IN THE SUPREME COURT OF THE STATE OF OREGON

S. FRED HALL; and VIEWCREST INVESTMENTS, LLC, an Oregon limited liability company,

Plaintiffs- Respondents, Petitioners on Review,

v.

STATE OF OREGON, by and through the Oregon Department of Transportation,

Defendant-Appellant, Respondent on Review,

and

WESTEK PROPERTIES, LLC,

Intervenor.

Linn County Circuit Court
Case No. 081164

Court of Appeals Case No. A146386

Supreme Court Case No. S060879

BRIEF ON THE MERITS OF *AMICUS CURIAE* LEAGUE OF OREGON CITIES IN SUPPORT OF DEFENDANT STATE OF OREGON BY AND THROUGH THE OREGON DEPARTMENT OF TRNSPORTATION

Review of the decision of the Oregon Court of Appeals
on appeal from the Judgment of the Circuit Court for Linn County
The Honorable John A. McCormick, Judge
Opinion Filed: October 10, 2012
Author of Opinion: Schuman, P.J.
Joined By: Wolheim, J., Nakamoto, J.

(continued on next page)

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HARRY AUERBACH, OSB #821830
Chief Deputy City Attorney
DENIS M. VANNIER, OSB #044406
Deputy City Attorney
Portland Office of City Attorney
1221 SW Fourth Avenue, Room 430
Portland, OR 97204
Telephone: (503) 823-4047
Facsimile: (503) 823-3089
harry.auerbach@portlandoregon.gov
denis.vannier@portlandoregon.gov
Attorneys for Amicus Curiae League of Oregon Cities

W. Michael Gillette, OSB #660458
David Anderson, OSB #092707
Schwabe, Williamson & Wyatt, P.C
1211 SW 5th Avenue, Suite 1900
Portland, OR 97204
Telephone: (503) 222-9981
Facsimile: (503) 796-2900
wmgillette@schwabe.com
danderson@schwabe.com
Attorneys for Plaintiffs-Respondents/ Petitioners on Review

Ellen F. Rosenblum, OSB #753239
Attorney General
Mary H. Williams, OSB #911241
Solicitor General
Denise Fjordbeck OSB #822578
Attorney-in-Charge
Civil/Administrative Appeals
Stephanie Striffler, OSB #824053
Assistant Attorney General
Patrick M. Ebbett, OSB #975013
Assistant Attorney General
1162 Court Street NE
Salem, Oregon 97301
Telephone: (503) 378-4402
denise.fjordbeck@doj.state.or.us
patrick.m.ebbett@doj.state.or.us
stephanie.striffler@doj.state.or.us
Attorneys for Defendant-Appellant/ Respondent on Review

Russell L. Baldwin, OSB #891890
Attorney at Law
P.O. Box 1242
Lincoln City, OR 97367
Telephone: (541) 994-6166
baldwin_atty@embarqmail.com
Attorney for Plaintiffs-Respondents/ Petitioners on Review

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STATEMENT OF THE CASE

The League of Oregon Cities ("League") joins in the statement of the case submitted by defendant State of Oregon by and through the Oregon Department of Transportation. The League also submits three questions and proposed rules of law for this Court's consideration.

Interest of *Amicus Curiae*

By leave of this Court, the League appears as *amicus curiae* to support defendant State of Oregon, by and through the Oregon Department of Transportation. Founded in 1925, the League is a voluntary statewide association representing all of Oregon's 242 incorporated cities. Its official mission is to be "the effective and collective voice of Oregon's cities and their authoritative and best source of information and training." The League advocates for improved quality of municipal services through technical assistance, research, and education. The League's interest in this case—and therefore the interest of its 242 members—arises because this Court's decision will affect the potential liability of all cities in Oregon and, ultimately, their ability to provide the core services for which they are incorporated.

This case presents several issues regarding the application of Article I, section 18, of the Oregon Constitution to claims that government has taken private property for public use without exercising its formal eminent-domain

authority and paying just compensation. Those issues relate to the nature and extent of interference with property rights that an owner must show in order to make out a claim that the government has "taken" property, when the government has not physically invaded or occupied the property—but rather, has simply commented about a potential future project that may or may not affect that property.

This case is important to all Oregon cities because of the myriad ways in which local governments communicate with their citizens about public plans, policies, or programs, and about their potential impacts on private property. Especially because Oregon cities are striving to enhance their transparency and to increase public participation in—and public discussion of—important government initiatives, it is critical that this drive for more openness and participation not have the perverse effect of exposing local governments to unwarranted liability for "taking" private property.

Legal Questions Presented

(1) When a plaintiff claims that government has taken property under Article I, section 18, of the Oregon Constitution by imposing a "condemnation blight" on that property through its public statements, must the plaintiff prove that those statements have resulted in the loss of all economically viable use of the property?

(2) In such a "condemnation blight" case based on public statements by a government entity, must the plaintiff also prove that those statements are evidence of the government's intent to acquire the property for public use?

(3) Here, plaintiffs argue that employees of the Oregon Department of Transportation were motivated by their desire to pursue a personal vendetta against plaintiffs. Even if true, is evidence of animus by individual employees sufficient to prove that the government itself intended to take plaintiff's property for public use?

Proposed Rules of Law

(1) There are only two classes of takings for which a property owner may seek compensation under Article I, section 18, of the Oregon Constitution:

- If the government physically occupies, invades, or destroys property so that it can be said intentionally to have acquired for public use an interest akin to the fee, an easement, or some other recognized property right, it has "taken" that interest and must pay compensation for it.
- If a property owner claims that the government has "taken" property other than by a physical occupation, invasion, or

destruction, it makes no difference whether the owner describes the action as a "regulatory taking," a "condemnation blight," or any other label. In all such cases, the owner must establish that the government's actions have either deprived the owner of all economically viable uses of the property, or inflicted virtually irreversible damage on the property

(2) In all cases in which an owner seeks compensation for a taking under Article I, section 18—whether by a physical or non-physical invasion of property—the owner must prove that the government intended to acquire the property, or some interest in it, for public use.

(3) Inverse condemnation under Article I, section 18, is not a tort. Government is not vicariously liable in a takings claim based solely upon its employees' motivations, and allegations that employees were motivated by ill will in making statements against a property owner do not state a claim under Article I, section 18. Rather, a plaintiff in such a case must establish that the government itself, through its official public statements, evidenced the intent to acquire the plaintiff's property for public use.

Summary of Argument

This case presents several issues regarding the application of Article I, section 18, of the Oregon Constitution to claims that the government has taken

private property for a public use without exercising its formal eminent-domain authority and paying just compensation. Specifically, plaintiffs seek compensation for an alleged non-physical, "blight taking" of their property. They contend that a "blight taking" is a special category of non-physical taking under Article I, section 18, that is subject to a lesser standard for recovery than other non-physical takings. Plaintiffs are incorrect.

This Court has previously established the standard for recovery in the case of any alleged non-physical "taking" of private property: in such a case, the plaintiff must demonstrate that the government caused a diminution of the value of the plaintiff's land that has either (1) precluded all economically viable private uses of the property, or (2) inflicted virtually irreversible damage on that property. The distinction that plaintiffs now seek to draw between "regulatory takings" and "blight takings" is not supported by this Court's cases. On the contrary, the only distinction this Court has drawn is between claims that involve physical invasions of property, and those that involve non-physical burdens imposed by government.

Plaintiffs nevertheless attempt to distinguish two of this Court's cases by arguing that they were really "regulatory taking" cases, not "blight taking" cases like plaintiffs'. But there is no principled distinction between the governmental action challenged in those cases and the one plaintiffs challenge

here. All involved claims that the government publicly identified the plaintiffs' properties for ultimate acquisition for a public use, and that the result was to significantly impair the value of the affected properties. This Court should therefore reject plaintiffs' arguments in favor of a separate, lesser standard for recovery in what they call the "blight taking" category of non-physical "takings" under Article I, section 18.

Plaintiffs also raise a related issue with respect to the purpose that must have motivated the government's actions to constitute a "taking" for which compensation must be paid under Article I, section 18. Consistent with the text of the Oregon Constitution itself, this Court has long held that "a claim for inverse condemnation requires a showing that the governmental defendant intended to take private property for a public use." Plaintiffs do not appear to challenge that holding. Therefore, to the extent plaintiffs in this case could show that ODOT intended to preclude them from developing their property so that ODOT ultimately could acquire it for highway purposes, plaintiffs would have proved that the government intended to take their property for a public use. But, to the extent plaintiffs claim only that personal animus by ODOT employees caused those employees to place a cloud over petitioner's property *without* ODOT having any intent ultimately to acquire their property, plaintiffs

would have failed to prove that the government intended to take their property for a public use.

In this regard, it must be kept in mind that an inverse-condemnation claim is not a tort claim for which the government is vicariously liable for the acts and omissions of its employees. Rather, it is a claim *that the government itself* has intentionally taken a compensable interest in the plaintiff's property for a public use. In other words, the intent that the plaintiff must prove is that of the government. Neither the beneficent nor malicious motivations of individual employees are sufficient, by themselves, to establish the intent of the government. In sum, plaintiffs could prevail on their non-physical "taking" claim only if they proved that the state, irrespective of the motivation or animus of individual employees, intended to acquire plaintiffs' property for a public use—and that it did so by depriving the plaintiffs of all viable economic use of their property.

ARGUMENT

This is an inverse-condemnation case under Article I, section 18, of the Oregon Constitution in which plaintiffs seek compensation for an alleged non-physical "taking" of their property. Plaintiffs contend that the Court of Appeals misconstrued this Court's case law—in particular, by analogizing plaintiffs' "blight taking" theory to a regulatory-taking claim under Article I, section 18. (*See* Pet BOM 18-28) (making that argument). Plaintiffs argue that a "blight

taking" is a special category of non-physical taking, which is subject to a lesser standard for recovery than other non-physical takings under the Oregon Constitution. (Pet BOM 19-23). Plaintiffs are incorrect, and their arguments are based on a misreading of Article I, section 18, and this Court's precedent.

Admittedly, Oregon case law on inverse condemnation spans over a century, and decisions have often used imprecise and inconsistent wording depending on the facts of each case—and sometimes the era in which a case was decided. This Court should reject plaintiffs' arguments for a separate "blight taking" category of non-physical taking under Article I, section 18, and take this opportunity to restate and clarify the law governing inverse-condemnation cases in Oregon.

I. The evolution of the doctrine of inverse condemnation under Article I, section 18, of the Oregon Constitution

Article I, section 18, of the Oregon Constitution provides in pertinent part: "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation * * *." The phrase "inverse condemnation" is "the popular description of a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking

agency." *Thornburg v. Port of Portland*, 233 Or 178, 180, 376 P2d 100, 101 (1962) ("*Thornburg I*").

History is key to understanding the present ambiguities in the case law governing inverse condemnation under Article I, section 18. This Court, beginning in the late 19th Century, developed its doctrine of inverse condemnation to address two overriding concerns: (1) that, to have a meaningful effect, the right to compensation guaranteed by Article I, section 18, needed to be self-executing; and (2) that, absent an expansive interpretation of the doctrine, individuals would have no remedy for property damage caused by government actors. Those concerns led to a gradually expanding concept of "taking" that reached its zenith shortly before the passage of Oregon Tort Claims Act in the late 1960s.[1]

1. The protections afforded by Article I, section 18, are self-executing.

Because Article I, section 18, protects an "absolute right" to property, this Court has long held that its protection "should not be * * * dependent upon legislative action" to be effective. *Tomasek v. Oregon Highway Comm'n*, 196 Or 120, 143, 248 P2d 703 (1952); *Morrison v. Clackamas County*, 141 Or 564, 569-70, 18 P2d 814 (1933). For this reason, this Court concluded early in its

[1] The Oregon Tort Claims Act became effective July 1, 1968. *Urban Renewal Agency of City of Coos Bay v. Lackey*, 275 Or 35, 41 n 5, 549 P2d 657 (1976).

history that the article is "unquestionably self-executing" and "requires no legislation to put it into operation." *Id.* at 143; *Gearin v. Marion County*, 110 Or 390, 396, 223 P 929 (1924); *see also McQuaid v. Portland & V. Ry. Co.*, 18 Or 237, 22 P 899 (1889) (treating the right to compensation as self-executing); *Willamette Iron Works v. Oregon R. & Nav. Co.*, 26 Or 224, 37 P 1016 (1894) (same).

Having concluded that Article I, section 18, is self-executing, this Court was naturally required to interpret what the section contemplates when it states that "just compensation" must be given when "property [has been] taken for public use." In other words, this Court had to develop a doctrine of inverse condemnation. In doing so, however, it gradually expanded on the original scope and purpose of Article I, section 18—largely because of the absence of alternative remedies for government-caused, serious injuries to property.

2. *A takings claim under Article I, section 18, must be premised on intentional government action that actually deprives an owner of an identifiable property right.*

As this Court recognized from the start, "The provisions contained in our constitution and statute in relation to the taking of private property for public use appear to have been taken from the Indiana constitution and statute; and, having adopted them after they had been judicially construed by the courts of that state, it must be presumed that we adopted along with them the

construction of those courts." *Putnam v. Douglas County*, 6 Or 328, 331 (1877). The rule in Indiana when the Oregon Constitution was adopted was that a taking required the actual deprivation, for public use, of a tangible property right: "a proper construction of the word 'taken' makes it synonymous with seized, destroyed, and deprived of." *Evansville & Crawfordsville R. Co. v. Dick*, 9 Ind 433, 436 (1857). Early Oregon cases followed that approach.

For example, in one of the earliest inverse-condemnation cases in Oregon, this Court held that the government's act of constructing a streetcar in a way that actually deprived a homeowner of access to a street was a taking under Article I, section 18. *McQuaid*, 18 Or at 248-56. The key to that holding was the premise that the owner of land adjacent to a street has a property interest in the street itself. *See Willamette Iron Works*, 26 Or at 229-30 (explaining as much). Indeed, this Court expressly noted in *McQuaid* that "the grounds of liability [in this case], is not carelessness or negligence * * *, but a wrongful usurpation" of an identifiable property right by the state. *McQuaid*, 18 Or at 256. The holding in *McQuaid* was not novel—it was what the Indiana Supreme Court had held in the same situation before the adoption of the Oregon Constitution. *See Tate v. Ohio & Miss. R. Co.*, 7 Ind 479, 483-84 (1856) (holding that building a railroad on public street in manner that obstructed adjacent owner's "easement in the street" was a compensable taking). This

Court reaffirmed and applied *McQuaid* five years later in *Willamette Iron Works*, 26 Or at 225-26, 228-31 (holding that building the approach to a private toll bridge on public street in a way that impaired plaintiff's access and use of that street was a compensable taking).

For almost fifty years after *McQuaid* and *Willamette Iron Works*, this court adhered to the rule that, for there to be taking under Article I, section 18, three elements had to be met: (1) there must be a physical deprivation of an actual property right, (2) for public use, and (3) the deprivation must be intentional. *See, e.g, Fraser v. City of Portland*, 81 Or 92, 96, 158 P 514 (1916) (holding that laying sewer lines across plaintiff's property without consent was a compensable taking); *Davis v. City of Silverton*, 47 Or 171, 177-78, 82 P 16 (1905) (holding that public street work that resulted in accidental damage to a retaining wall on plaintiff's property was not a taking, because the street work was not an "exercise of eminent domain [aimed at] appropriating private property to public use"); *Gearin v. Marion County*, 110 Or 390, 392, 223 P 929 (1924) (holding that county's negligent removal of logjam on river, which resulted in plaintiff's farm buildings being "lost and destroyed," was not a "taking" under Article I, section 18, because "[t]he acts done by the county were done without any intention to exercise the power of eminent domain or to take plaintiff's property or any part thereof").

This Court began to stray somewhat from that approach in *Morrison*. In that case, the county had built a jetty to protect a highway and bridge from the Sandy River's current. 141 Or at 566-67. When the river later flooded, the plaintiff alleged that "all his personal property and improvements were lost and destroyed and the surface of said real property were completely washed away and rendered utterly valueless, with the further result that a new channel for said river was created over and across plaintiff's land." *Id.* For the first time since the adoption of Article I, section 18, this Court held that destruction of property that was merely the consequence of lawful public improvements was a compensable taking—whether or not the damage itself was intended. *See id.* at 567 (holding that "'[t]he county is bound by the natural and probable consequences of its acts, whether the result was contemplated or not."). Significantly, in reaching that conclusion, this Court did not discuss the original intent of Article I, section 18, or its reason for departing from the precedent discussed above.[2]

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[2] This Court did draw an analogy between the facts at issue and *Theiler v. Tillamook County*, 75 Or 214, 146 P 828 (1915). *See Morrison*, 141 Or at 573. But the analogy was inapposite: governmental intent was not at issue in *Theiler*, and the only issue was whether a state statute that, among other things, shielded counties from certain damage suits, also shielded those counties from inverse-condemnation suits under Article I, section 18. *See Theiler*, 75 Or at 217-19. The Court held in *Theiler*—unsurprisingly—that the statute did not trump the constitutional guarantee. *Id.* at 218 (holding that the statute does not shield

Instead, it referred several times to "the more modern authorities" on eminent domain and to recent developments in other jurisdictions. *See id.* at 568-71 (citing, among other authorities, the *Corpus Juris* and a treatise). This Court noted approvingly that "the trend in judicial interpretation" had been to extend the concept of "takings" to "any destruction, restriction or interruption of the common and necessary use and enjoyment of property." *Morrison*, 141 Or at 570-71. And in holding that a "taking" under Article I, section 18, occurs whenever damage to property is the "natural and probable consequences of [a government's] acts, whether the result was contemplated or not," this court cited only three cases: a decision from the New Jersey Court of Chancery, a decision from the Washington Supreme Court, and a short opinion by the United States Court of Claims. *See Id.* at 569 (citing *Miller v. City of Morristown*, 20 A 61 (NJ Eq 1890); *Great Northern Ry. Co. v. Washington*, 173 P 40 (Wash 1918); and *John Horstman Co. v. United States*, 48 Ct Cl 423 (1913)). None of those cases involved Article I, section 18, and this Court did not explain how those decisions were relevant to interpreting the Oregon Constitution.

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counties when the challenged conduct "amounts to a taking * * * without condemnation").

One of this Court's unacknowledged concerns in *Morrison* appears to have been the fact—noted but disclaimed by the Court— "that a county of the state of Oregon is not liable for ordinary torts or for the wrongful acts or omissions of its officers, servants, or employees unless made so by statute or some constitutional provision." 141 Or at 574. It seems that this Court might have been inclined to stretch the original understanding of Article I, section 18, because the plaintiff would otherwise have been left without any remedy even though there was no dispute that the county's improvements caused the damage to plaintiff's property.

The same unspoken concern—providing a remedy for significant, undisputed injuries to property that would go uncompensated if the concept of "taking" were not liberally construed—appears to underlie several of this Court's decisions into the 1960s. Thus, in *Thornburg I*, this Court held that the noise of jet airplanes continually landing and taking off at nearby Portland International Airport could constitute a nuisance severe enough to constitute a "taking" of the plaintiffs' property under Article I, section 18. 233 Or 178. In doing so, this Court acknowledged that it had previously held that consequential damages from lawful activity, as well as "situations where there was no actual physical injury to the real property," were not compensable takings under the Oregon constitution. *Id.* at 194. This Court explained, however, that whereas

those prior cases had involved single instances, the continual overflights and noise in *Thornburg I* were a "repeated" nuisance that amounted to a compensable taking. *Id.* at 191-92. As it had in *Morrison*, this Court noted in passing that torts committed by public bodies generally "are not compensable"—but that in this instance "the continued interference amounts to a taking for which the constitution demands a remedy." *Id.*

The same concern about lack of any alternative remedy appears to have, unconsciously or not, influenced the holdings of several other cases around that time. *See, e.g., Tomasek*, 196 Or at 150 (suggesting that, in some cases involving property damage, "it is no defense that there was no specific intention on the part of [government] to appropriate plaintiff's property.") (citing *Morrison*, 196 Or at 569). The effect of those decisions was not so much to fundamentally change the concept of "taking" under Article I, section 18, but rather to lead to unclear verbiage and blurring of some important elements and distinctions.

After the Oregon Tort Claims Act became effective in the late 1960s, those concerns about the lack of alternative remedies diminished, and this Court began somewhat to tighten the law of inverse-condemnation in Oregon. *See generally Coast Range Conifers v. State ex rel. Oregon State Bd. of Forestry*, 339 Or 136, 117 P3d 990 (2005) (summarizing history of inverse condemnation

in Oregon, restating basic test, and placing limits on concept of "regulatory taking"). That tightening process was not uniform, and several decisions outside the trend do appear—notably the "non-physical takings" cases of the late 1970s discussed below. Nevertheless, the movement of recent decisions has been toward gradually returning to the original scope and purpose of Article I, section 18. *See, e.g., Boise Cascade Corp. v. Bd. of Forestry*, 325 Or 185, 198-200, 935 P2d 411 (1997) (placing limits on concepts of temporary and non-physical takings). Significant ambiguities remain, however, and this Court should take this opportunity to further clarify the law in this area.

In particular, this Court should reemphasize two bedrock requirements for any "takings" claim under Article I, section 18: (1) the plaintiff must show that the government effectively has "taken" a recognized interest in the property, as opposed to merely having caused damage to the property; and (2) the plaintiff also must show that the government actually intended to acquire that interest in the plaintiff's property for a public use. While some of this Court's 20th Century decisions may have expanded the notion of the kinds of government activities that can result in a "taking," and have generously interpreted what constitutes "intent" on the part of the government, this Court consistently has adhered to those requirements for recovery under Article I, section 18. *See, e.g., Vokoun v. City of Lake Oswego,* 335 Or 19, 27-29, 56 P3d

396 (2002) (applying those elements). This Court should expressly reaffirm those key elements in this case.

II. This Court has recognized only two categories of "takings" under Article I, section 18: physical and non-physical, each of which involves slightly different elements.

Turning to the present case, plaintiffs argue that this Court has recognized multiple categories of takings, each with its own elements and distinct burden of proof. (*See* Pet BOM 10-11, 19-23) (stating that the three categories plaintiffs identify are "not exhaustive"). In particular, plaintiffs contend that an owner who brings a claim premised on a "blight taking" theory need only "prove that the government substantially interfered" with the use and enjoyment of its property—as opposed to the loss of all economically viable uses, as the Court of Appeals held below. (Pet BOM 11). Plaintiffs are incorrect.

This Court has recognized only two broad categories of compensable takings under Article I, section 18: physical and non-physical. Moreover, in all cases based on an alleged non-physical "taking," the plaintiff must demonstrate that the government's actions have either (1) precluded all economically viable private uses of the property, or (2) inflicted virtually irreversible damage on that property. This Court should therefore reject plaintiffs' attempt to establish a separate, lesser standard for recovery in the "condemnation blight" category of non-physical "takings" under Article I, section 18.

1. Physical takings

The first category of taking—the intentional physical appropriation of a recognized property interest such as the fee, a lease, or an easement—is the most familiar and well established. *See, e.g., Coast Range Conifers*, 339 Or at 145-47 (explaining that a "classic taking" occurs when "the government intentionally has authorized a physical invasion" of a property interest). In such a case, the relevant inquiry is "whether the invasion substantially interfered with the owner's use and enjoyment of that property." *Id.* at 146 (citing *Vokoun*, 335 Or at 26, and *Morrison*, 141 Or at 568-69). If that question is answered in the affirmative, the owner is then entitled to just compensation for the taking. *Coast Range Conifers*, 339 Or at 146.

The nature of the physical intrusion and the type of property interest seized can vary widely, and may affect any part of the "bundle of sticks" of property rights:

> "When the sovereign exercises the power of eminent domain it deals with what lawyers term the individual's 'interest' in [property]. That interest may comprise the group of rights for which the shorthand term is 'a fee simple,' or it may be an interest known as an 'estate or tenancy for years,' as in the present instance."

Cereghino v. State ex rel. State Highway Comm'n, 230 Or 439, 445, 370 P2d 694 (1962) (citing *United States v. General Motors Corp.*, 323 US 373, 377-378 (1944); 1 Lewis, Eminent Domain (3d ed.) §§ 63, 64; internal quotation

marks omitted). For instance, the property interest seized may be an owner's right of access to a public street. *McQuaid*, 18 Or at 248-56. It may be a "flowage easement" across the property. *Tomasek*, 196 Or at 138-39. Or it may be a "noise easement" for the physical intrusion of sound waves from continual, low overflights and near-overflights by jet airplanes landing and taking off. *Thornburg I*, 233 Or at 181-82, 191-92; *Thornburg v. Port of Portland,* 244 Or 69, 72, 415 P2d 750 (1966) ("*Thornburg II*").

To date, *Thornburg I* and *II* represent the outer reaches of what may constitute a "physical taking" of a property interest under Article I, section 18. Because plaintiffs erroneously rely on *Thornburg I* and *II* to support their argument that a lesser burden of proof should apply to their case, it bears discussing precisely what *Thornburg I* and *II* involved, and what they did and did not hold.

The plaintiffs in those cases had alleged two separate physical takings:

> "(1) Systematic flights directly over [plaintiffs'] land cause a substantial interference with their use and enjoyment of that land. This interference constitutes a nuisance. Such a nuisance, if persisted in by a private party, could ripen into a prescription. Such a continuing nuisance, when maintained by government, *amounts to the taking of an easement* * * *.
>
> (2) Systematic flights which pass close to their land, even though not directly overhead, likewise *constitute the taking of an easement*, for the same reasons, and upon the same authority."

Thornburg I, 233 Or at 181-82 (emphasis added). In other words, the plaintiffs' theory was that low, "systematic flights" directly over their property—as well as continual flights passing close to but not directly over their land—resulted in the taking of noise easements. Noise is a physical intrusion: it is produced by sound waves, which can be both felt and heard—and which, when loud or prolonged enough, can result in physical discomfort and even injury to human beings. This Court ultimately agreed with plaintiffs.[3] *Id.* at 233 Or 178, 191-92.

Thornburg I, at heart, therefore rests on the notion that repeated noise intrusions from airplanes—while not as visible as intrusions from a road or a river—nevertheless can amount to physical takings of property, under certain special circumstances. As this Court explained in *Thornburg II*, however, those special circumstances will exist only if the plaintiff can meet a certain threshold:

> "The proper test to determine whether there has been a compensable invasion of the individual's property rights *in a case of this kind* is whether the interference with use and enjoyment is

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[3] The three dissenting Justices in *Thornburg I* argued that "it is the taking of an owner's possessory interest in the land as compared with interfering with an owner's use and enjoyment of his land that distinguishes a trespass which is a 'taking' from a nuisance, which is not." 233 Or at 210 (Perry, J., dissenting). The dissent therefore concluded that the flights directly over plaintiffs' property, being trespassory, could have resulted (but on the record before the Court, did not result) in a "taking," but that the flights over neighboring property, being merely nuisances, could not have done so. *Id.* at 203-07.

> sufficiently direct, sufficiently peculiar, and of sufficient magnitude to support a conclusion that the interference has reduced the fair market value of the plaintiff's land by a sum certain in money."

Thornburg II, 244 Or at 73 (emphasis added).

In other words, the above language—which plaintiffs point to as the key test for their "blight taking" claim—does not mean that any takings claim can be premised on the proposition that government has so interfered with an owner's use and enjoyment of property. Rather, when an owner claims that government has essentially taken an easement through a physical intrusion that is not readily visible—such as the sound waves in *Thornburg I* and *II*—whether the intrusion is sufficiently physical to support a finding that it amounts to the taking of an easement turns on the inquiry described above. In short, what this Court meant by "a case of this kind" was a case involving a continual nuisance that was "such an invasion of the rights of a possessor as to amount to a taking, in theory, at least," because it physically "ousted [the possessor] from the enjoyment of his land." *Thornburg I,* 233 Or at 190.

2. Non-physical "takings"

By contrast with the physical taking of an identifiable property interest discussed above—which dates essentially from the inception of Article I, section 18—this court did not recognize that non-physical impacts on property could also constitute "takings" until fairly recently. The first such case was

Lincoln Loan v. State Hwy. Comm., 274 Or 49, 545 P2d 105 (1976), followed shortly thereafter by *Fifth Avenue Corp. v. Washington County,* 282 Or 591, 581 P2d 50 (1978), and *Suess Builders v. City of Beaverton,* 294 Or 254, 656 P2d 306 (1982). Those three cases have come to define what has been referred to as "condemnation blight" takings.[4]

The first, *Lincoln Loan*, was a pleading case, and the issue was whether plaintiff's complaint, when liberally construed, was sufficient to state a claim for just compensation under Article I, section 18. 274 Or at 52, 56-58. The plaintiff in that case alleged that the State had intentionally engaged in a "de facto taking" of "a substantial use and benefit" of its property by taking numerous actions:

- announcing that all real property in the area would be taken for roadway purposes;
- condemning real property in the immediate vicinity of plaintiff's property;
- publicizing that no compensation would be made for improvements, including those necessary for maintenance only;

[4] The League notes that plaintiffs' definition of a so-called "blight taking" is much broader than "condemnation blight" under Oregon law. As this Court has explained, "condemnation blight" is a theory based on "actions of the government [that] reduce the value of the property before the actual taking." *State ex rel. Dep't of Transp. v. Hewett Prof'l Grp.*, 321 Or 118, 134, 895 P2d 755 (1995). By contrast, plaintiffs contend that a "blight taking" is any "non-regulatory, non-trespassory government conduct that directly and substantially interferes with use of an owner's property." (Pet BOM 1 n 1).

- dismantling surrounding structures;
- bringing heavy equipment into the neighborhood for demolishing adjacent buildings;
- notifying tenants that they would be required to vacate the buildings in the area;
- publishing notices that tenants would by paid moving expenses and other compensation if they vacated plaintiff's premises;
- filing condemnation papers and initiating condemnation proceedings against plaintiff's property, although those proceedings apparently went nowhere.

Id. at 51-52. The plaintiff alleged that the combined result of all these actions was to place a "condemnation blight" on plaintiff's property and "make it impossible to maintain * * * any rental schedules or maintenance of plaintiff's dwelling." *Id.* In a short opinion, this Court agreed with the plaintiff that, taking the allegations in the complaint and all reasonable inferences therefrom as true, the complaint was sufficient to "state[] a cause of action in inverse condemnation" and survive a demurrer. *Id.* at 52. In so holding, this Court explained that the "combination of the acts alleged in plaintiff's complaint, the alleged pervasive extent of that combination of acts and the alleged duration of those acts over a ten year period unite to allege a substantial interference with the use and enjoyment of its property by plaintiff." *Id.* at 57. This Court

accordingly held that the trial court had incorrectly granted the defendant's demurrer, and remanded the case for further proceedings.

This Court clarified the rule that applies to non-physical takings two years later in *Fifth Avenue*. The plaintiff in that case claimed that the county's zoning ordinance, which designated portions of plaintiff's property as a transit station and as a greenway, effected a compensable "taking" of the property. 282 Or at 608-09. This Court affirmed the demurrer to the inverse-condemnation claim because the plaintiff "did not allege facts which, if proved at trial, would establish either of the[ ] two elements" of such a claim. *Id.* at 614. Specifically, this Court held that the elements of a non-physical takings claim were the following:

> "In summary, even if planning or zoning designates land for a public use and thereby effects some diminution in value of his land, the owner is not entitled to compensation for inverse condemnation unless: (1) he is precluded from all economically feasible private uses pending eventual taking for public use; or (2) the designation results in such governmental intrusion as to inflict virtually irreversible damage."

Id. Because the plaintiff could not satisfy those elements, this Court affirmed the trial court's grant of the county's demurrer. *Id.* This Court reaffirmed that holding four years later in *Suess Builders*, which was a "condemnation blight" case very similar to plaintiffs' in this case.

The plaintiffs in *Suess Builders* alleged that the city had "deprived them of the rental value of the property and caused a permanent depression of its market value by designating the major part of the property as a future park site in the city's comprehensive land use plan." 294 Or at 256. The plaintiffs appealed from the trial court's dismissal of their complaint, and this Court reversed. *Id.* Significantly, this Court first explained that mere "planning for future acquisition as such does not constitute a compensable taking of property" under Article I, section 18. 294 Or at 256-57. This Court went on to state, however, that the wording of the plaintiffs' complaint was "broad enough to encompass a hypothetical claim that defendants told plaintiffs that the property was certain to be acquired, that it would be useless to pursue any proposals for private development, and that defendants began to acquire easements for certain development." *Id.* at 263. "If that were the case, and defendants later abandoned their plans, a court could find that one or perhaps both of the governmental bodies had temporarily taken *all economic use* of plaintiffs' property." *Id.* (emphasis added). In so holding, this Court reaffirmed *Fifth Avenue* and reiterated that plaintiffs would not be entitled to compensation under Article I, section 18, unless they could prove that they were (1) "precluded from all economically feasible private uses pending eventual taking for public use," or (2) the city's actions "result[ed] in such governmental

intrusion as to inflict virtually irreversible damage." *Suess Builders*, 294 Or 258 (citing *Fifth Avenue*, 282 Or at 614).

Here, plaintiffs attempt to distinguish *Fifth Avenue* from their situation by labeling it a "regulatory taking" case and arguing that its holding does not apply to so-called "blight taking" cases. (Pet BOM 26). But this Court expressly rejected such a distinction in *Suess Builders*.[5] Specifically, this Court declined the plaintiffs' request to reconsider *Fifth Avenue* and adopt a "regulatory taking" analysis instead, explaining that the distinction was not helpful because "[t]he issue in this case does not arise from regulation of property." *Suess Builders*, 294 Or at 258. Rather, "[t]he issue in this case arises from a governmental plan to acquire private land for public ownership" at some future date. *Id.* at 260. Plaintiffs' argument that the holding of *Fifth Avenue*—and, by extension, the similar holding of *Suess Builders*—was intended to apply only to "regulatory takings" therefore does not survive scrutiny.

Moreover, as this Court noted in *Suess Builders*, the distinction between "regulatory takings" and other non-physical "takings" is one without a difference. *See* 294 Or at 259-63 (noting that government can affect property values through many non-physical means, only some of which are regulatory in

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[5] Plaintiffs do not discuss, distinguish, or cite *Suess Builders* in their brief.

nature). At heart, *Lincoln Loan, Fifth Avenue,* and *Suess Builders* all involved claims that the government had "taken" private property in part by announcing a future intent to acquire it for a public purpose. And as *Fifth Avenue* and *Suess Builders* made clear, allegations of governmental interference with plaintiffs' enjoyment of property will *not* support a claim for inverse condemnation unless the interference is much more than the mere announcement of the government's future intent to acquire the property. *See Suess Builders*, 294 Or at 256-57 (explaining that, under *Fifth Avenue*, "planning for future acquisition as such does not constitute a compensable taking of property, even if anticipation of the eventual taking substantially diminishes the uses of the property that will seem worthwhile to its owner or to potential buyers").

Rather, an owner must point to some affirmative act by the government that (1) deprived, at least temporarily, the owner of "all economically feasible private uses" of the property; or (2) "inflict[ed] virtually irreversible damage" to the property. *Suess Builders,* 294 Or 258; *Fifth Avenue*, 282 Or at 614. For those reasons, this Court should reject plaintiffs' arguments in favor of a separate "blight taking" category with a lesser standard for recovery than other non-physical "takings" under Article I, section 18.

III. In all inverse-condemnation cases under Article I, section 18—whether they involve a physical taking or not—plaintiffs must prove that the government intended to acquire their property for a public use.

In addition to the requirements discussed above, any inverse-condemnation claim under Article I, section 18, must satisfy another key element: the government must have intended to acquire the property interest at issue for a public use. As the Court of Appeals noted below, that element appears to be fatal to plaintiffs' arguments in this case.

As this Court has repeatedly held, "a takings claim cannot be based on interference with property rights that is merely a consequence of negligent government conduct." *Vokoun*, 335 Or at 27; *see also Gearin*, 110 Or at 402 (holding that no taking under Article I, section 18, occurred when county acted "without any intention to exercise the power of eminent domain or to take plaintiff's property or any part thereof"). Rather, any "claim for inverse condemnation requires a showing that the governmental acts alleged to constitute a taking of private property were done with the intent to take the property for a public use." *Vokoun*, 335 Or at 27. While it is true that this Court held in *Morrison* and *Tomasek* that "the fact-finder may infer the intent-to-take element of a claim for inverse condemnation from the natural and ordinary consequences of the government's act," the fact remains that "intent to take" continues to be a key element of any claim under Article I, section 18.

Vokoun, 335 Or at 28. In sum, "neither *Morrison* nor *Tomasek* eliminated the requirement that a claim for inverse condemnation requires a showing that the governmental defendant intended to take private property for a public use." *Vokoun*, 335 Or at 29.

Plaintiffs agree that "this Court has announced a rule that no compensatory [*sic*] taking occurs unless the government acts * * * were done with the intent to take the property for a public use." (Pet BOM 11) (citing *Vokoun*, 335 Or at 27). Plaintiffs further concede that they were required to produce "evidence showing that the government intended to take [plaintiffs'] property for public use * * *." (Pet BOM 12). As the Court of Appeals noted below, however, a key part of their inverse-condemnation claim appeared to be that "the intent behind ODOT's actions was *not* to take plaintiff's property for public use"—but rather that "ODOT was pursuing a vendetta" against plaintiffs. *Hall et al. v. State ex rel. Oregon Dep't of Transp. et al.*, 252 Or App 649, 655, 288 P3d 574 (2012) (emphasis in original). And although plaintiffs' brief is somewhat unclear on that point, they seem to make that same argument in this Court.

Plaintiffs thus appear to argue that ODOT's intent was not actually to close the Viewcrest freeway interchange, but rather was a targeted attempt by ODOT employees to make plaintiffs' property "undevelopable through public

statements calculated to prevent any investor from buying the property or lending any money to plaintiffs to develop the property themselves." (*See* Pet BOM 16-17). Plaintiffs further state that ODOT "worked to ensure that result by targeting its message to potential investors or buyers" of the property. (Pet BOM 17). But even if true, those allegations do not establish that *the government itself intended to acquire the property, or some interest in it, for public use.* In other words, those allegations are insufficient to allege a compensable taking under Article I, section 18. Rather, any remedy for such behavior would lie in the realm of tort and not inverse condemnation.

IV. Because inverse condemnation under Article I, section 18, is not a tort, a government is not vicariously liable in a takings claim based solely on its employees' statements, absent evidence that the government intended to acquire property for a public use.

In addition, to the extent plaintiffs argue that the state should be held to have "taken" their property under Article I, section 18, because of a personal vendetta against them by ODOT employees, such an argument is contrary to law. As explained above—and as plaintiffs concede—any inverse-condemnation claim under Article I, section 18, requires proof that *the government intended to take* the plaintiffs' property *for public use.* Mere evidence that individual employees were motivated by ill will in making statements against a property owner is therefore insufficient to prove a takings claim against the government.

The doctrine of vicarious liability of an employer for the misdeeds of its employees—also known as *respondeat superior*—is a torts doctrine, which this Court has never extended to inverse-condemnation claims under Article I, section 18. *See Chesterman v. Barmon,* 305 Or 439, 442-43, 753 P2d 404 (1988) (stating legal test for vicarious liability in tort). Indeed, it is well established that a government entity is not liable, under a takings theory, for the torts of its employees. *See, e.g., Davis*, 47 Or at 177-78 (holding that negligence in performing work, which resulted in accidental damage to plaintiffs' wall, could not give rise to claim under Article I, section 18, because the work was not aimed at "appropriating private property to public use"); *Gearin*, 110 Or at 392 (holding that negligent removal of logjam on river, which resulted in destruction of plaintiff's farm buildings, did not give rise to claim under Article I, section 18, against the county because the county did not have "any intention * * * to take plaintiff's property"). To the extent plaintiffs argue otherwise, they are incorrect, and this Court should reject their arguments.

Because there is no vicarious liability in inverse condemnation, allegations that individual government employees were motivated by personal animus in making statements against a property owner do not, standing alone, state a claim against the government for a taking under Article I, section 18.

Rather, the plaintiff in such a case would have to prove that *the government itself*—through its official statements—evidenced the intent to acquire the plaintiff's property for a public use.

V. Aside from being inconsistent with Article I, section 18, plaintiffs' proposed rule would lead to absurd and perverse results.

At heart, plaintiffs' inverse-condemnation claim is based on the proposition that government "takes" property under Article I, section 18, when public statements by government employees—statements that are merely part of a preliminary public discussion, and fall short of any actual regulation, occupation, invasion, or destruction of property—have the effect of "significantly reducing [the] value" of a piece of property. (*See* Pet BOM 1) (making that argument). Such a proposition, if it were to become enshrined in Oregon law, would lead to absurd results and have very deleterious effects on the future ability of governments to engage in public discourse and invite comments by their constituents.

Governmental bodies constantly engage in a myriad of public conversations that may affect, temporarily or not, the value of real property to a significant degree. A city may hold hearings on closing a school in an area of town dominated by a large condominium complex owned by a single entity, which could have the effect of severely depressing its rental value while the issue remains unresolved. A county government may publicly discuss raising

property taxes, temporarily depressing property values. A city council might debate whether to build a light-rail line in a particular area of town—potentially making that area more desirable, but areas situated farther away from the project less so. A public transit district might, for budgetary reasons, decide to terminate bus service to a particular area, thereby making properties in that area much less desirable and significantly depressing their value. Or, as in this case, a public agency may hold public hearings to discuss potentially closing a highway interchange. All of those scenarios have the potential to affect property values to some extent—in some cases, that effect may be "substantial" and "direct," to use plaintiffs' description. (See BOM 3) (stating proposed test for "blight taking"). And perversely, *the potential effect on property values is greater the more those discussions are publicized, and the more the public is invited to provide input and make its opinions known.*

As a result, were it to become the law in Oregon, plaintiffs' proposed rule would encourage governments to keep discussions of any future projects that could have any potential effect on property values secret for as long as possible—lest any public knowledge of those discussions actually depress property values, making the government liable for a "taking." The chilling effect on planning itself, let alone public discussions related to planning, would be significant. At a time when Oregon cities and all levels of government are

striving to enhance their transparency, and to increase public participation and discussion of important government initiatives, it is critical that this drive for more openness and participation not have the perverse effect of exposing local governments to unwarranted liability for "taking" private property. For that additional reason, this Court should reject plaintiffs' proposed approach to inverse-condemnation under Article I, section 18.

CONCLUSION

For the reasons discussed above, this Court should reject plaintiffs' arguments to establish a separate, lesser standard for recovery in what they label the "blight taking" category of non-physical "takings" under Article I, section 18. And this Court should expressly hold that, in the case of any alleged non-physical "taking" of private property, a plaintiff must demonstrate that the government caused a diminution of the value of the plaintiff's land that has either (1) precluded all economically viable private uses of the property, or (2) inflicted virtually irreversible damage on that property.

Respectfully submitted,

/s/ Denis M. Vannier
Denis M. Vannier, OSB #044406
Deputy City Attorney
Attorneys for League or Oregon Cities

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE-SIZE REQUIREMENTS

Pursuant to ORAP 5.05(2)(d) and 9.05(3)(a), I certify that the word count of this brief is 9,044, and the size of the type is not smaller than 14 point for both the text of the brief and the footnotes.

/s/ Denis M. Vannier

DENIS M. VANNIER, OSB #044406
Deputy City Attorney
Attorney for *Amicus Curiae* League of Oregon Cities

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed the foregoing BRIEF ON THE MERITS OF AMICUS CURIAE LEAGUE OF OREGON CITIES with the State Appellate Court Administrator, Appellate Court Records Section, 1163 State Street, Salem, OR 97301, on August 1, 2013, by electronic filing.

I further certify that I caused true copies of the foregoing BRIEF ON THE MERITS OF AMICUS CURIAE LEAGUE OF OREGON CITIES to be served on the following parties:

W. Michael Gillette, OSB# 660458
David Anderson, OSB# 092707
Schwabe, Williamson & Wyatt, P.C
Pacwest Center
1211 SW 5th Ave., Suite 1900
Portland, OR 97204
Telephone 503 .222.998 1
wmgillette@schwabe.com
danderson@schwabe.com

Russell L. Baldwin, OSB# 891890
Attorney at Law
P.O. Box 1242
Lincoln City, OR 97367
Telephone: (541) 994-6166
baldwin_atty@embarqmail.com

Of Attorneys for Plaintiffs-Respondents, Petitioners on Review

Ellen F. Rosenblum, OSB# 753239
Attorney General
Mary H. Williams, OSB# 9ll24l
Solicitor General
Denise Fjordbeck OSB# 822578
Attorney-in-Charge
Civil/Administrative Appeals
Stephanie Striffler, OSB# 824053
Assistant Attorney General
Patrick M. Ebbett, OSB# 97 5013
Assistant Attorney General
1162 Court St. NE
Salem, OR 97301
Telephone: (503) 378-4402
denise.fjordbeck@doj.state.or.us
patrick.m.ebbett@doj.state.or.us
stephanie.striffler@doj.state.or.us

Attorneys for Defendant-Appellant, Respondent on Review

on August 1, 2013, by electronic filing.

/s/ Denis M. Vannier
Denis M. Vannier, OSB #044406
Deputy City Attorney
Attorney for *Amicus Curiae* League of Oregon Cities