IN THE SUPREME COURT OF THE STATE OF OREGON

LORI HORTON, as guardian ad litem and Conservator of and for T. H., a Minor,
Plaintiff-Respondent,

and

LORI HORTON, individually; and STEVE HORTON,
Plaintiffs,

v.

OREGON HEALTH AND SCIENCE UNIVERSITY, a Public corporation,
Defendant,

and

MARVIN HARRISON, M.D.,
Defendant-Appellant,

and

PEDIATRIC SURGICAL ASSOCIATES, P.C., an Oregon professional corporation; and AUDREY DURRANT, M.D.,
Defendants.

Multnomah County Circuit Court
110811209

S061992

Appeal from the Limited Judgment of the Circuit Court for Multnomah County
Honorable Jerry B. Hodson, Judge

BRIEF OF *AMICI CURIAE* OREGON SCHOOL BOARDS ASSOCIATION, CITYCOUNTY INSURANCE SERVICES, SPECIAL DISTRICTS ASSOCATION OF OREGON, UNIVERSITY OF OREGON, OREGON STATE UNIVERSITY, AND PORTLAND STATE UNIVERSITY IN SUPPORT OF DEFENDANT-APPELLANT

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June 2014

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INTRODUCTION

The *amici curiae* represented in the following brief are Oregon public bodies and associations of Oregon public bodies. This brief is submitted to urge this court to hold that the statutory caps on damages set forth in the Oregon Tort Claims Act, as amended by the Legislature in 2009 and 2011 in direct response to this court's opinion in *Clarke v. OHSU*, 343 Or 581 (2007), 175 P3d 418 (2007), do not violate any of the provisions of the Oregon Constitution here at issue, *i.e.*, Article I, section 10 (the Remedy Clause), Article I, section 17 (the Right to Jury Trial), and Article VII (Amended), section 3 (the prohibition on re-examination by courts of facts found by a jury).

Although *amici* have no direct interest in the outcome of this litigation, the ruling of the trial court from which direct appeal has been taken would effectively remove all caps on recoverable damages against each and every public body in the state of Oregon. If the trial court's ruling is affirmed by this court, the negative economic impact on all Oregon public bodies would be substantial in every case and, in some cases, potentially devastating.

The magnitude of this negative economic impact will be shown below in greater detail. *See*, *infra*, pp. 21-27. However, stated briefly, it is reasonable to estimate that an uncapped liability environment would remove from the budgets of Oregon school districts a sum equal to the total compensation packages of between 227 and 487 classroom teachers, from the budgets of Oregon local

governments a sum equal to the compensation of 1,220 to 2,614 full-time employees, from the budgets of Oregon special districts an amount equal to the compensation of 128 to 274 full-time employees, and from the budgets of Oregon's state universities an amount equal to the full-time resident tuition and mandatory fees of between 830 and 1,778 students.

Amici therefore wish to call this court's attention to the care with which the Oregon Legislature considered the issues raised by *Clarke* in arriving at the current caps set forth in the OTCA. Those caps, which include built-in upward adjustments into the indefinite future, serve the important purpose of ensuring that public bodies can engage in fiscal planning with stability and predictability in the total cost of their liability risks.

The present caps also reflect the legislature's effort, in good faith, to follow this court's guidance in *Clarke*. Given the fact that, in *Clarke*, this court did not so much as whisper that the OTCA damages caps might soon be held *facially* unconstitutional, for this court *not* to reverse the trial court's ruling would render utterly futile all the work of the Legislative Assembly and innumerable citizens who participated in crafting the 2009 and 2011 amendments to the OTCA.

By this brief, the *amici curiae* also wish to put into their proper context the three constitutional provisions upon which respondent exclusively relied in urging the trial court to conclude, erroneously, that the OTCA caps are

unconstitutional. Put simply, the Oregon Constitution is not simply a catalogue of individual rights to be considered in isolation.

Instead, from its very inception, the Constitution evinced a clear intention, both by mandate and empowerment, that educational services would be provided by public schools, colleges and universities, and that a wide variety of other critically important public services would be provided by municipalities, including cities, counties and districts. Most recently, amendments to the Constitution have made it quite clear that the people intend that all such services be provided without unlimited budgets.

This brief will not attempt to address in depth the particular arguments and authorities for reversal thoroughly developed in appellant's opening brief and in the *amicus* briefs already filed here. While *amici* represented in the present brief do agree with those arguments, the purpose of this brief is to offer a broader perspective on the Oregon Constitution. As will be shown below, when viewed from a proper perspective, the Remedy Clause and the two clauses relating to jury trials in civil cases cannot reasonably be seen as supporting the conclusion that the OTCA caps on recoverable damages are unconstitutional. *Amici* therefore respectfully urge this court to reverse the judgment of the trial court and to hold that the present OTCA caps do not violate the Oregon Constitution.

THE AMICI CURIAE

Oregon School Boards Association (OSBA): OSBA is an association consisting of more than 1,400 locally-elected public officials who serve on the boards of directors of school districts, charter schools, education service districts and community colleges throughout Oregon. Collectively, OSBA's members oversee the education of more than 970,000 students. Among other services provided by OSBA is Property and Casualty Coverage for Education (PACE), which is the largest property and liability risk pool of school entities in the state of Oregon.

Citycounty Insurance Services (CIS): CIS was formed by the League of Oregon Cities and the Association of Oregon Counties to meet the risk management and employee benefit needs of cities, counties and other eligible local governments. CIS administers the CIS Trust, which includes the CIS Property/Casualty Trust and the two CIS Benefits trusts: EBS (cities) and AOCIT (counties). Thereby, CIS provides, among other services, pooled liability insurance coverage together with loss prevention, claims and risk management services to 98% of Oregon cities and more than 78% of counties.

Special Districts Association of Oregon (SDAO): SDAO is an Oregon nonprofit corporation representing the interests of Oregon special districts, which include at least 927 local public bodies. Special districts provide a very wide variety of services, including fire and rescue, water supply, irrigation,

drainage, parks and recreation, ports, roads, soil and water conservation, hospitals and health, transit, public utilities, and many others. Like OSBA and CIS, SDAO provides to its members a self-insurance pool for liability coverage (both general and automobile), in addition to loss prevention, claims management, and risk management services. That self-insurance pool is the Special Districts Insurance Services Trust (SDIS).

University of Oregon (UO), Oregon State University (OSU) and Portland State University (PSU): This court is already well aware of each of Oregon's three largest universities. As relevant to the issues here before the court, each is a public university established by ORS 352.002. The 2013 Legislature amended the statutes pertaining to these universities (s*ee* Oregon Laws 2013, chapter 768), and consistent with those amendments, each university has its own governing board, which will be fully operative on July 1, 2014, pursuant to ORS 352.054. Each participates in a shared risk management program, which includes a self-insurance pool, with the other Oregon public universities. Each is required by ORS 352.129 to continue to participate in that program until July 1, 2015, after which time it will become voluntary.

Enrollment at UO in 2013 was 24,548, including graduate students, while the comparable enrollment number for OSU was 27,925, and for PSU, total enrollment was 29,452. Academic staff numbers for approximately the same time period were as follows: 1,478 at UO, 2,918 at OSU, and 1,763 at PSU.

Each university has received worldwide recognition for outstanding educational and research achievements.

COMMON INTERESTS OF THE *AMICI CURIAE*

The *amici curiae* represented in this brief are all public bodies, or associations of public bodies, that participate in or administer self-insurance pools that are subject to the lower tier of the OTCA caps, because they are not agencies of the State. *See* ORS 30.271(2) and ORS 30.272(2); *see also*, as pertaining to the three universities, ORS 351.086(4)(a) and ORS 352.138(2), the latter statute effective as of July 1, 2014.

Therefore, each of the six *amici curiae* has a real and immediate interest in the legal issues here before this court. Each must be able to plan for liability risks with stability and predictability, but this case casts doubt on such planning. Indeed, for smaller municipalities, even the continued existence or viability of markets for excess insurance or reinsurance might be imperiled by judicial abolition of *all* damages limitations for *all* Oregon public bodies.

THE CONSTITUTIONAL FOUNDATIONS OF THE 2009 AND 2011 LEGISLATIVE RESPONSE TO *CLARKE v. OHSU*

Immediately following this court's decision in *Clarke v. OHSU*, the Oregon legislature recognized that a potential fiscal emergency existed for all public bodies in Oregon. The legislature moved rapidly to establish the "Joint

Interim Task Force on the Oregon Tort Claims Act" for the sole purpose of making recommendations for changes to the OTCA. APP-62 – 68.

The Interim Task Force was bi-partisan in composition and included legal expertise from both the plaintiffs and the defense bar. *See* APP-244 – 250. Thus, the 2009 amendments to the OTCA caps represent a careful balancing of two competing constitutional concerns: (1) the concern, recognized by this court in *Clarke*, for compensation of injured claimants; and (2) the concern for the continued provision of essential public services by government within reasonably sustainable fiscal constraints.

The second of these concerns is no less constitutionally grounded than is the concern for compensation of injured claimants. Indeed, the function of state and local government as a provider of public services is so pervasive a theme in the Oregon Constitution that it might go unrecognized because of its ubiquity. But when specific services are considered, the constitutional basis of this concern becomes obvious.

The Oregon Constitution's "Common Schools" Mandate

For example, the provision of public primary and secondary educational services is the subject of the following specific constitutional mandate:

> The Legislative Assembly shall provide by law for the establishment of a uniform, and general system of Common schools.

Or. Const., Art. VIII, § 3; *see also*, Art. VIII, § 1-2, §§ 4-6, § 8; Art. XI-K and Art. XI-P. The mandatory character of this provision is clear, because an early draft of Article VIII, Section 3, provided only that the legislature "may" provide by law for a system of "common schools." *Pendleton School Dist. 16R v. State*, 345 Or 596, 616 n. 8, 200 P3d 133 (2009).

The substitution of the mandatory verb "shall" must therefore be construed as expressing the framers' intent to raise Article VIII, Section 3, from the level of an empowerment to that of a command embodied in the State's organic law. To appreciate the importance of this constitutional command, it is important to recognize that, in 1857 and throughout the Nineteenth Century, the term "common schools" was universally understood to mean tuition-free, public schools providing an adequate basic of education. *Id.*, 345 Or at 612-16. *See also*, *Monaghan v. School Dist. No. 1, Clackamas County*, 211 Or 360, 373, 315 P2d 797 (1957) ("Few of our administrative agencies are creatures of the organic law. But, as to schools, the Constitution mandates the legislature to provide by law 'for the establishment of a uniform, and general system of Common schools'… It is a sovereign power and cannot be bartered away.").

Provisions for Higher Education in the Oregon Constitution

The framers were also well aware of the importance of higher education when drafting the Oregon Constitution. This is clear from the fact that the 1859 Congressional Act admitting Oregon to the Union specified that certain lands

would be set aside as land for "schools" and for "the use and support of a State university." *See* Section 4 of the Act of February 14, 1859 (11 Stat. 383). Carrying out and expanding upon this Congressional directive, Article VIII, Section 2, of the Oregon Constitution pertinently provides as follows:

> (1) The sources of the Common School Fund are:
>
> (a) The proceeds of all lands granted to this state for educational purposes, except the lands granted to aid in the establishment of institutions of higher education under the Acts of February 14, 1859 (11 Stat. 383) and July 2, 1862 (12 Stat. 503).

From this wording (*i.e.*, "to aid in the establishment of institutions of higher education"), the framers' intention is clear that colleges and universities would be established and publicly supported. Therefore, no less than "common schools," the support of higher education was integral to the "educational purposes" addressed in Article VIII.

The level of public support for education that was intended, both by Congress and by the framers of the Oregon Constitution, may be appreciated by consideration of the public lands that were set aside for educational purposes. The Act of February 14, 1859, Section 4, designated "sections sixteen and thirty-two of every township of public lands … for the use of schools." (*See* ORS 273.251(4)(a), where that statutory definition is now codified.)

For "the use and support of a State university," the Act of 1859 specified that "seventy-two sections shall be set apart." (*See* ORS 273.251(8) *and* ORS

273.251(1).) Thereafter, amendments to the Oregon Constitution were adopted pertaining specifically to the further expansion and support of both universities and community colleges, albeit by way of empowerment rather than mandate. Art. XI-F(1); Art. XI-G; and Art. XV, § 10.

Provisions for Local Government in the Oregon Constitution

Similarly, the Constitution evinces the clear intention that a broad range of critically important services would be provided by local government entities other than public schools. This intent is a necessarily inferred from the multitude of constitutional provisions referencing cities, counties, and districts. *See* Art. IV, § 1, Art. VI, § 6-10 and Art. XI, §§ 2-2a, *inter alia*. Among the many beneficial public services that the Constitution presupposes will be performed by local public bodies are law enforcement (Art. VI, §§ 6-8, and Art. VII (Original), §§ 1, 11-14, 16-17), public records regarding title to land (Art. VII (Orig.), § 15), domestic water supply, and projects providing for irrigation, drainage, fish protection, and watershed restoration (Art. XI-I(1)).

More recently, provisions were adopted for the funding of pollution control projects carried out by municipal corporations. Art. XI-H. Municipalities may own and operate water, gas, electric and other public utilities (Art. XI, § 12) and may own and operate provide public transportation systems (Art. XI, § 13).

Perhaps the most revealing provision of the Constitution regarding the broad range of public services that the Constitution envisions will be provided by local government is Article XI, Section 15. Subject to certain state-funding conditions, that section states that municipalities may be required by the Legislature to "provide administrative, financial, social, health or other specified services to persons, government agencies or to the public generally." Or. Const., Art. XI, § 15(2)(c). It would be challenging to attempt to imagine constitutional wording suggesting a broader role for cities, counties, and districts than what is embodied in that provision.

In fact, the role of local government has expanded greatly because of state mandates. Most noteworthy is the extent to which the state requires counties to provide vital public services. *See* State-County Shared Services, published by the Association of Oregon Counties, *see also* Letter of Legislative Counsel Committee, April 1, 2009, setting forth "County Duties and Services Required by Oregon Law." Indeed, the legislature has recognized that counties may experience a "fiscal emergency" as a result of imposition by the state of "unfunded mandates." ORS 203.095.

The public services discussed above, all of which the Oregon Constitution either requires or foresees as being performed by public bodies other than state agencies, is by no means exhaustive. The importance of this

broader perspective is that the Constitution only makes sense when it is read as a whole and not as an assemblage of clauses.

> [T]he Constitution must not be interpreted on narrow or technical principles, but liberally and on broad general lines, in order that it may accomplish the objects intended by it and carry out the principles of government… The whole Constitution must be construed together.

State v. Cochran, 55 Or 157, 179, 105 P 884 (1909). (Emphasis added.)

Therefore, correct jurisprudence requires that the Constitution be construed as a whole. In contrast, to interpret the Remedy Clause and jury trial provisions in isolation would do violence to the meaning of the whole document. The drafters of the Constitution could not have intended that these clauses would someday be interpreted as so absolute that public bodies would be substantially impeded in the performance of their constitutionally-mandated, important and essential government functions.

Relevant Constitutional Provisions Relating to Taxation

In this context, consideration must also be given to provisions of the Oregon Constitution relating to taxation. Of particular relevance to the issues here before the court are the constitutional limitations on ad valorem property taxation imposed by amendments adopted during the period 1990 through 1997 as embodied in the present version of Article XI of the Oregon Constitution. These amendments represent the popular will and are no less a part of the Constitution than the Bill of Rights.

This is important because a principal source of revenue of most local public bodies is property taxation. Nevertheless, Article XI as amended is a clear mandate that public funds must be prudently and frugally managed. Therefore, the Constitution must be seen as requiring both (1) that necessary public services be delivered by local public bodies and (2) that such local public bodies must accomplish their missions without the benefit of open-ended budgets capable of withstanding the pressure of unlimited liability exposure.

Thus, even before *Clarke*, the Constitution embodied concerns that were inherently in tension with one another. After *Clarke*, the 2009 and 2011 Oregon Legislature confronted yet another overlay of conflicting interests. Given this court's holding that the OTCA caps were unconstitutional as applied to the plaintiff in *Clarke*, the goal of the Legislature was to craft amendments that would restore and preserve stability and predictability in the total cost of liability risks for public bodies. In so doing, the clear legislative intent was to strike a balance between (1) the public interest in compensating injured claimants and (2) the public interest in assuring that those public bodies, operating as they must on limited budgets, can continue to deliver essential services effectively. *See* APP-315 – 319.

It is with these competing constitutional and prudential concerns in mind that the Oregon Legislature enacted the OTCA amendments of 2009 and 2011. *Amici curiae* respectfully submit that this court should approach the question of

the constitutionality of the current OTCA caps with this legislative history in mind and from the perspective of the Oregon Constitution as a whole. When viewed from that properly broad perspective, the OTCA caps, as presently codified, must be judged as constitutionally permissible.

LEGISLATIVE HISTORY: THE COSTS OF UNCAPPED LIABILITY

The 2009 legislature heard testimony that the negative financial impact of *Clarke* on Oregon public bodies had been immediate and substantial. However, the proposed amendments to the OTCA then under consideration were expected to afford the level of certainty needed to keep future increases somewhat under control. *See* APP-287-93.

Not surprisingly, the expected costs of such increased liability exposure were not only financial. Public bodies, like private sector businesses, are reluctant to undertake or continue high-risk activities that can precipitate expensive tort claims. Unlike private businesses, however, public bodies cannot "simply abandon the functions they were created to perform." APP-290. Given their necessarily limited budgets, therefore, some of the impact of *Clarke* on public bodies was expected to be felt in the very "programs and services that help *prevent* accidents and injuries." *Id.* (Emphasis added.)

School districts were active participants in the 2009 legislature's search for an answer to the problem of continuously increasing costs of insurance and

self-insurance post-*Clarke*. *See* APP-238-39 (OSBA) and APP-272-74 (Portland Public Schools). For those public bodies, it was projected that there would be pressure to drop optional high-risk activities, including "career related classes, such as welding, auto shop, and wood working classes as well as physical education." APP-239.

The 2009 legislature also received from the Interim Task Force testimony and reports of three actuarial studies that attempted to predict the effect of *Clarke* on the cost of tort claims and the resulting increases in the cost of maintaining self-insurance funds, with or without excess insurance coverage purchased in the commercial market. Because the expense of professionally reliable actuarial advice is substantial, only the Department of Administrative Services, the City of Portland, and Oregon Health and Science University could fund independent actuarial studies and present the results to the legislature. *See* APP-144 –153; APP-191 – 227; and APP-231 – 237.

All three actuarial reports projected substantial increases in the cost of self-insurance funds and excess liability insurance premiums. Each study employed the customary "confidence level" ("CL") analysis to arrive at various projections. "The confidence level for a particular loss year is the probability that the ultimate loss will not exceed the stated amount." APP-138.

OHSU's actuaries projected the following: (1) to achieve 55% CL, excess premiums would be 226% of the pre-*Clarke* premiums; (2) to achieve

75% CL, the projected premiums would be 290% of the pre-*Clarke* rates; and (3) to achieve 90% CL, projected cost of excess liability insurance premiums would be 355% of the pre-*Clarke* rates. APP-222. The foregoing projections do not include administrative costs or the maintenance of OHSU's $5,000,000 self-insured retention (SIR).

The City of Portland's actuaries also projected large increases in claims and insurance costs post-*Clarke*, estimating that excess liability insurance premiums would likely rise to 315% of the pre-Clarke rates. The City also made a nearly $3,000,000 increase in its self-insurance fund, based on its SIR of $1,000,000, just to achieve a 75% CL. APP-237.

DAS, on behalf of the State of Oregon, presented a report that specifically considered the increased claim costs – not insurance rates – that would result from the hypothetical complete abolition of the OTCA caps. The conclusion was that, assuming no tort liability limits, the State's losses were estimated to be 75% higher than under the prior limits. APP-145.

Because actuarial science relies on loss probabilities over an extended period of time, the projected increases set forth above were recognized to be only the beginning of the negative fiscal impact.

> Historical State experience may prove to be a poor predictor of future experience. Many factors, such as changes in the legal environment, can result in wide variations of results. In addition, the instability of results from year-to-year can have an impact on financial results. That is, even if the State's results

> over an extended period of time are very close to the expected value, the year-to-year fluctuation creating the average can be significant. These contingencies make the addition of a margin for adverse deviation both appropriate and desirable."

APP-153.

Therefore, prudent self-insurance fund administrators and commercial insurance companies customarily retain funds from year-to-year that are substantially larger than the projected losses. That is, in anticipation of the inevitable "bad year" – *i.e.*, one in which convergent, related or unrelated large claims form a "perfect storm" that makes financial demands far in excess of the long-term median – self-insurance fund administrators and insurers are compelled to maintain even larger contingency reserves.

CONFIRMATION OF ACTUARIAL PROJECTIONS IN THE STATE OF WASHINGTON

The Washington legislature waived sovereign immunity without caps for any governmental bodies, both state and local, in 1961. 1961 Wash. Laws 136; *see* Wash. Rev. Code § 4.92.005, *et seq*., and § 4.96.010, *et seq*. Therefore, Washington provides a potentially useful comparator for Oregon.

The state of Washington's experience has been widely recognized as both expensive and counter-productive.

> The open-ended waiver is no longer satisfactory. The case-by-case development of government liability law has been uncertain, inconsistent, and costly. The cases have not protected judgment exercised by public officials or the implementation of legislative and executive policy decisions.

> On the contrary, the cases have created liability for governmental functions with inherent risk factors, such as misconduct of third parties, which cannot be fully eliminated, even with the best possible risk management. The broad liability for these functions has diverted the resources of worthwhile programs to pay legal defense costs and verdicts that result from the act of governing.

"Washington State's 45-Year Experiment in Government Liability," Michael Tardif & Rob McKenna, 29 Seattle Univ. Law Review 1, 50 (2005).

Fundamentally, the authors of the cited article conclude that operating critically important governmental services in an uncapped liability environment errs "by treating only injured persons, rather than all protected persons, as intended beneficiaries of social programs." *Id.* at 51.

Especially in the context of exposure to "heavy liability for high-risk governmental functions," such as "offender supervision and child protective activities," they explain:

> Funds should be spent on the programs and not on defense costs and claim payments inflated by emotion and outrage towards the criminal acts of codefendants in these cases.

Id., 29 Seattle Univ. Law Review at 51.

This court can gain some sense of how much more costly Washington's uncapped governmental liability has been than Oregon's by comparing the premiums paid for liability insurance by counties in the two states. The following chart reveals that Washington counties pay general liability (GL)

insurance premiums that are much higher than the premiums paid by Oregon counties of comparable size:

OR - County & Population	GL Premium & Deductible	**WA - County** & Population	GL Premium & Deductible
Coos – 62,890	$137,920 ($97,608)	**Walla Walla** – 59,100	$369,104 ($50,000)
Klamath – 66,740	$269,496 (None)	**Mason** – 61,420	$611,258 ($10,000)
Polk – 76,625	$111,225 ($80,162)	**Chelan** – 73,200	$505,012 ($100,000)
Umatilla – 77,120	$168,565 (None)	**Lewis** – 76,300	$419,760 ($250,000)
Josephine – 82,775	$210,912 ($10,000)	**Island** – 79,350	$442,116 ($50,000)
Benton – 86,785	$140,150 ($50,000)	**Franklin** – 82,500	$366,461 ($25,000)
Yamhill – 100,550	$233,601 (None)	**Cowlitz** – 103,050	$487,706 ($100,000)

[The data in the above chart were compiled in 2014 by *amicus curiae* CIS, and the amount that all Oregon and Washington counties pay for liability insurance can be ascertained generally as a matter of public record.]

Based on the above data, and excluding consideration of the deductible amounts, the average cost of liability coverage for a Washington county is 268% that of an Oregon county. However, the true cost of liability coverage for counties in Washington is considerably more expensive, because most such

counties carry a larger "deductible" than do Oregon counties. When a deductible is large enough, it is, in effect, a self-insured retention.

The best illustration of this fact is Lewis County, which has a deductible of $250,000. By reference to that county's 2013 Budget (*see* p. 79, Expenditures), it is apparent that the true total cost to the county of its "General Liability" coverage was $1,010,121, which is more than twice its excess insurance premiums for 2013 (paid to the Washington Counties Risk Pool).

Thus, to reach a truly accurate comparison of Lewis County's cost of general liability coverage, reference should be made to Umatilla County's 2013-14 Adopted Budget, which shows that "Insurance – Liability" (as charged by the county to each county department separately) comes to a budgeted total of $219,500. Thus, Lewis County's coverage is really 460% of Umatilla County's ($1,010,021 ÷ $219,500 = 4.60). Note that this is about the same ratio as results from a comparison of Chelan County, Washington with Polk County, Oregon, for the excess coverage only ($505,012 ÷ $111,225 = 4.54). Those two counties, it will be observed, have roughly the same "deductible."

The above comparison suggests that cost to a county of liability coverage in an uncapped liability environment is 268% to 460% that of an Oregon county under the present OTCA caps. In view of the role of non-State governmental entities in providing important or critical public services, as mandated or

anticipated by express provisions of the Oregon Constitution, the magnitude of such likely increases in liability coverage costs cannot be ignored or minimized.

The Law of Torts – Washington and Oregon

Moreover, in Oregon, the law of torts has developed rules that are more favorable to claimants than in Washington, as is illustrated in three ways. First, the "public duty doctrine," which bars liability of public bodies for duties owed to the public in general, is followed in Washington but not in Oregon. Compare *Babcock v. Mason County Fire Dist. No. 6*, 144 Wash2d 774, 784-86, 30 P3d 1261 (2001), with *Brennen v. City of Eugene*, 285 Or 401, 409-11, 591 P2d 719 (1979) (rejecting the "public duty doctrine").

Second, in Washington, a *prima facie* negligence case depends on the existence of a duty owed to the plaintiff, which is a question of law, but in Oregon, the factual inquiry of "foreseeability" has all but replaced "duty." Compare *Sheikh v. Choe*, 156 Wash2d 441, 447-48, 128 P3d 574 (2006), with *Fazzolari v. Portland School Dist. No. 1J*, 303 Or 1, 17, 734 P2d 1326 (1987).

Third, Washington applies a narrower standard for course and scope of employment for purposes of respondeat superior liability than does Oregon. Compare *Rahman v. State*, 170 Wash2d 810, 815-24, 246 P3d 182 (2011), with *Fearing v. Bucher*, 328 Or 367, 372-77, 977 P2d 1163 (1999). For all these reasons, Oregon public bodies are required to respond in damages to a much broader range of potential tort liabilities than are Washington public bodies.

Thus, for Oregon not to retain its OTCA caps would prove even costlier for public bodies here than the empirically established high cost of Washington's complete waiver of sovereign immunity on public bodies there.

APPLICATION OF THE STATE OF WASHINGTON'S EXPERIENCE TO *AMICI CURIAE* AND THEIR MEMBERS

The actuarial studies submitted to the 2009 legislature by OHSU, the City of Portland, and DAS all projected that their general liability claims costs would increase markedly in an uncapped liability environment: 355%, 315%, and 175% of what those public bodies paid pre-*Clarke*, respectively. However, because those projections were done prior to enactment of the 2009 and 2011 amendments to the OTCA, they do not take into account the increased costs of tort liability claims that have already been experienced by all Oregon public bodies post-*Clarke*.

The more reliable projections, *amici* submit, arise from the experience of Washington counties when compared to Oregon counties. This is true for two reasons: first, the data were compiled in 2014, and second, the comparison is more apt regarding the projected consequences on non-State public entities.

The comparison of Washington to Oregon counties suggests that the cost of general liability coverage in an uncapped environment would be somewhere between 268% and 460% of what Oregon public bodies now must pay under the present OTCA caps. As shown below, should those projections prove

accurate, the fiscal impact on Oregon school districts, Oregon universities, Oregon cities and counties, and the entire range of special districts throughout the state could prove to be devastating.

Projected Impact on Public School Districts in Oregon

Consider first the present cost of general liability insurance coverage for Oregon school districts, which is $9,624,974 for PACE members alone. *See* PACE 2013-14 Member Contributions by Line of Insurance Coverage. Application to that cost of the projections derived from the Washington/Oregon counties data produces the following results:

- $9,624,974 ▪ 460% (WA - high) = $44,274,880 (+ $34,649,906)
- $9,624,974 ▪ 268% (WA - low) = $25,794,930 (+ $16,169,956)

Now, consider the impact of such increases on Oregon school districts, when framed in concrete terms. Using $80,000 as the average annual compensation package (salary + benefits + payroll taxes) of a classroom teacher in Oregon, diversion of public school revenues to liability claims in an uncapped environment would produce the following consequences:

- 460% of present liability costs = loss of **433** classroom teachers
- 268% of present liability costs = loss of **202** classroom teachers

[For salary and benefits information, *see* Teacher Salary Information, and 2013-2014 Survey: Salaries, Economic Benefits and Selected Policies for Teachers in Oregon School Districts, p. 5, published by *amicus curiae* OSBA.]

Alternatively, the financial impact would equal the elimination of between 6,929 and 3,234 high school coaches of football, basketball, baseball, track, or most other sports. [*See* 2013-2014 Survey, *supra*, pp. 20-21, 38-42, 56-57, 86-95, suggesting an average of $5,000 extra duty pay per coach.] However, there are less than one quarter that many public schools in all of Oregon – primary schools, middle schools, and high schools included. *See* Oregon Blue Book, Education. Thus, even the lower projected financial impact would not be offset by the elimination of all coaches –and thus effectively all athletics – in all Oregon public high schools.

The above projections include Oregon's community colleges, but they do not include Oregon's three largest school districts, *i.e.*, Portland Public Schools, Beaverton School District, and Salem-Keizer School District, which are self-insured and therefore not members of the PACE insurance pool. Those three districts have total enrollment of approximately 120,000 students, compared with approximately 970,000 students in PACE member school districts. Thus, considering all Oregon school districts, the impacts on K-12 public education and community colleges would be at least 12.4% larger than projected above – that is, between **227** and **487** classroom teachers.

Projected Impact on Cities and Counties in Oregon

Next, consider the present cost of pooled general liability coverage for Oregon counties and cities. For CIS members, the currently projected total cost

for such coverage in 2014-2015 is $21,787,900. *See* CIS Trust Gross Member Contributions by Line of Coverage. (Note that, as with PACE's coverage of school districts, this figure leaves out of consideration Oregon's largest, self-insured cities and counties.) Applying the same projections to the cost of general liability coverage produces the following results:

- $21,787,900 ▪ 460% (WA - high) = $100,224,340 (+ $78,436,440)
- $21,787,900 ▪ 268% (WA - low) = $ 58,391,572 (+ $36,603,672)

Now, consider the impact of such increases on Oregon cities and counties. Using $60,000 as the average annual total compensation package (salary + benefits + payroll taxes) of Oregon full-time city or county employees, the impact becomes apparent. Diversion of the above city and county revenues to claims in an uncapped liability environment would produce the following consequences:

- 460% of present liability costs = loss of **1,307** public employees
- 268% of present liability costs = loss of **610** public employees

[The figure $60,000 as average across all CIS-member cities and counties appears reliable. *See*, for example, Linn County, Crook County, and the cities of Grants Pass, Dallas, and Astoria.]

These projections do not include Oregon's largest cities and counties, which are self-insured and therefore not within the CIS risk pool. Cities in this category are Portland, Salem, Eugene, and Medford, which have a combined

population of about 1,000,000 (more than 25% of Oregon's 3.9 million people). The self-insured counties are Multnomah, Washington, Clackamas, Marion, Lane, Deschutes, Douglas, and Jackson, which have a combined population of about 2.84 million (about 73% of the state by population). Thus, the total negative financial impact on all Oregon cities and counties would be approximately double the above projections. That is, assuming that the same proportional increase in tort liability coverage costs would hit the large metropolitan local governments, the total impact on all cities and counties in Oregon of operating in an uncapped liability environment would equate to the loss of between **1,220** and **2,614** full-time employees.

Projected Impact on Special Districts in Oregon

Now, consider Oregon special districts. "Special districts" is a statutory category of municipal corporation that includes at least 26 different types of local government entities. Among the important public services provided by special districts are firefighting, emergency medical, domestic water supply, irrigation, drainage, parks and recreation facilities, mass transit systems, libraries, ports, utilities, public health and many others. ORS 198.010.

Amicus curiae SDAO was organized to provide support to all these special districts, including pooled liability insurance coverages through Special Districts Insurance Services Trust (SDIS). The total cost for such coverage for 2013-2014 was $4,189,442, for SDIS members only. *See* SDIS Trust Member

Contributions by Line Item of Coverage. (Note that, as with PACE and CIS, some large, urban districts are self-insured and thus not SDIS members, *i.e.*, TriMet, Metro, and Port of Portland.)

Applying the projections derived from the Washington/Oregon counties comparison to the cost of general liability coverage for SDIS members produces the following results:

- $4,189,442 ▪ 460% (WA - high) = $19,271,433 (+ $15,081,991)
- $4,189,442 ▪ 268% (WA - low) = $11,227,705 (+ $ 7,038,263)

Because special districts are so diverse, it is even more difficult to ascertain an average annual total compensation package for employees than for employees of cities and counties. However, a high estimate appears to be in the range of $55,000, and using that number, an uncapped liability environment would produce the following consequences:

- 460% of present liability costs = loss of **274** public employees
- 268% of present liability costs = loss of **128** public employees

[The figure $55,000 is postulated only as a high-range estimate for purposes of discussion, but it is approximately correct. While some districts have posted information for salary and benefits of personnel, most have not. *See*, for example, Bend Park & Recreation District, Tualatin Valley Park & Recreation District, Tualatin Valley Fire & Rescue District, and Port of Newport.]

Projected Impact on Universities

Finally, consider the impact of uncapped tort liability on Oregon's universities. *Amici curiae* UO, OSU, and PSU are all participants in the Oregon University System (OUS). *See* ORS 352.002, *et seq*. Among the shared services currently provided to all three of these universities by OUS are "risk management, the purchase of insurance [and] the management of a self-insurance program…" ORS 352.129(1)(c).

For fiscal year 2013-14, the total sum of $4,396,758 was allocated by the OUS Risk Management program for "general liability" and "automobile liability." *See* Oregon State Board of Higher Education, Committee on Finance and Administration, February 15, 2013, Exhibit III-A. Applying the same projections discussed above to the universities' pooled self-insurance through OUS, the following increases result:

- $4,396,758 ▪ 460% (WA - high) = $20,225,087 (+ $15,828,329)
- $4,396,758 ▪ 268% (WA - low) = $11,783,311 (+ $ 7,386,553)

Converting the above figures into projected reductions in personnel at the three universities is impossible for two reasons. First, OUS Risk Management does not break down the numbers by university, and second, the range of occupations is simply too expansive and too diverse.

Therefore, a more appropriate illustration of the impact of the above financial losses on universities may be found in tuition and mandatory fees.

Annual tuition and mandatory fees for 2013-2014 charged to a resident, full-time (15 credits) undergraduate student at UO, OSU and PSU averaged about $8,900. *See* OUS 2013-14 Fee Book. Application of this figure to the projected additional costs produces the following results:

- 460% of present liability costs = annual tuition & fees of **1,778** students
- 268% of present liability costs = annual tuition & fees of **830** students

That is, the projected annual cost of operating Oregon universities in an uncapped liability environment would pay for between 830 and 1,778 in-state undergraduates to attend UO, OSU, or PSU without charge.

CONCLUSION

As shown above, the Oregon Constitution, both by mandate and by empowerment, expresses the clear intent that school districts, community colleges, and universities provide educational services, and that cities, counties, and special districts provide a broad range of public services – and that all these public entities operate on limited budgets. Education is a constitutional priority, and many of the critically important services provided by local governments – law enforcement, firefighting, emergency medical, public health, and domestic water supply, just to name a few – are indispensable for a functioning society. The OTCA, as amended in 2009 and 2011, represents the judicious re-balancing of these interests following this court's ruling in *Clarke*.

Thus, viewed as a whole, the Oregon Constitution must be seen as the organic charter of a functioning government, not merely as a catalogue of individual rights. Certainly, those who drafted and adopted the Constitution could not have intended that any isolated clause would, generations later, become an economic weapon used to impede or prevent public bodies from delivering critically important services to the people.

Amici curiae therefore urge this court to uphold the legislative judgment embodied in the present OTCA as fully constitutional, not only because that result is correct as a matter of Oregon constitutional law, but also because the consequences of doing otherwise would be immediate and potentially devastating to every public body in Oregon.

DATED: JUNE 24, 2014

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CERTIFICATE OF COMPLINACE WITH BRIEF LENGTH
AND TYPE-SIZED REQUIREMENTS

Pursuant to ORAP 5.05(2)(d) and 9.05(3)(a), I certify that the word count fof this brief is 6,621 words and the size of the type is not smaller than 14 point for both the text of the brief and the footnotes.

DATED: JUNE 24, 2014

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing BRIEF OF *AMICI CURIAE* OREGON SCHOOL BOARDS ASSOCIATION, CITYCOUNTY INSURANCE SERVICES, SPECIAL DISTRICTS ASSOCATION OF OREGON, UNIVERSITY OF OREGON, OREGON STATE UNIVERSITY, AND PORTLAND STATE UNIVERSITY IN SUPPORT OF DEFENDANT-APPELLANT on June 24, 2014 with the State Court Administrator at the following address:

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I further certify that I electronically served the foregoing BRIEF OF *AMICI CURIAE* OREGON SCHOOL BOARDS ASSOCIATION, CITYCOUNTY INSURANCE SERVICES, SPECIAL DISTRICTS ASSOCATION OF OREGON, UNIVERSITY OF OREGON, OREGON STATE UNIVERSITY, AND PORTLAND STATE UNIVERSITY IN SUPPORT OF DEFENDANT-APPELLANT on June 24, 2014 on the following attorneys: