**IN THE SUPREME COURT OF THE STATE OF OREGON**

**STATE OF OREGON**, by and through its Department of Transportation,

Plaintiffs-Respondent, Respondent on Review,

v.

**ALDERWOODS (OREGON), INC.,** an Oregon corporation, successor by merger with Youngs Funeral Home, Inc., an Oregon corporation,

Defendant-Appellant, Petitioner on Review,

and

**BANK OF AMERICA, N.A.**, a national association, as administrative agent,

Defendant.

Washington County Circuit Court
No. C085449CV

Court of Appeals No. A146317

Supreme Court No. S062766

# AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER

Petition to Review the Decision of the Court of Appeals
On Appeal from the Judgment of the Circuit Court of Washington County
Honorable Thomas W. Kohl, Judge

Opinion Filed: September 17, 2014
Authors of Opinions:
Concurring: Armstrong, J., joined by:
Ortega, Duncan, DeVore, and Garrett, JJ.
Concurring: Sercombe, J.
Dissenting: Wollheim, J. Joined by:
Haselton, C.J., Nakamoto, J., Egan, J., Tookey, J., and Schuman, S.J.

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## IDENTITY AND INTEREST OF AMICI CURIAE

PLF was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide who believe in limited government and private property rights. PLF attorneys have participated as lead counsel or amicus curiae in several cases before the U.S. Supreme Court in defense of the right of individuals to make reasonable use of their property. *See, e.g.*, *Koontz v. St. Johns River Water Management District*, __ US __, 133 S Ct 2586, 186 L Ed 2d 697 (2013); *Arkansas Game & Fish Comm'n v. United States*, __ US __, 133 S Ct 511, 184 L Ed 2d 417 (2012); *Palazzolo v. Rhode Island*, 533 US 606, 121 S Ct 2448, 150 L Ed 2d 592 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 US 725, 117 S Ct 1659, 137 L Ed 2d 980 (1997); *Nollan v. California Coastal Comm'n*, 483 US 825, 107 S Ct 3141, 97 L Ed 2d 677 (1987).

Before the Oregon Supreme Court, PLF attorneys served as counsel of record for the property owners in *Dodd v. Hood River County*, 317 Or 172, 855 P2d 608 (1993), and as amicus curiae in *West Linn Corporate Park L.L.C. v. City of West Linn*, 349 Or 58, 240 P3d 29 (2010). PLF has also appeared as amicus curiae in several appellate cases concerning property rights. *See, e.g., Hammer v. City of Eugene*, 202 Or App 189, 121 P3d 693 (2005), *rev den*, 340 Or 308, 132 P3d 28 (2006), *cert den*, 549 US 825, 127 S Ct 176, 166 l Ed 2d 42 (2006); *League*

*of Oregon Cities v. State*, 334 Or 645, 56 P3d 892 (2002); *Boise Cascade Corp. v. State ex rel. Oregon State Bd. of Forestry*, 164 Or App 114, 991 P2d 563 (1999), *rev den*, 331 Or 244, 18 P3d 1099 (2000), *cert den*, 532 US 923, 121 S Ct 1363, 149 L Ed 2d 291 (2001).

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all fifty state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses.

NFIB represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs ten people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

PLF and NFIB believe that this case is of significant importance to Oregon's landowners and has far-reaching implications for their traditional rights in

property. PLF and NFIB believe that their public policy perspective and litigation experience will provide an additional and useful viewpoint in this case.

## ISSUE ADDRESSED BY AMICUS BRIEF

Whether owners of properties located adjacent to a state highway or county road enjoy abutting rights of access that cannot be extinguished without compensation.

## INTRODUCTION AND SUMMARY OF THE CASE

This case raises important questions regarding the protections guaranteed to Oregon landowners by Article I, Section 18, of the State Constitution. Specifically, this case asks whether a landowner whose property abuts a highway is entitled to present evidence of substantially impacted value when the state acquires the landowner's right of access in a condemnation action. Here, as part of a project to improve SW Pacific Highway in Tigard, the Oregon Department of Transportation (ODOT) brought a condemnation action against Alderwoods (Oregon), Inc., to acquire a temporary easement for work areas and to condemn "all abutter's rights of access" between the land and the highway. Petition Appendix (Pet. App.) at 22. Before trial, ODOT filed a motion in limine, asking the court to bar Alderwoods from introducing any evidence showing that the elimination of existing curb cuts and driveways impacted the value of the land. Pet. App. at 4. The trial court granted the motion. Pet. App. at 4-5.

The trial court's decision was affirmed by an equally divided, en banc decision from the Court of Appeals. Pet. App. at 1-2. The competing opinions offer two very different views about whether the Takings Clause protects a landowner's right to access an abutting highway. Judge Armstrong's opinion states that, as a matter of Oregon law, "a governmental regulation or modification of a road for road purposes that deprives a landowner of access to the road does *not* give rise to a compensable taking of the owner's access right." Pet. App. at 6 (emphasis in original).

Writing in dissent, Judge Wollheim notes that the Armstrong opinion improperly relies on principles borrowed from regulatory takings and inverse condemnation case law, ignoring the fact that this is an eminent domain case. Pet. App. at 21, 31, 39. Applying condemnation law, Judge Wollheim concludes that Alderwoods should have been permitted to introduce evidence of how ODOT's decision to extinguish its right of access impacted the value of its property. Pet. App. at 21, 24, 26-31. He notes that Oregon's relevant eminent domain statutes set out two requirements that should control this case. First, the state is required to pay just compensation when it uses eminent domain to acquire an interest in

private property. ORS 374.035(1). And second, the statute requires that the landowner be permitted to put on evidence of "[a]ll damages by reason of deprivation of the right of access."[1] ORS 374.055.

Amici Curiae PLF and NFIB Small Business Legal Center believe that the trial court's motion in limine should be reversed on the grounds discussed in Judge Wollheim's dissent without reaching the substance of Judge Armstrong's constitutional arguments. After all, the underlying question was simply whether Alderwoods could introduce evidence of impairment and severance damages.[2] Nonetheless, Amici believe that it is necessary to address the Armstrong opinion because his understanding and application of certain constitutional principles is incorrect and the consequences of his proposed rule would be far-reaching and harmful to Oregon's property owners.

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[1] "In any proceeding in eminent domain evidence of the entire plan of improvement is admissible for the purpose of determining: (1) Value of property taken. (2) All damages by reason of deprivation of right of access to any highway to be constructed, established or maintained as a throughway. (3) The damages which, if the property sought to be condemned constitutes a part of a larger parcel, will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and by reason of the construction of the improvement in the manner proposed." ORS 374.055.

[2] In an eminent domain proceeding, the jury is charged with determining whether condemnation of a right of access deprives the owner of reasonable access to and from the highway. If so, then the jury may consider severance damages when determining the amount of just compensation to award. *State ex rel. State Highway Comm'n v. Center*, 23 Or App 693, 696, 543 P2d 1084 (1975).

## ARGUMENT

### I

### THE COMMON LAW RECOGNIZES THAT AN ABUTTING LANDOWNER'S RIGHT OF ACCESS TO AND FROM A PUBLIC HIGHWAY IS AN INCIDENT OF OWNERSHIP THAT CANNOT BE EXTINGUISHED WITHOUT COMPENSATION

The existence of a protected property right should not be a matter of dispute in a condemnation proceeding. Indeed, when the state brings a condemnation action seeking to force the transfer of a specific interest in real property to the public, it admits the existence of that property. As Judge Wollheim aptly notes, "The state cannot, on the one hand, seek to *acquire* an abutting landowner's right of direct access through eminent domain and, on the other hand, claim that there is no right to establish just compensation for the taken property right." Pet. App. at 31 (emphasis in original). Nonetheless, instead of addressing the evidentiary question on appeal,[3] Judge Armstrong's opinion focuses on the nature of Alderwoods' interest in a right of access, recharacterizing that right in a manner

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[3] When the state condemns private property for public use, the owner of the property is entitled to "just compensation." Or Const, art I, § 18. Just compensation generally means "fair market value," defined as what a willing buyer would pay a willing seller. *State Highway Comm'n v. Superbilt Mfg. Co.*, 204 Or 393, 412, 281 P2d 707 (1955). In the case of a partial taking of property, fair market value is measured by the value of the property acquired plus any severance damages, that is, any depreciation in the value of the remaining property caused by the taking. *Dep't of Transp. v. Lundberg*, 312 Or 568, 574, 825 P2d 641 (1992). In determining fair market value, the threshold of relevancy is low. *Lundberg*, 312 Or at 575.

that deprives owners of the rights and protections established by the common law. Pet. App. at 6.

The right of access is traceable to the horse and cart days of England and colonial America, when neighboring landowners cleared passageways through woods and fields so that they could haul produce to nearby villages.[4] Wilkie Cunnyngham, *The Limited-Access Highway from a Lawyer's Viewpoint*, 13 Mo L Rev 19 (1948). It was common custom that, having contributed to the construction and maintenance of the road, the abutting landowner should have a right of access

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[4] The right of access is a well-recognized property interest throughout the United States. *See, e.g.*, *Davis v. Alabama*, 346 So2d 936, 938 (Ala 1977); *Triangle, Inc. v. Alaska*, 632 P2d 965, 967 (Alaska 1981); *Arkansas State H'way Comm'n v. Marshall*, 253 Ark 212, 485 SW2d 740, 743 (1972); *City of Yuma v. Lattie*, 117 Ariz 280, 572 P2d 108, 113 (Ariz Ct App 1977); *People v. Ricciardi*, 23 Cal 2d 390, 144 P2d 799, 803 (1943); *Brumer v. Los Angeles County Metro. Transp. Auth.*, 36 Cal App 4th 1738, 43 Cal Rptr 2d 314, 317-18 (Cal Ct App 1995); *Minnequa Lumber Co. v. City and County of Denver*, 67 Colo 472, 186 P 539 (1919); *Laurel Inc. v. Connecticut*, 169 Conn 195, 201, 362 A2d 1383 (1975); *Palm Beach County v. Tessler*, 538 So 2d 846, 848 (Fla 1989); *Florida DOT v. Lakewood Travel Park Inc.*, 580 So 2d 230, 233 (Fla 4th DCA 1991); *Dep't of Transp. v. Bridges*, 486 SE2d 593, 594 (Ga. 1997); *Dep't Public Works & Bldg. v. Wilson & Co., Inc.*, 62 Ill 2d 131, 340 NE2d 12, 15-16 (1975); *Garrett v. City of Topeka*, 259 Kan 896, 916 P2d 21 (1996); *Kau Kau Take Home No. 1 v. City of Wichita*, 281 Kan 1185, 135 P2d 1221 (2006); *Miczek v. Massachusetts*, 32 Mass App Ct 105, 586 NE2d 1004 (1992); *County of Anoka v. Blaine Building Corp.*, 566 NW2d 331, 334 (Minn 1997); *Johnson v. City of Plymouth*, 263 NW2d 603, 605 (Minn 1978); *Missouri v. Meier*, 388 SW2d 855, 859 (Mo 1965); *Capitol Plumbing & Heating Supply Co., Inc. v. New Hampshire*, 116 NH 513, 514, 363 A2d 199, 200 (1976); *Schwartz v. Nevada*, 111 Nev 998, 900 P2d 939, 941-42 (1995); *Hill v. State H'way Comm'n*, 85 NM 689, 516 P2d 199 (1973); *Jackson Gear Co. v. Pennsylvania*, 657 A2d 1370, 1371 (Pa Commw Ct 1995); *S. Carolina State H'way Dep't v. Wilson*, 254 SC 360, 175 SE2d 391, 394 (1970); *Texas v. Heal*, 917 SW2d 6 (Tex 1996); *Keifer v. King County*, 89 Wash 2d 369, 572 P2d 408 (1977).

to his road at any place he desired. *Id*.; *see also* William E. Duhaime, *Limiting Access to Highways*, 33 Or L Rev 16, 19-20 (1953). Over time, the custom developed into a well-recognized right, ensuring that abutting landowners are provided a right of ingress and egress to the street—after all, the primary purpose of a road is to give citizens access to homes and farms and businesses. *See* Dan Moody, Jr., *Condemnation of Land for Highway or Expressway*, 33 Tex L Rev 357, 365-66 (1955); *Freeways and the Rights of Abutting Owners*, 3 Stan L Rev 298, 299-300 (1951).

The right of access is inherent in ownership of land abutting a road. *Mortimer v. New York Elevated Ry. Co.*, 6 NYS 898, 905 (NY Sup Ct 1889) (Under the common law, the government's creation of a road carried with it an implied grant of an easement to the abutting owners.); *see also Freeways and the Rights of Abutting Owners*, *supra* at 299-300. Thus, by operation of law, the abutting owner is deemed to have "acquired an easement in the street as regards light, air, and access, and no express grant or covenant for that purpose was necessary." *Mortimer*, 6 NYS at 905. Oregon law is in accord with the general understanding of the right of access.[5]

Importantly, although an access right can be regulated, it is a valuable and protected property right and cannot be extinguished by legislation without

[5] The common law right applies only to landowners who established access points prior to 1951. *See* ORS 374.405 (legislation prospectively eliminating the common law right of access).

providing for just compensation.[6] *State, By and Through State Highway Comm'n v. Burk*, 200 Or 211, 228, 265 P2d 783 (1954).

> [A]n abutting owner's right of access to and from the street, subject only to legitimate public regulation, is as much his property as his right to the soil within his boundary lines. When he is deprived of such right of access, or of any other easement connected with the use and enjoyment of his property, other than by the exercise of legitimate public regulation, he is deprived of his property.

*Donovan v. Pennsylvania Co.*, 199 US 279, 302, 26 S Ct 91, 50 L Ed 192 (1905); *see also Muhlker v. New York & H.R. Co.*, 197 US 544, 571, 25 S Ct 522, 49 L Ed 872 (1905) (The right of access "'is as much property as the lots themselves.'") (quoting 1 Lewis, *Eminent Domain*, § 91 e); *see also Willamette Iron Works v. Oregon R. & Nav. Co.*, 26 Or 224, 228, 37 P 1016 (1894) (concluding that the legislature cannot deprive a property owner of access rights without providing for just compensation); *McQuaid v. Portland & V. Ry. Co.*, 18 Or 237, 255-56, 22 P 899 (1889) (calling into question the legislature's authority "to destroy or seriously impair [access] rights" without payment of compensation); *see also Haynes v. Thomas*, 7 Ind 38, 42-43 (1855) ("[I]t is not doubted that the legislature had power to vacate roads, streets, &c.; and of the propriety of their doing so they were the exclusive judges, so far as their acts might affect the citizens of the state at large;

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[6] *See Crawford v. Vill. of Delaware*, 7 Ohio St 459, 469 (1857) (recognizing that the access right "generally contributes to the enjoyment of the adjacent lot, and confers additional value upon it, and any act of another, which impairs that value, or interferes with that enjoyment, may be the subject of a suit.") (internal citations and quotation marks omitted).

but it is equally clear that they had no such power, where their action would take away a private right.").

Judge Armstrong's opinion rejects the very rights that this Court recognized in *Willamette Iron Works* and *McQuaid* by concluding that "a governmental regulation or modification of a road for road purposes that deprives a landowner of access to the road does *not* give rise to a compensable taking of the owner's access right." Pet. App. at 6. That conclusion, on its face, excludes actions taken by an agency like ODOT from the requirement to pay just compensation by holding that an exercise of police power is not subject to the protections and limitations of the Takings Clause. The opinion cannot stand for two reasons.

First, Judge Armstrong's legal conclusion is in error. The sole basis for his conclusion is the following quote, taken out of context, from an 1878 U.S. Supreme Court decision.

> "Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking, within the meaning of the constitutional provision."

Pet. App. at 6 (quoting *Oregon Investment Co. v. Schrunk*, 242 Or 63, 71, 408 P2d 89 (1965) (quoting *Brand v. Multnomah County*, 38 Or 79, 92, 60 P 390, *aff'd*, 38 Or 79, 62 P 209 (1900) (quoting *N. Transp. Co. v. City of Chicago*, 99 US 635, 642, 9 Otto 635, 25 L Ed 336 (1878))). Not only does the Armstrong opinion miss the essential qualification, "*and not directly encroaching upon private property*,"

it also misses the fact that each of the cited cases concerned whether the government could be held liable for inverse condemnation where *offsite* public projects result in unforeseen consequential damages to land. *Schrunk*, 242 Or at 71; *Brand*, 38 Or at 92; *N. Transp. Co.*, 99 US at 641. The quoted language, therefore, has no application where the government invokes eminent domain to condemn an abutting owner's right of access with a plan to remove the owner's curb cuts and block his or her driveways.[7] Pet. App. at 3-4, 21.

Second, merely labeling a government action an exercise of police power cannot determine whether compensation is owed "[b]ecause it provides no principled way to distinguish between that which is compensable and that which is not." *County of Anoka v. Esmailzadeh*, 498 NW2d 58, 61 (Minn Ct App 1993).[8]

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[7] Indeed, the *N. Transp. Co.* Court was careful to limit its rule to those circumstances where there was no direct government appropriation or invasion of private property and the damages were consequential. *Id.* (citing *Pumpelly v. Green Bay & Miss. Canal Co.*, 80 US (13 Wall) 166, 20 L Ed 557 (1871) (The government must compensate a landowner to the extent that it actually invades private property, thereby exercising dominion over the landowner's rights and inflicting irreparable harm thereto.); *Eaton v. Boston, Concord & Montreal R.R.*, 51 NH 504 (1872) ("Taking a part 'is as much forbidden by the constitution as taking the whole. The difference is only one of degree; the quantum of interest may vary, but the principle is the same.'" (citation omitted)).

[8] *See also* James D. Masterman, et al, *Eminent Domain and Land Valuation Litigation* 3 (ALI-ABA 2008) ("Any suggestion, however, that formal takings of private property are not compensable merely because they have safety as a purpose would be untenable."); William B. Stoebeck, *The Property Right of Access Versus Eminent Domain*, 47 Tex L Rev 733, 739 (1969) (Although some justify denying compensation for regulatory closures, such a distinction "seems

(continued...)

Indeed, the U.S. Supreme Court rejected such labeling when it famously held that an exercise of police power may effect a taking when "it goes too far." *See Pennsylvania Coal Co. v. Mahon*, 260 US 393, 415-16, 43 S Ct 158, 67 L Ed 322 (1922) ("[A] strong public desire to improve the public condition is not enough to warrant achieving that desire by a shorter cut than the constitutional way of paying for the change."). Modern takings case law is brimming with examples of police power regulations that result in a taking.[9] Judge Armstrong's categorical exclusion of ODOT closures of existing access rights from the guarantees of the Takings Clause finds no support in case law and should be rejected.

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[8](...continued)
totally unjustified, since it sets up a false dichotomy between the police and eminent domain powers.").

[9] *See, e.g., Lucas v. South Carolina Coastal Council*, 505 US 1003, 1020-22, 1030-31, 112 S Ct 2886, 120 L Ed 2d 798 (1992) (holding that a regulation intended to protect coastal environment by instituting dune buffers constituted a total taking); *Pennsylvania Central Transp. Co. v. New York City*, 438 US 104, 124, 98 S Ct 2646, 57 L Ed 2d 631 (1978) (developing multi-factor test for non-categorical regulatory takings; a compensable taking will be found—regardless of alleged public need—based on balancing of regulation's economic impact, the property owner's reasonable investment-backed expectations, and the character of the government action).

## II

## PRINCIPLES OF REGULATORY TAKINGS AND INVERSE CONDEMNATION LAW DO NOT SUPPORT A RULE THAT CATEGORICALLY EXCLUDES ACCESS RIGHTS FROM THE PROTECTIONS OF THE TAKINGS CLAUSE

Even if this Court were to consider the Armstrong opinion's reliance on regulatory takings and inverse condemnation principles, there is absolutely no support for his conclusion that, as a matter of law, regulatory acts or acts intended to improve the highway are not compensable. Although some of the principles cited in the Armstrong opinion may limit a landowner's ability to recover compensation where a road improvement project impacts a right of access without any formal condemnation proceeding, those principles are not relevant where the government has exercised its power of eminent domain to acquire a specific interest in private property. *See Curran v. State, Dep't of Transp.*, 151 Or App 781, 786, 951 P2d 183 (1997) (noting substantive differences between cases where the government has acquired an interest in private property and a claim that the impacts of a regulation effect a taking). In a condemnation action, the question before the court is whether the taking substantially impacted the owner's right of access. *Lundberg*, 312 Or at 574. If so, the owner must be allowed to put on evidence of diminished value to establish the proper measure of damages. *Id*.

### A. The U.S. Supreme Court Disfavors Per Se Defenses to Takings Clause Liability

There is no basis in takings law for adopting a rule that excludes all property damage caused by a government omission from the protections guaranteed by the Takings Clauses of the Oregon and U.S. Constitutions. In fact, the adoption of a such a rule would conflict with the U.S. Supreme Court's takings jurisprudence, which disfavors categorical defenses:

> [N]o magic formula enables a court to judge, in every case, whether a given government interference with property is a taking. In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area.

*Arkansas Game & Fish*, 133 S Ct at 518.

The U.S. Supreme Court's hostility toward invariable rules is based on two fundamental principles underlying its takings jurisprudence, which require courts to consider each case on its individual merits. First, the "Takings Clause is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Id.* at 518 (quoting *Armstrong v. United States*, 364 US 40, 49, 80 S Ct 1563, 4 L Ed 2d 1554 (1960)). And second, " '[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.' " *Arkansas Game & Fish*, 113 S Ct at 518 (quoting *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional*

*Planning Agency*, 535 US 302, 322, 122 S Ct 1465, 152 L Ed 2d 517 (2002)). Under those principles, the U.S. Supreme Court has long recognized that the government must compensate a landowner to the extent that it actually invades private property, exercising dominion over the landowner's rights and inflicting irreparable harm thereto. *See Pumpelly*, 80 US at 177-78.

The reason why the U.S. Supreme Court prefers that takings cases be determined on their merits is because, once the government invades or occupies private property, the owner's rights in his land are irreparably harmed and the owner must be compensated. *United States v. General Motors Corp.*, 323 US 373, 378, 65 S Ct 357, 89 L Ed 311 (1945) (Upon a physical invasion, the owner's rights are more limited and circumscribed in nature than they were before the intrusion.), cited favorably by *Cereghino v. State Highway Comm'n*, 230 Or 439, 445, 370 P2d 694 (1962); *see also Lingle v. Chevron U.S.A. Inc.*, 544 US 528, 539, 125 S Ct 2074, 161 L Ed 2d 876 (2005) (A physical invasion will always effect a taking because it eviscerates the owner's right to exclude others from entering upon and using his or her property, which is "perhaps the most fundamental of all property interests."). The question whether ODOT's appropriation of Alderwoods' curb cuts and driveways for conversion to a public sidewalk causes substantial harm to the property is no different in kind than any other physical taking: both have the effect of appropriating an owner's rights in his or her land for a public benefit. And, under those circumstances, a landowner is entitled to his or her day

in court. *Douglas Cnty. v. Briggs*, 34 Or App 409, 414, 578 P2d 1261 (1978), *aff'd*, 286 Or 151, 593 P2d 1115 (1979) ("When restrictions on access are imposed, whether or not adequate access remains available is a question of fact which must be determined in light of the highest and best use of the affected property." (citing 2 Nichols, *Eminent Domain*, s 5.72(1) at 5-165 (1976))).

**B. The Government's Intent Is Irrelevant to Its Obligation To Pay Just Compensation**

The Armstrong opinion is also inconsistent with takings law in that it treats the government's purpose as if it were determinative of whether just compensation is owed. In an eminent domain proceeding, the purpose for which property is being condemned is only relevant to the question whether the property is being condemned for a public purpose. *See Foeller v. Hous. Auth. of Portland*, 198 Or 205, 233, 256 P2d 752 (1953). The public purpose has no bearing on how much compensation is due. Similarly, the government's purpose has little relevance in a regulatory taking or inverse condemnation action. Indeed, the first U.S. Supreme Court opinion addressing inverse condemnation focused on the irrelevance of intent to the analysis. *See Pumpelly*, 80 US at 177-78. In *Pumpelly*, the government's construction of a dam caused a lake to flood, which almost completely destroyed the plaintiff's property. *Id.* at 177. The government argued that it could not be held liable for a taking because the damage was collateral to the government project, and there was no intent to appropriate the plaintiff's property.

*Id.* at 167-68. The *Pumpelly* Court rejected this argument, holding that collateral and unintended damage to private property resulting from a government project can result in a taking:

> It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, . . . it shall be held that if the government refrains from the absolute conversion of real property to uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private rights under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.

*Id.* at 177-78.

Indeed, "'[t]he fundamental justification for inverse condemnation liability is that the government, acting in furtherance of public objectives, is taking a calculated risk that private property may be damaged.'" *Arreola v. County of Monterey*, 99 Cal App 4th 722, 744, 122 Cal Rptr 2d 38, 55 (Cal Ct App 2002) (quoting *Yee v. Sausalito*, 141 Cal App 3d 917, 920 (1983)). The rationale is that if an entity has "made the deliberate calculated decision to proceed with a course of conduct, in spite of known risk, just compensation will be owed." *Arreola*, 122 Cal Rptr 2d at 53 (citing Arvo Van Alstyne, *Inverse Condemnation: Unintended Physical Damage*, 20 Hastings LJ 431, 489-90 (1969)). There is no basis,

therefore, for Judge Armstrong's proposed rule that would exempt certain government actions based on the agency's intended use of the condemned property.

### C. The "Loss of All Economically Viable Use" Standard Is Inapplicable to Condemnation Actions

In order to recover compensation in an ad hoc regulatory takings case, the landowner must show that a regulation deprives him or her of all economic viable use of the land. *Coast Range Conifers, LLC v. State ex rel. Oregon State Bd. of Forestry*, 339 Or 136, 146-51, 117 P3d 990 (2005). Judge Armstrong seizes upon this standard to propose that ODOT should only be required to pay compensation if its condemnation of access rights deprives the landowner of all use of the property. Pet. App. at 8-9. According to Judge Armstrong, a showing of "significantly diminished" value attributable to the taking would not warrant any compensation. *Id*. That opinion, however, conflicts with the standard applicable to access condemnations cases, which require compensation when the government eliminates or "substantially interfere[s]" with access to one's property. *Sweet v. Irrigation Canal Co.*, 198 Or 166, 201, 254 P2d 700 (1953); *see also Ail v. City of Portland*, 136 Or 654, 667, 299 P 306 (1931) (compensation is required where a public project "greatly" impaired access to private property); *Willamette Iron Works*, 26 Or at 233 (damage that is substantial, irreparable, destructive, or of a continuous nature will trigger the protections of the Takings Clause). Moreover,

it is settled law that when the government condemns less than entire tracts of land, it must pay compensation for the diminished value of the remaining property. *See Lundberg*, 312 Or at 574.

Even if this Court were to consider regulatory takings principles to assist in determining whether Alderwoods was entitled to introduce evidence of impaired value, this case would not implicate an ad hoc takings analysis. The regulatory action in this case authorized ODOT to go upon Alderwoods' easement, remove existing improvements (cut outs and driveways), and install a public sidewalk. Those actions would give rise to a physical taking analysis, which requires compensation as a matter of law. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419, 426, 435-37, 102 S Ct 3164, 73 L Ed 2d 868 (1982) (regulation directing owners to apartments to allow cable television companies to install boxes and cables on their properties constituted a physical invasion taking).

The reason why physical takings always require compensation is because the right to exclude others from entering upon one's land is universally held to be one of the most fundamental rights associated with the ownership of private property. *Loretto*, 458 US at 433 (quoting *Kaiser Aetna v. United States*, 444 US 164, 176, 100 S Ct 383, 62 L Ed 2d 332 (1979)). Indeed, the right to exclude is so essential to private property that the United States Supreme Court has held that, to the extent that the government authorizes the public to cross over an individual's land, the government destroys all of the essential rights thereto and constitutes a

categorical taking. *Loretto*, 458 US at 435.

## CONCLUSION

The public interest in improved transportation systems does not override the constitutional mandate that the state pay just compensation when it takes private property for public use, nor does that interest negate the property interest that an abutting landowner has in his or her access rights. The Armstrong opinion runs contrary to established law and would radically rewrite the State's common law system of property ownership, depriving Oregon's abutting landowners of well-settled rights and expectations. For those reasons, Amici Curiae PLF and NFIB Small Business Legal Center respectfully request that this Court reject the Armstrong opinion, reverse the lower court decisions, and remand this matter to allow Alderwoods to introduce evidence of the substantial impact that ODOT's actions had on its property.

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Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 6,424 words.

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s/ Brian T. Hodges
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## CERTIFICATE OF FILING AND SERVICE

I certify that on March 27, 2015, I filed the original of this AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER with the State Court Administrator by the eFiling system.

I further certify that on March 27, 2015, I served a copy of the AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER on the following parties by electronic service via the eFiling system, if applicable, and by the United States Postal Service, first-class mail, at the following addresses:

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