedings the only fair value of the property was a 2009 BOH $23,840,000 appraisal, about what BOH in 2009 claimed owed, compared to KKP's unsupported successful bid price of $10,000,000, whereas the Hawaii Supreme Court is reversing all nonjudicial foreclosure sales in the absence of proof of fair value, *Kondaur Capital Corp. v. Matsuyoshi*, 136 Haw. 227, 361 P.3d 454 (2015) (surely the requirement of proving fair value should not be any different for upholding a judicial foreclosure sale

than it is for upholding a nonjudicial foreclosure sale).

Second, regarding the state court appeal in both cases regarding the refusal to consolidate both cases, both cases were inseparably interconnected, since Petitioners' new case was challenging the standing of KKP to foreclosure, its parent HRB having breach its contract with Petitioners not to pursue the foreclosure upon its purchase of the BOH promissory notes.

This *Petition* presents three separate, purely constitutional issues of law to this Court (set forth in the *Questions Presented* Section, with no intention of burdening this Court by asking it to decide the merits of any transactional facts as those discussed herein, the purpose being only to assist the Court to fully understand the bizarre nature of the Hawaii proceedings in being able to properly assess the depth of the appearances of partiality, *see Peters v. Jamieson*, 48 Haw. 247, 264, 397, P.2d 575 (1964).

Briefly, all parties understood the two-part transaction – HRB purchasing the promissory notes and cancelling the guaranties, and KKD transferring title from KKD to HRB – was one inseparable transaction, divided into two simultaneous stages so that HRB would have in effect a firm option to purchase should its negotiations with BOH be successful.

Those listed in the initial Paragraph of the Acquisition Agreement as agreeing to terms, and those also signing on the concluding signature page of the Acquisition Agreement as agreeing to terms, were KKD, HRB, and Fuchs, and with respect to Fuchs it is recited before his signature that he has "AGREED with respect to the provisions of Section 8.7 applicable to Guarantor," making him as a party

liable as well as having bargained for and entitled to consideration from HRB under Section 8.8, as follows:

> 8.7 EXISTING LOAN DOCUMENTS. . . . Owner and Guarantor undertake and agree that if, as a result of discussions with Existing Lender, the Parties and Existing Lender agree that, if at Closing, the Existing Loan Documents shall be amended and/or assigned to and assumed by HRB or a related entity, such that all further liability of Owner and Guarantor thereunder is terminated and the condition set forth in Section 8.8 is satisfied, then Owner and Guarantor shall be obligated to accept such resolution and shall not be entitled to object to Closing on such basis.
>
> 8.8 *RELEASE AND INDEMNITY.* It shall be a condition to HRB's delivery of a Notice to Proceed and right and obligation to proceed with Closing that HRB undertake and agree, from and after Closing, to release and indemnify Guarantor as guarantor of the Existing Loan under the Existing Loan Documents in the event HRB elects to assume or purchase the Existing Loan.

It was agreed for HRB to offer $14,000,000 to buy out BOH's loan position, an initial proposal made by Hunt's senior representative in Hawaii, Steven W. Colon, to KKD by letter dated July 27, 2010.

BOH agreed in writing on August 13, 2010 to entertain loan buyout proposals from HRB, but only if Petitioners would agree in writing to waive any claim of breach of confidentiality or tortious

interference "relating to such communications between BoH and HRB;" and KKD, Fuchs, and HRB signed evidencing their individually required approval.

Consequentially, on August 13, 2010 HRB transmitted its next buyout offer to BOH increasing its buyout price from $14,000,000 to $16,000,000, and again setting forth a summary of the terms of its Acquisition Agreement.

Petitioners finally lost confidence in HRB and Colon and hired at their own expense a retired highly respected former Hawaii banking executive, Howard Hamamoto, to contact the representatives of BOH and the other local participating banks to negotiate a reduced acquisition price to be paid by HRB, which included a full release of Petitioners as to all loan obligations, including Fuchs' guaranties which as HRB knew and agreed was the only reason the Acquisition Agreement was entered into in the first place, and Hamamoto successfully negotiated a $17,500,000 buyout price with BOH with a full release of Fuchs' guaranties.

As a direct result of Hamamoto's efforts, on October 22, 2010 Ralph Mesick, then Executive Vice President of BOH, with whom KKD, Fuchs, HRB, Case, Colon, and Hamamoto had principally been dealing, delivered to HRB and Colon a buyout counteroffer of $17,500,000, with a letter of transmittal, conditioned on an attached Mortgage Loan Purchase and Sale Agreement (Loan PSA) being signed by everyone ("HRB, Petitioners on or before 5:00 p.m. H.S.T. on October 25, 2010)."

Petitioners had entered into the Acquisition Agreement induced by the promises of HRB set forth therein to buy out BOH's Consortium's position with its own monies in exchange for HRB cancelling

KKD's promissory notes and releasing Fuchs' guaranties, but after receiving from BOH the $17,500,000 buyout price, HRB refused, demanding that Petitioners' come up with the extra $1,500,000 plus "new added expenses."

Under obvious duress, Petitioners agreed, both required by HRB to sign a First Amendment to Acquisition Agreement, effective November 1, 2010, agreeing to add $1,500,000 to HRB's $16,000,000 at closing.

Once again, the required signatures on the First Amendment to Acquisition Agreement were KKD, HRB, and Fuchs, reaffirming therein what no one disputed that all three were principal parties to the Acquisition Agreement as well as the First Amendment thereto ("A. Owner, HRB and Guarantor entered into that certain Acquisition Agreement effective July 9, 2010" based upon "their mutual promises"), all three again signing the First Amendment, reaffirming what no one disputed, that all three were also parties to the Loan PSA (Paragraph 13):

> 13. *Agreement/Loan PSA Intention.* HRB, Owner and Guarantor acknowledge and agree that their mutual intent, *in executing this amendment and the Loan PSA*, is that "Closing" as defined under both agreements encompasses both the acquisition by HRB of the Existing Lender's Interests and the immediate conveyance thereafter of the Property by Owner to HRB in a transaction akin to a conveyance in lieu of foreclosure, all as set forth in these agreements and subject to all conditions precedent thereto.

The First Amendment to Acquisition Agreement recognized that both closings had to close together or neither would close – about as joined together as two parts of the same transaction could possibly ever be. The joint closings were then extended to November 30, 2010. The First Amendment to Acquisition Agreement contained the following new term:

> 10. *Owner/Guarantor Deposit.* On or before 5:00 p.m., Hawaii Standard Time, on the third (3rd) day after the Amendment Effective Date, and as a condition of payment by HRB to Escrow Agent of the Loan PSA "Deposit", Owner shall deposit with Escrow Agent ("Owner/Guarantor Deposit"), by letter of credit, wire transfer or certified check or other form of immediately available funds, the amount of ONE MILLION SIX HUNDRED FIFTY THOUSAND DOLLARS AND NO/100 DOLLARS ($1,650,000.00).

Immediately after the signing of the First Amendment to Acquisition Agreement, the Loan PSA was signed on or about November 9, 2010 by BOH, CPB, FF, HRB, KKD, and Fuchs, the document itself clearly recognizing Petitioners to be indispensable participants exchanging consideration in the Loan PSA:

> SECTION 22. *Consent of Borrower and Guarantor.* As evidenced by their signatures below, the Borrower and the Guarantor hereby assent to the execution, delivery and performance of this Agreement by Seller and Purchaser and to the closing of the transactions contemplated hereby. * * * *

Moreover, "Exhibit C" to the executed Loan PSA, entitled "Mutual Release Agreement," was a required document that specifically had to be signed before the Loan PSA would be effective, wherein Petitioners were listed as the "Borrower Parties" from start to finish ("This Mutual Agreement . . . entered into by and among: BANK OF HAWAII . . . , CENTRAL PACIFIC BANK . . . , FINANCE FACTORS . . . , KE KAILANI DEVELOPMENT . . . , MICHAEL J. FUCHS . . . AND HAWAII RENAISSANCE BUILDERS"), setting forth their promises and required performances throughout, with their signatures required within signature blocks specifically provided on the "signature page."

In furtherance of that part of the deal pertaining to the Fuchs' guaranties, it was specifically acknowledged by all parties to the Loan PSA that as a part of the bargained for contractual performance, the Fuchs guaranties were to be "released and cancelled":

> SECTION 2 (c) *Guaranties Excluded.* The Loans and the Loan Documents shall not include any right, title or interest of Seller under those certain guaranties (the "Guaranties") executed in favor of Seller in connection with the Loans by Michael J. Fuchs (the "Guarantor"), dated July 6, 2005, and July 31, 2006, respectively, which Guaranties shall be released and cancelled upon the Closing by way of the Mutual Release Agreement in the form of *Exhibit C* attached hereto and made a part hereof.

Escrows for both the Acquisition Agreement escrow and the Loan PSA escrow accordingly were

opened at the same time for a joint closing at Title Guaranty in Honolulu.

And while Fuchs was making his promised cash deposit into a New York escrow company with irrevocable instructions to transfer funds to TG upon closing, Case representing HRB refused the tender, and HRB closed the BOH escrow, and refused to close the escrow with Petitioners, thus running off with the assigned notes, mortgages, and guaranties (the double-cross").

Any thought that an appellate court would conclude as Judge Ayabe did that the two escrows were not part and parcel of the same transaction escaped logic and common sense.

Where several writings are made as part of one transaction, executed between the same parties, the law in Hawaii courts remains to this day that they must be read together as one instrument, *Hayashi v. Chong*, 2 Haw. App. 411, 634 P.2d 105 (1981).

Separate agreements must be read together in Hawaii if not everywhere as to parties and as to performances when their relationship or connection to each other appears precisely as here on their face evidencing internal unity, which is even sufficient as a matter of law to make parol evidence as to their relationship furthermore completely unnecessary, *Glockner v. Town*, 42 Haw. 485 (1958).

The result on appeal in both cases however was disappointing. Challenging the recusal ethics of a popular state court judge received a less than friendly reception.

The first appeal was suddenly ruled untimely and dismissed for lack of appellate jurisdiction by the Intermediate Court of Appeals, after having been

fully briefed and awaiting decision for several years.

In Hawaii, unsuccessful civil litigants have thirty days from the filing of a final judgment to file a notice of appeal, and if a motion for reconsideration is filed, thirty days after an order is entered disposing of the motion, and an additional thirty days within which to seek an extension if they can demonstrate, pursuant to appellate rules, "excusable neglect."

And there is another, Hawaii civil procedure rule, borrowed from an identical federal rule, Rule 77(d), stating that failure to have notice of the entry of a final judgment is not a sufficient basis for being allowed to appeal after the expiration of the first thirty days even though not having notice that a final appealable judgment had been filed.

Here are the relevant Hawaii jurisdictional rules:

> Rule 4. APPEALS - WHEN TAKEN.
>
> (a) Appeals in civil cases
>
> (1) Time and Place of Filing. When a civil appeal is permitted by law, the notice of appeal shall be filed within 30 days after entry of the judgment or appealable order.
>
> (2) Time To Appeal Affected by Post-Judgment Motions. If any party files a timely motion . . . to reconsider . . . , and court or agency rules specify the time by which the motion shall be filed, then the time for filing the notice of appeal is extended for all parties until 30 days after entry of an order

disposing of the motion.

(3) Extensions of Time To File the Notice of Appeal.

(B) Requests for Extensions of Time After Expiration of the Prescribed Time. The court or agency appealed from, upon a showing of excusable neglect, may extend the time for filing the notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by subsections (a)(1) through (a)(3) of this Rule. However, no such extension shall exceed 30 days past the prescribed time.

Rule 77. CIRCUIT COURTS AND CLERKS.

(d) Notice of Orders or Judgments. Immediately upon entry of a judgment, or an order for which notice of entry is required by these rules, the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of a judgment or order is required by these rules. In addition, immediately upon entry, the party presenting the judgment or order shall serve a copy thereof in the manner provided in Rule 5. Lack of notice of the entry by the clerk or failure to make such service, does not affect the time to appeal or

> relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Hawai'i Rules of Appellate Procedure. The court may impose appropriate sanctions against any party for failure to give notice in accordance with this rule.

In the case of the first appeal, from the dismissal of Petitioners' new case, Petitioners' counsel only accidentally found out on the last day of the "excusable neglect" extension period that the appealable order denying reconsideration had been filed, and immediately filed an emergency motion with Judge Chang for an extension (Appendix #15).

An immediate hearing was held that afternoon by Judge Chang, the transcript of which is set forth in Appendix #16, who apologetically explained that his clerks must have made a mistake by not serving the filed appealable order on the parties, KKP's attorney acknowledging she had not been served with the appealable order either.

Judge Chang granted the motion finding "excusable neglect," and the order was signed, filed, and recorded that same day, together with a notice of appeal for the dismissal by Judge Chang of the new complaint, within the appellate extension period allowed by HRAP Rule 4(3)(B) (Appendix #17).

Several years later after the filing the notice of appeal and an immediate "Jurisdictional Statement" filed, required of the parties so as to determine jurisdiction before briefing begins, the first appeal was fully briefed and just before a three-judge panel of the Intermediate Court of Appeals, a six-judge bench, was finally about to issue its decision, an unprecedented merry-go-round of recusals was

announced, suggesting the was a completed written opinion in desperate search of sponsors (Appendix #18).

First, Judge Leonard recused herself. Chief Judge Nakamura took her place the same day, then two weeks later Chief Judge Nakamura recused himself. He was replaced by Judge Reifurth.

Two weeks later Judges Fujise, Reifurth, and Ginoza dismissed the first appeal (Appendix 19), ruling they lacked appellate jurisdiction because the notice of appeal was deemed filed late, criticizing Judge Chang for "abusing his discretion" by extending the filing deadline, despite Rule 4(3)(B), his supposedly erroneously making a finding of "excusable neglect" because allegedly attorneys should constantly check with the court regarding the entry of judgments, and holding that Rule 77(d) prohibited any extension even though the entry of that appealable order was not known by any of the parties due to an apparent error by court clerks sitting on the appealable order according to Judge Chang.

Petitioners, frankly in disbelief, moved for reconsideration, explaining that the case authority being relied on was not even germane, involving a mistake by the filing attorney and not the Court, *Enos v. Pacific Transfer & Warehouse*, 80 Haw. 345, 353-355, 910 P.2d 116, 124-125 (1996).

Nevertheless, reconsideration was denied (Appendix #20) based on adding a new *non sequitur* of a rationale, and a discretionary application for certiorari to the Hawaii Supreme Court was then filed and similarly rejected without comment (Appendix #21).

The appeal in the foreclosure case experienced a

similar fate (Appendix #22, #23).

First, once again the disqualification issue was avoided, claiming *sua sponte* a lack of appellate jurisdiction due to yet another filing technicality once again as in Petitioners' new case appeal months earlier, a jurisdictional defect not even raised in the Answering Brief:

When the filing of the notice of appeal for Petitioners' new case was attempted on the evening of the 30th day pursuant to Rule 4(a)(1), *supra*, the relatively newly installed electronic appellate filing system (JEFS) was not working that evening, continually rejecting the attempted filing.

The undersigned counsel, who is the one who attempted the filing, is experienced in appellate filings, including electronic filings way before being instituted in Hawaii, having been successful in nearly fifty appeals in the past twenty years, as a matter of public record, in this Court, in the Ninth Circuit Court of Appeals, the Hawaii Supreme Court, and the Hawaii Intermediate Court of Appeals, never before experiencing such personal vituperative retaliatory animosity as here.

The appellate clerks, pursuant to preprinted instructions in the event of encountering electronic filing difficulties, were immediately called, left voice mail messages; the next morning the notice of appeal and filing fee were submitted, and upon seeking certiorari review in a July 25, 2016, *Declaration of Gary Dubin*, the circumstances were explained under oath to the Hawaii Supreme Court:

> 3. First, with regard to the filing of the Notice of Appeal, I prepared the Notice of Appeal on August 30, 2012. I usually file at the end of the day after court

appearances. But I was prevented from doing so on August 30, 2012, the deadline with respect to the disqualification issue, as JEFS would not permit me to complete the electronic filing due to no fault of mine or of my clients.

4. Immediately on August 30, 2012, experiencing the malfunction, I called the JEFS number listed to call if one had a filing problem and I also called the Clerk's Office and left voice mail messages for both, explaining the problem I was having with JEFS.

5. And I went to the Clerk's Office the next day explaining orally and by letter, documenting the filing problem I had with JEFS and the importance of the Notice of Appeal being filed as of August 30, 2012, and I was assured that the Court had a procedure for doing precisely that, correcting a problem with JEFS preventing a filing.

6. Set forth in Exhibit "L" [Appendix #24] is my letter to the Clerk's Office documenting the problem I encountered with JEFS with screenshots dated August 30, 2012, which was noted thereafter by the Clerk in the docket sheet set forth in Exhibit "M" ["Notice of Appeal Filed OTC due to tech problems in JEFS"].

7. It should also be noted that opposing counsel did not challenge the timing of the filing of the Notice of Appeal in its June 18, 2013 Answering Brief.

The Hawaii Supreme Court rejected the certiorari application in the foreclosure appeal, specifically dismissing the challenge to Judge Ayabe "for lack of appellate jurisdiction" without comment (Appendix #25).

Second, the deficiency judgment issue was ignored on the merits by the Intermediate Court of Appeals, the panel confusing challenging the auction price where the test is whether the price "shocks the conscience of the court," stating forced sales bring lower prices, with challenging method used for measuring amount of deficiency judgments requiring completely different "fair value" analysis unrelated to confirmed bid prices.

Third, the HRB double-cross was similarly whitewashed by ruling Petitioners were supposedly not parties to the BOH buy out by HRB and had no standing to complain, notwithstanding their exchange of already partially performed contractual promises set forth *verbatim* on pages 11-15, *supra*.

D. LEGAL ARGUMENT SUPPORTING WRIT

1
Judge Ayabe Was a Disqualified Jurist Whose Decisions Should Be Set Aside Pursuant to Federal Constitutional Law

In the federal system, 28 U.S.C. § 455 governs disqualification of judges "where his impartiality might reasonably be questioned," enforced as a *per se* rule disqualifying federal judges owning even one share of stock in a party before him, as adopted in the *Code of Conduct for United States Judges* (Appendix #26); *see Union Carbide Corp. v. U.S. Cutting Service, Inc.*, 782 F.2d 710, 714 (7th Cir. 1986):

> The purpose of (b) is to establish an absolute prohibition against a judge's knowingly presiding in a case in which he has a financial interest, either in his own or a spouse's (or minor child's) name. Before the statute was passed judges did not recuse themselves in such cases unless the interest was so large that a reasonable person might think it could influence the judge's decision. This standard was too nebulous -- not least from the judge's standpoint -- and Congress replaced it by a flat prohibition. Although the prohibition results in recusal in cases where the interest is too small to sway even the most mercenary judge, occasional silly results may be an acceptable price to pay for a rule that both is straightforward in application and spares the judge from having to make decisions under an uncertain standard apt to be misunderstood. See H.R. Rep. No. 1453, 93d Cong., 2d Sess. 2 (1974).

Earlier, Section 455 read: "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest" (1970), which was amended to presently read:

> (b) He shall disqualify himself in the following circumstances: * * * *
>
> (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding . . . .;

> (d) (4) "financial interest" means ownership or a legal or equitable interest, however small . . . .

The legislative history of Section 455 is instructive; *see In re Initial Public Offering Securities Litigation*, 174 F. Supp. 2d 70, 81-82 (D.C. S.D.N.Y. 2001):

> Critics of the "substantial interest" test gave two reasons why it should be rejected. *First*, they raised the question as to whether a judge could constitutionally preside over a case in which it owned a financial interest in light of *Tumey v. Ohio*, 273 U.S. 510, 71 L. Ed. 749, 47 S. Ct. 437 (1927). *See Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee of the Judiciary*, 92nd-93rd Cong. 102 (1971) and (1973) ("Senate Hearings") (testimony of Professor Thode). *Second*, the critics argued that "substantial" was inherently ambiguous. For example, 100 shares of AT&T stock might not be substantial if measured against the total stock in the corporation. *See Kinnear-Weed Corp.* 403 F.2d at 440. But the stock might appear quite significant if measured against the assets of the judge or the average person. In the view of many, the result was an erosion of confidence in the judicial system because, from the public's perspective, judges were sitting on cases in which they had a significant interest. The purpose of the revision "[was] just to

> make sure that judges [did] not sit in cases in which they have a financial interest, however small." *Union Carbide*, 782 F.2d at 714.

This Court has repeatedly elevated this concern to protected constitutional status; *see, e.g.*:

Tumey v. Ohio, 273 U.S. 510, 522 (1927) (held Fourteenth Amendment violation for a judge to preside over action where court had direct interest in litigant or matter in controversy);

In re Murchison, 349 U.S. 133, 136 (1955) ("a fair trial in a fair tribunal is a basic requirement of due process . . . 'no man can be a judge . . . where he has an interest'");

Ward v. Village of Monroeville, 409 U.S. 57, 61-62 (1972) ("Petitioner is entitled to a neutral and detached judge");

Aetna Life Insurance Co. v. Lavole, 475 U.S. 813, 825 (1986) (disqualification based on mere appearance of partiality offering "a possible temptation to the average judge to lead him to not hold the balance nice, clear and true"); and

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 860, 866 (1988) ("the judge's lack of knowledge of a disqualifying circumstance may bear on the question of remedy, but it does not eliminate the risk that 'his impartiality might reasonably be questioned' by other parties," holding vacating past judgments is mandatory "when a reasonable person, knowing the relevant facts, would expect that a justice, judge, or magistrate knew of circumstances creating an appearance of partiality").

More recently, this Court in *Williams v.*

Pennsylvania, 136 S. Ct. 1899, 1903 (2016) empathized the constitutional test for determining appearance of partiality is an objection one, not what the judge subjectively thinks:

> Due process guarantees an absence of actual bias on the part of a judge. Bias is easy to attribute to others and difficult to discern in oneself. To establish an enforceable and workable framework, the U.S. Supreme Court's precedents apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present.

Judge Ayabe failed to disclose ownership of BOH stock, as well as other conflicts, *supra*. As the Supreme Court of New Hampshire held in *Blaisdell v. City of Rochester*, 135 N.H. 598, 593-594, 609 A.2d 388 (1992), adopting the same Model Code as Hawaii:

> It is the judge's responsibility to disclose, *sua sponte*, all information of any potential conflict between himself and the parties or their attorneys when his impartiality might reasonably be questioned. . . . Neither the client nor his attorney have any obligation to investigate the judge's impartiality; * * * * we hold that a judge's failure to disclose to the parties the basis for his or her disqualification under Canon 3C ["appearance of impropriety"] will result in a disqualification of the judge.

He applied the wrong, subjective standard for appearance of partiality while defending his bank stock ownership ("the Court believes it has been fair

and impartial throughout this case and feels that it can remain to do so," page 5, *supra*) and defending some conflicts on the basis of lacking knowledge ("the Court is not aware . . . . [S]he may have "), the proper test should have been an objective one; see, e.g., *United States v. Champlin*, 388 F. Supp. 2d 1177, 1182 (D. Haw. 2005):

> The test is 'whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned.' *United States v. Wilkerson*, 208 F.3d 794, 797 (9th Cir. 2000) (citations omitted).

He also contended his bank stock, worth a significant percentage of his annual salary, was "de minimis," page 5.

The "de minimis" concept is virtually identical to the "substantial interest" test, page 24, *supra*, that Congress abandoned following this Court's decision in *Tumey*, *supra*.

However, the ABA Model Code of Judicial Conduct (Appendix #27) still contains the "de minimis" concept, adopted in almost every State, including Hawaii (Appendix #28), creating a split among the States as to its interpretation.

Unlike the interpretation given the "de minimis" language by Judge Ayabe, many States have held the general language against appearances of partiality trumps any application of a "de minimis" standard, but the majority of state courts sharply differ; *e.g.*:

Huffman v. Arkansas Judicial Discipline and Disability Commission, 344 Ark. 274, 281-282, 42

S.W.3d 386, 344 (2001), whose State adopted an identical Code as Hawaii, still differs with Judge Ayabe:

> While there is little doubt that the action taken by Judge Huffman was unlikely to fundamentally affect the value of his and his wife's stock, which comprises but a minuscule percentage of the total stock existing in Wal-Mart, this analysis on the *de minimis* value of an economic interest mentioned in Canon 3E(1)(c) ["more than *de minimis* interest that could be substantially affected by the proceeding"] ignores the more basic issue of appearance of impropriety.

White v. Suntrust Bank, 245 Ga. App. 828, 538 S.E.2d 889 (2000), whose State adopted an identical Code as Hawaii, differs with Judge Ayabe: ("a judge who holds stock in a corporation that is a party to a suit should recuse herself from the case").

The remedy for such disqualification is universally considered setting aside prior judgments; *e.g.*:

Liljeberg, 486 U.S. at 868 ("there is a greater risk in upholding the judgment in favor of Liljeberg than there is in allowing a new judge to take a fresh look at the issues");

Shell Oil Co. v. United States, 672 F.3d 1283, 1293 (Fed. Cir. 2012) ("we vacate Judge Smith's final judgment in favor of Shell Oil and Arco, as well as the summary judgment orders on which it was premised"); and

Blaisdell v. City of Rochester, 135 N.H. 589, 594,

609 A.2d 388 (1992) ("it would be inconsistent with the goals of our code to require certain standards of behavior for the judiciary in the interest of avoiding the appearance of impropriety, but then to allow a judge's ruling to stand when those standards have been violated. * * * * [W]e vacate all existing orders").

Ultimately, it is only this Court that has the power to resolve this constitutional crisis.

What is the effect upon the public's view of the integrity of our Judiciary nationwide, especially in this time of growing disrespect for our institutions of government, when as in this case in Hawaii the federal district court and the state circuit court are across the street from each other, yet on one side of the street owning 1 share of stock in a foreclosing mortgagee is considered an appearance of partiality, *constitutionally* disqualifying a federal judge, whereas on the other side of the street a foreclosure judge owning 600 shares of stock in a foreclosing mortgagee is considered business as usual?

2
Hawaii's Judge Made Deficiency Procedures Produce Forfeitures in Foreclosure Actions Violating Federal Constitutional Law

During the Great Depression, Hawaii Courts like courts in other jurisdictions grappled with the perceived unfairness of forcing a sale in a down economy.

Ultimately, a common auction practice arose whereby an upset sale price was set at a determined value.

The Hawaii Supreme Court in 1933 in *Wodehouse v. Hawaiian Trust Co.,* 32 Haw. 835, 852-853 (1933), announced approved procedures for selling foreclosed properties, and Hawaii appellate courts interpreted *Wodehouse* to mean that "[t]he lower court's authority to confirm a judicial sale is a matter of equitable discretion" and "[i]f the highest bid is so grossly inadequate as to shock the conscience, the court should refuse to confirm." *Hoge v. Kane*, 4 Haw. App. 533, 540, 670 P.2d 36, 40 (1983).

The reasoning behind this rule was to ensure neither party gets a windfall. *See Hoge*, 4 Haw. App. at 533, 540, 670 P.2d at 36, 40.

The fair value of a property for purposes of a deficiency judgment is a completely different issue.

The *Woodhouse* procedure applied to deficiencies ignores reality -- that mortgagees can credit bid for much more than the property is usually worth, scarring away competition, in effect "rigging" auction sales, enabling foreclosing mortgagees to recover property at less than fair market value, while at the same time using artificial auction price to secure

windfall profits above what is actually owed by adding onto below-market purchases sizeable deficiency judgments.

At first, courts nationally blindly allowed foreclosing mortgagees windfall profits through bloated deficiency judgments, concluding that otherwise it would be an unconstitutional impairment of capital and interference with the right to contract, viewing exclusively the return of money, not property, what lenders had bargained for.

In 1941, this Court in *Gelfert v, National City Bank of New York,* 313 U.S. 221 (1941), finally gave authoritative approval to the constitutionality of States preventing "sacrificial prices" by regulating deficiency judgment amounts.

Today, many states have passed anti-deficiency statutes requiring that after a foreclosure auction, courts must hold separate evidentiary hearings to determine "fair value" of foreclosed properties, not necessarily the "auction price" even if the "auction price" does not "shock the conscience of the court."

And recently, state courts have not waited for legislatures to pass anti-deficiency statutes, but have acted on their own to correct obvious injustices; *e.g.*:

In *Pearman v. West Point National Bank*, 887 S.W.2d 366, 368 (Ky. Ct. App. 1994) (refused to allow a mortgagee to recover any deficiency judgment where purchased property at two-thirds its actual value, had a large deficiency judgment, and then contracted to sell the property for slightly more than the amount of money it had in the property, concluding that the foreclosing mortgagee breached the covenant of good faith and fair dealing implied

within every mortgage contract);

First National Bank of Southeast Denver v. Blanding, 885 P.2d 324 (Colo. Ct. App. 1994) (lack of good faith bid by mortgage holder requires full adjustment of deficiency);

Wansley v. First National Bank of Vicksburg, 566 So.2d 1218, 1224 (Miss. 1990) (foreclosing mortgagee must show more than just difference between net sale proceeds and amount of indebtedness, but must affirmatively show property's fair value was insufficient to satisfy what the mortgagee had in the property, requiring a fair valuation of the property for deficiency purposes after confirmation; and

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

There is still a sharply divided split today among states how to calculate foreclosure deficiency judgments, hence among federal district courts having to make such calculations or enforce such judgments based upon state law in diversity cases, with about half of the states refusing to differentiate between (1) the admittedly lower forced auction sale price regulated by whether it shocks the conscience of the court, and (2) the fair value of foreclosed property calculated instead limiting deficiencies.

The most recent, extensive consideration of this disagreement is found in the West Virginia Supreme Court of Appeals' Opinion in *Sostaric v. Marshall*, 234 W.Va. 449, 766 S.E.2d 396 (2014).

The Arizona Supreme Court in *CSA 13-101 LOOP, LLC v. LOO 101, LLC*, 236 Ariz. 410, 412,

341 P.3d 452 (2014), has held fair value deficiency protections cannot be waived as a matter of public policy, and apply equally to guarantors and to commercial foreclosures, adopting the approach of the Restatement (Third) of Property: Mortgages § 8.4(d).

This Court throughout its history has continually found such forfeitures unconstitutional; *e.g.*, *Fuentes v. Shevin,* 407 U.S. 67, 81 (1972); *Mathews v. Eldridge*, 424 U.S. 319 (1976).

It was Justice Douglas, writing for a unanimous Court in *Gelfert*, 313 U.S. at 232-233, who addressing foreclosure deficiency judgment calculations for the first time, reversing, took the first step in regulating archaic deficiency judgment forfeiture procedures like those in Hawaii, holding that New York could regulate foreclosure deficiency judgments without impairing contractual obligations, concluding that "[m]ortgagees are constitutionally entitled to no more than payment in full."

Yet that of course is exactly what happened to Petitioners, wherein matured commercial loans they could not refinance due to the 2008 mortgage crisis, on which were owed less than $24,000,000, secured by real property appraised at $23,840,000, went into foreclosure, selling at auction for a credit bid of $10,000,000, no one else bidding, giving KKP, BOH's assignee, the property it paid discounted $17,500,000 for, plus a deficiency judgment of $21,594,668.55, with statutory interest added at 10% now approaching $30,000,000.

3

The Right To Appeal in Hawaii Civil Cases Was Denied to Petitioners in this Case Violating Federal Constitutional Law

Rule 77(d), borrowed by Hawaii from the Federal Rules of Civil Procedure, is clearly unconstitutional if interpreted as here to deny Petitioners the right to appeal where a notice of appeal is not filed within 30 days or any extension thereof solely because (1) the court clerks had made a mistake and the appealable judgment was concealed until time had expired (Re: Petitioners' new case appeal) or (2) the relatively newly installed court authorized electronic appellate filing system had malfunctioned (Re; Petitioners' foreclosure case appeal).

Although Rule 77(d) not surprisingly was amended in the federal courts to allow extensions for good cause, and Hawaii did the same, as reflected on pages 18 and 19, *supra*, the Hawaii appellate courts, given perhaps the unpopular nature of the two cases challenging the conduct of a popular sitting judge, refused to grant extensions, in Petitioners' new case astonishingly even though the presiding judge, Judge Chang, conducted a hearing and forthright apologized, finding "excusable neglect," acknowledging his law clerks were apparently at fault, not following document processing protocols.

This Petition seeks review of the foreclosure case appeal, but since consolidation of both cases was requested and denied by Judge Ayabe before he reassigned Petitioners' case to Judge Chang, if this Court rules in favor of Petitioners with respect to disqualification and sets aside, *inter alia*, his refusal to consolidate the cases, the appellate decisions in both cases would in effect be overturned.

That would be especially true, since the

Intermediate Court of Appeals refused consolidation of the two appeals as a reason for refusing to review in the foreclosure appeal the evidence found in discovery while Judge Chang had Petitioner's new case.

There is only one reported appellate case found considering what to do in circumstances where electronic filing systems malfunction, *Ewing Concrete LLC v. Rochon Corp.*, 2016 Iowa LEXIS 11 2016), where, as here, a 30-day deadline was inadvertently missed on the eve of the statutory filing deadline due solely to a malfunction in the court's electronic document management system through no fault of counsel.

In *Ewing*, that Court, contrary to its electronic filing rules specifying "a technical failure . . . will not excuse a failure to comply with a jurisdictional deadline," reversed, at *9-10:

> [U]nder the unique and specific circumstances of this case only, equity requires us to deem Ewing's petition as having been filed on April 30, 2014; at this time in the court's initial transition and use of the EDMS process, equity does not allow us to force Ewing to bear the burden of the systemic failure of our new filing system by "strictly interpreting" the chapter 16 rules.

Petitioners, in being capriciously denied the right to appeal, were denied due process without a hearing, and denied equal protection since others are freely allowed to appeal in Hawaii and Petitioners were not through no fault of their own.

In *Lindsey v. Normet*, 405 U.S. 56, 77 (1942), still controlling authority, this Court held:

> This Court has recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review [citations omitted]. When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. Griffin v. Illinois, supra; Smith v. Bennett, 365 U.S. 708 (1961); Lane v. Brown, 372 U.S. 477 (1963); Long v. District Court of Iowa, 385 U.S. 192 (1966); Gardner v. California, 393 U.S. 367 (1969). Cf. Coppedge v. United States, 369 U.S. 438 (1962); Ellis v. United States, 356 U.S. 674 (1958).

Almost three decades later, in *M.L.B. v. S.L.J.*, 519 U.S. 102, 110 (1996), this Court reaffirmed that constitutional requirement, holding in the context of a state requiring payment of appellate transcript costs as a condition for appealing, that "[a]lthough the Federal Constitution guarantees no right to appellate review, *id.*, at 18 ["*Griffin* v. *Illinois*, 351 U.S. 12, 16, 100 L. Ed. 891, 76 S. Ct. 585 (1956)"] once a State affords that right, *Griffin* held, the State may not "bolt the door to equal justice," *id.*, at 24 (Frankfurter, J., concurring).

Petitioners are requesting this Court unbolt that door for them as well. Their cases have been ongoing for more than seven years without benefit of impartial judicial review.

E. CONCLUSION

Petitioners are faced with an extraordinarily unfair and unconstitutional deficiency judgment in amount with interest approaching $30,000,000.

Enforcement of that deficiency judgment has been stayed pending outcome of their appeals by the New York Supreme Court where Fuchs resides and all of Fuchs' assets are located.

New York's Legislature coincidentally has declared judges automatically disqualified if owning stock in a corporate litigant (NY CLS Judiciary Law § 14) and restricts foreclosure deficiency judgments to proof of fair value at post-confirmation evidentiary hearings (RPAPL 1371).

The Due Process and Equal Protection Clauses are set forth in Appendix #29, and specification of the stage of proceedings were federal questions were raised by Petitioners is found in Appendix #30, pursuant to Rule 14.1(g)(i).

Petitioners respectfully request in the interests of justice this Court grant review and reverse, protecting their constitutional rights to due process and equal protection, Fuchs being a New York resident investing $100,000,000 in interstate commerce in Hawaii having had the right to expect more of Hawaii justice than was visited upon Captain Cook.

Respectfully submitted,

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