IN THE SUPREME COURT OF THE STATE OF OREGON

TYLER TURNER,

Plaintiff-Appellant,
Respondent on Review,

v.

STATE OF OREGON, through its Department of Transportation,

Defendant-Respondent,
Petitioner on Review,

and

CITY OF DEPOE BAY and LINCOLN COUNTY,

Defendants-Respondents,

and

CAROL COLIP,

Defendant-Appellant,
Respondent on Review.

CITY OF DEPOE BAY, et al.,

Cross-Plaintiffs,

v.

CAROL COLIP, et al.,

Cross-Defendants.

Marion County Circuit Court No. 10C17842

CA A151193

SC S063319

BRIEF ON THE MERITS OF PETITIONER ON REVIEW, STATE OF OREGON

Continued…

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the District Court for Marion County
Honorable THOMAS M. HART, Judge

Opinion Filed: April 15, 2015
Author of Opinion: Timothy J. Sercombe, Presiding Judge
Concurring Judges: Erika L. Hadlock, Judge, and Douglas L. Tookey, Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional & Statutory Provisions

Administrative Rules

Other Authorities

BRIEF ON THE MERITS OF PETITIONER ON REVIEW, STATE OF OREGON

INTRODUCTION

The Oregon Department of Transportation (ODOT) is charged with a duty to maintain a safe and comprehensive statewide transportation system. To fulfill that duty, ODOT has implemented a statewide process for allocating limited highway improvement funds. For safety improvements, that process prioritizes improvements to those sites determined—through accident data—to be the most dangerous.

This case involves ODOT's assertion of discretionary immunity against claims of negligence for failing to make particular improvements to a roadway site that ODOT declined, as part of that periodic and systematic statewide process, to improve. The results of that process—both the selection of sites to improve and the necessarily concomitant omission to improve other sites—represent decisions of the sort that give rise to discretionary immunity under the Oregon Tort Claims Act. For that reason, ODOT is entitled to discretionary immunity for the negligence claims at issue here.

Question Presented

The state is generally immune from liability for the consequences of discretionary policy choices. Is the state entitled to immunity for deciding not to improve a particular roadway site if it can show that—although ODOT did

not conduct a particularized study of that site—ODOT did consider the site for possible improvements as part of a periodic and systematic statewide safety review and then decided that accident data supported prioritizing improvement projects elsewhere instead?

Proposed Rule of Law

Yes. When the state implements a systematic data-driven process for identifying and selecting roadway sites for safety improvements, a decision to improve some sites necessarily reflects a simultaneous decision not to improve any other sites. That decision immunizes the state from liability for taking no action on any particular site for which data were included but which was not selected for safety improvements.

Summary of Argument

Discretionary immunity protects policy choices made by government officials, including decisions to discharge a duty of care by declining to act. ODOT asserts immunity against claims for failing to undertake certain safety improvements at a particular intersection. If ODOT considered safety improvements at that particular intersection but decided to allocate its safety improvement funds to other, more dangerous, locations, it would be entitled to immunity on the basis of that decision. Here, ODOT made just such a decision as part of its systematic budget allocation process. Although ODOT did not consider the specific improvements suggested by plaintiff, it considered the

safety of the particular intersection at issue by including its historical crash information in its data-driven budget allocation process. Through that process, it allocated safety improvement funds to the most dangerous road sites. That action amounts to a decision not to allocate funds for safety improvements at any other site encompassed in the data used, and the intersection here is such a site. That decision is the sort of decision that entitles ODOT to discretionary immunity.

Statement of Facts

The tort claims at issue in this case arose from a highway accident in which plaintiff's motorcycle collided with defendant Carol Colip's automobile. *Turner v. State ex rel. Dept. of Transp.*, 270 Or App 353, 355, 348 P3d 253 (2015). The collision occurred when plaintiff was traveling on Highway 101 and Colip turned in front of him from a county road. *Id*. Seeking damages for his injuries, plaintiff filed an action against Colip and various governmental entities including ODOT. *Id*. As against ODOT, plaintiff alleged negligent maintenance of the intersection and roads where the accident took place. *Id*. at 355, 365 n 4.

ODOT responded that it was entitled to discretionary immunity because improvements or changes to the intersection and roads at issue were considered—and ultimately not funded—in the State of Oregon Statewide Transportation Improvement Program (STIP), which includes a systematic data-

driven mechanism for prioritizing, funding, and scheduling safety improvements. *Id*. at 357, 365–66. That process is discussed in more detail below.

On summary judgment motions, the trial court agreed that ODOT was immune from liability.[1] *Id*. at 358. But the Court of Appeals reversed, observing that "the record does not show that all of the Highway 101 modifications in question were considered and rejected in the STIP process or that other available processes were used to decide to not make those changes." *Id*. at 367. That ruling is now under review in this court.

ARGUMENT

Government bodies are entitled to discretionary immunity for policy decisions. Here, ODOT established that it uses a systematic data-driven process to rank accident sites according to dangerousness and then to allocate safety improvement funds to the most dangerous locations. ODOT further established that the accident site here was not ranked as sufficiently dangerous to receive

[1] The procedural context of that discretionary immunity ruling is not entirely straightforward. Discretionary immunity was not the basis of the trial court's ruling granting summary judgment against plaintiff; rather, that ruling rested on the statute of limitations, though the state also asked for a ruling based on discretionary immunity. *Turner*, 270 Or App at 357–58. Discretionary immunity was, however, the basis of the trial court's ruling granting summary judgment on Colip's cross-claim seeking contribution from ODOT. *Id*. at 358. Thus, when the Court of Appeals reversed the trial court's statute-of-limitations ruling against plaintiff, *id*. at 363, discretionary immunity became the only basis remaining for ODOT to avoid liability for plaintiff's claims.

safety improvement funds. Those circumstances reflect a policy-level decision not to improve the accident site at issue. That decision is sufficient to immunize ODOT from plaintiff's negligence claims, which rest on alleged failures to make improvements at that site.

A. Discretionary immunity protects policy choices made by government officials, including decisions not to take action.

Discretionary immunity is an exception to the general governmental liability created by the Oregon Tort Claims Act. *Westfall v. State ex rel. Oregon Dept. of Corrections*, 355 Or 144, 156–57, 324 P3d 440 (2014). Under that law,

> [e]very public body and its officers, employees and agents acting within the scope of their employment or duties * * * are immune from liability for * * * [a]ny claim based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.

ORS 30.265(3)(c).[2]

Discretionary immunity exists to permit the executive branch to consider "'the whole spectrum of the ingredients for governmental decisions such as the availability of funds, public acceptance, order of priority, etc.'" without fear that such decisions will later be reviewed in a judicial proceeding in which a

[2] After the time relevant to this appeal, the quoted text moved to ORS 30.265(6)(c). *See* Or Laws 2011, ch 270, § 1. Although that change did not affect the substance of the quoted text, this brief uses the version applicable to the events at issue.

court or jury must ignore such considerations. *Stevenson v. State Dept. of Transp.*, 290 Or 3, 8–9, 619 P2d 247 (1980) (quoting *Smith v. Cooper*, 256 Or 485, 506, 511, 475 P2d 78 (1970)).

A "decision of a governmental official, employee, or body is entitled to discretionary immunity if a governmental person or entity made a policy choice among alternatives, with the authority to make that choice." *Westfall*, 355 Or at 157. Thus, above all else, discretionary immunity requires a *choice* or a *decision*. *Accord Miller v. Grants Pass Irr. Dist.*, 297 Or 312, 321, 686 P2d 324 (1984) (explaining that although an agency would "not be immune for wholly disregarding and declining to consider whatever duty it had under tort law," it would be immune if it discharged that duty by "weighing competing policy considerations," regardless of the outcome of that policy).

And so long as that decision satisfies the other requirements for discretionary immunity—that it reflects the adoption of a policy by a policy-maker, *see generally Westfall*, 355 Or at 157—courts will not review the wisdom of the decision. *See Garrison v. Deschutes County*, 334 Or 264, 276, 48 P3d 807 (2002) (rejecting, as "the kind of second-guessing that is defeated by immunity under ORS 30.265(3)(c)," any argument that a county "should have done something more, or something different"). The refusal to "second-guess" such discretionary decisions flows from the very reasons for maintaining discretionary immunity in the first place. Discretionary immunity "promotes

the separation of powers" by ensuring that executive officials retain independence from the judicial branch and the possibility of "courtroom questioning * * * regardless of the fact that they cannot be held personally liable." *See* Osborne M. Reynolds, Jr., *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 Geo LJ 81, 121 (1968) (cited by this court in *Stevenson v. State Dept. of Transp.*, 290 Or 3, 10 n 3, 619 P2d 247 (1980), and *Daugherty v. Oregon State Highway Commission*, 270 Or 144, 147 n 2, 526 P2d 1005 (1974)).

Under that view, officials should be permitted to formulate policy by "trial and error," and although they "should be subject to the test of the ballot box," they "should not have their every action weighed by the courts' reasonable man test." Reynolds, 57 Geo LJ at 121. Moreover, the "normal rules of liability cannot be applied easily to the unusual and gigantic tasks that few but the Government perform."[3] *Id*. at 122.

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[3] Federal courts have observed that discretionary immunity—or at least the federal version of the doctrine—"is not about fairness, it is about power," because it reflects the sovereign's reservation "to itself the right to act without liability for misjudgment and carelessness in the formulation of policy." *Molchatsky v. United States*, 713 F3d 159, 162 (2d Cir 2013) (citing *National Union Fire Insurance v. United States*, 115 F3d 1415, 1422 (9th Cir 1997); internal quotation marks and citations omitted).

But one might also argue that the doctrine is about elevating the common good over the interests of any one citizen. *Cf*. Eula Biss, *On Immunity : An Inoculation*, 47, 163 (2014) (exploring the history of

Footnote continued…

Importantly, courts must not second-guess agency policy even when that policy results in a decision not to act. Under the statute, immunity attaches both to the "performance of" a discretionary function and to the "failure to exercise or perform" such a function. ORS 30.265(3)(c). To be sure, this court has held that the state does not enjoy immunity for deciding—in the discharge of a duty of care—"not to exercise care at all." *Hughes v. Wilson*, 345 Or 491, 496 199 P3d 305 (2008). But nothing in *Hughes* prevents the state from deciding, in appropriate circumstances, that the discharge of its duty of care requires declining to act. *See id*. at 496 ("When a public body owes a duty of care, that body has discretion in choosing the means by which it carries out that duty."); *see also Garrison*, 334 Or at 276 (rejecting the argument that immunity does not attach when officials considered safety and decided that "safety measures would not be adopted, whether due to expense, inconvenience, or some other reason"). Particularly when an agency is charged with "unusual and gigantic" responsibilities, the discharge of that duty may often require declining to act on some tasks in order to allow action on other tasks. *Accord Mitchell v. United*

(…continued)
immunization from disease; discussing the relationship between "immunity," and "munity," from the Latin *munis* for service or duty; explaining how the benefits of immunity accrue not just to the immunized but also to others in a community). That is, the doctrine deprives some injured individuals of a full remedy in order to facilitate the undertaking of endeavors that benefit the many—endeavors so colossal that they would be unworkable without immunity from tort liability.

States, 225 F3d 361, 364 (3rd Cir 2000), *cert den*, 532 US 1007 (2001) (explaining, under the federal discretionary immunity doctrine, that the National Park Service's "choice to focus on a few highly dangerous portions of [a] road rather than to distribute its finite resources along the whole of [that road] is a policy choice this court should not second-guess").

B. ODOT made a policy-level decision not to make the improvements at issue here, and that decision provides immunity against claims relating to those improvements.

Under the foregoing principles, ODOT is entitled to immunity if it can point the court to a policy decision encompassing the alleged failures at the heart of plaintiff's negligence claims. And that is precisely what ODOT did here. Specifically, ODOT produced a declaration from Angela Kargel, an ODOT traffic engineer, identifying and describing the policy decisions reflected in ODOT's allocation of safety improvement funds. (App 1–3).[4]

In that declaration, Ms. Kargel explained the systematic safety ranking process that ODOT uses to select safety improvement projects based on the relative dangerousness of roadway sites:

> 3. Highway safety construction projects are selected according to high-level ODOT budgetary policy using a computerized safety ranking process known as Safety Priority

[4] In ruling on discretionary immunity, the court of appeals appears to have relied primarily on that declaration. *See Turner*, 270 Or App at 365–66 & n 6.

> Index System (SPIS), and according to a cost/benefit analysis of improvements to high accident sites.
>
> 4. ODOT prioritizes safety construction funds primarily on crash history as reflected in the SPIS safety statistics and the projected safety benefit that a project will have on that crash history. Specifically, it is ODOT policy to include the worst 5 percent SPIS-rated accident sites, as well as other high accident rated sites based on a cost/benefit analysis, in a list of potential highway safety construction improvement projects in the Statewide Transportation Improvement Program (STIP) Safety Budget.

(App 1–2 (underlining in original)).[5]

Ms. Kargel further explained that the intersection at issue here: (1) "was not listed on the top 5 percent of crash sites in the statewide SPIS records" on the date of plaintiff's accident; and (2) "was not considered a high accident site"

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[5] Although the record does not contain further details about the SPIS and STIP processes, the Court of Appeals appears to have taken judicial notice of ODOT publications explaining those processes, as available on ODOT's official webpage. *Turner*, 270 Or App at 365 n 5 (citing http://www.oregon.gov/ODOT/TD/STIP/Pages/STIPDocs.aspx).

ODOT requests that this court similarly take judicial notice of officially published STIP documentation. *Cf. State v. Tourtillott*, 289 Or 845, 892, 618 P2d 423 (1980), *cert den*, 451 US 972 (1981) (examining the Oregon Administrative Rules in search of an "administrative program or policy of which [this court] might take judicial notice"). In particular, ODOT requests that this court take judicial notice of the STIP Users' Guide, which is available at the webpage cited by the Court of Appeals and accessible directly at http://www.oregon.gov/ODOT/TD/STIP/documents/stipusers.pdf).

The STIP Users' Guide explains that, "[e]very year, each 0.10 mile segment of state highway that has had either one fatal crash or three non-fatal crashes in the last three years receives a SPIS score (value 0-100)." (STIP Users' Guide at 6-148; *see also* App 4).

before the date of plaintiff's accident. (App 2). More specifically, "only two accidents were reported for the [intersection at issue] in the five years before [a 2005 study]." (App 3).

Thus, the record reveals at least four policy-motivated decisions not to undertake safety improvement projects at the intersection at issue. First is the decision to allocate safety improvement funding to certain road sites rather than to all sites. Second is the decision to select sites for improvement projects based on relative dangerousness. Third is the decision to assess dangerousness using crash data and the SPIS metric. And fourth is the ultimate decision resulting from those predicate decisions—the decision (repeated with each budget) to undertake only certain projects and not to undertake other projects, such as the safety improvements that plaintiff alleges should have been made to the intersection at issue. Each of those decisions reflects precisely the type of policy choice which the doctrine of discretionary immunity was created to protect.

Nor are those sorts of decisions unique to ODOT. To the contrary, they are similar to the sorts of decisions commonly made by other agencies with similar supervisory responsibilities. For example, the Department of Administrative Services relies on periodically updated facility inventory data when making "decisions on capital projects, space needs, and maintenance of the buildings." OAR 125-125-0150(6). And the Occupational Safety and

Health Division prioritizes its enforcement activities to "focus * * * on places of employment reasonably believed to be the most unsafe." OAR 437-001-0055. Such agencies—if not all governmental bodies, *see, e.g.*, ORS 1.176(1) (discussing process for prioritizing capital improvements to county courthouses)—cannot function without some way of allocating necessarily finite resources to their necessarily infinite obligations.

The policy choice involved in such prioritization and allocation decisions stands in contrast to the sort of non-policy discretion that does not give rise to immunity. For example, no policy choice is typically involved in a decision to "make a safety fence two feet rather than three feet high" or a decision of how steep to make the sides of a highway cut. *See Stevenson v. State Dept. of Transp.*, 290 Or 3, 10, 11, 619 P2d 247 (1980). Because those decisions are the product of weighing *technical* constraints, they do not reflect the exercise of policy discretion, and they therefore do not give rise to immunity. *See id*. at 9–11. But decisions of priority-setting and resource-allocating weigh *resource* constraints and therefore do reflect the exercise of policy discretion.

If priority-setting and resource-allocating decisions reflect policy choices, then as long as those decisions can fairly be said to have considered and rejected the allocation of resources to all potential needs, the refusal to meet or prioritize a particular need can fairly be said to be the result of a policy choice. And a global process that turns on data for all potential needs is one way to

ensure consideration of all those needs, even without more particularized consideration of each potential need. Because ODOT's safety-ranking process is just such a process, ODOT is entitled to immunity for declining to meet safety needs not selected for resource allocation under that process.

Put more simply, a global and non-particularized decision-making process obviates the need for more particular consideration of any specific need. Indeed, with respect to federal agencies charged with broad supervisory responsibilities likes those of ODOT, federal courts have held that no particularized decision-making process is necessary for immunity to attach under the discretionary immunity provision contained in the Federal Tort Claims Act. *See* 28 USC § 2680(a).[6]

For example, in *Merando v. United States*, 517 F3d 160, 162, 165 (3rd Cir 2008), the plaintiff brought a negligence claim against the National Park Service for failing "to find and remove" a hazardous tree that fell on a vehicle

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[6] That statute provides immunity against

> [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or *based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused*.

28 USC § 2680(a) (emphasis added).

in which his family had been riding. The Park Service, however, claimed discretionary immunity on account of an unwritten plan for visual inspections of trees—to be conducted on foot in high-traffic areas and by drive-by "windshield inspections" in other areas. *Id*. at 168, 170. Although the plan imposed no particular route or schedule for those windshield inspections, *id*. at 170, the Third Circuit concluded that such a decision-making process gave rise to immunity:

> [B]ecause of the Park Service's decision to implement "windshield inspections" in low usage areas of the Park, Park Service personnel did not find and remove the tree. The discretionary function exception immunizes the Government from a lawsuit based on these circumstances.

Id. at 173. In reaching that conclusion, the Third Circuit was not troubled by the lack of particularized consideration of every tree, explaining that the choice "to use 'windshield inspections' in low usage areas of the Park was a discretionary decision, driven by limited resources, not to individually inspect every potentially hazardous tree in the Park, even if that meant that some hazards would remain unidentified." *Id*. at 173–74.

And *Merando* relied on the reasoning from a case in which the United States Supreme Court held, on claims that the Federal Aviation Administration (FAA) was negligent in certifying the safety of certain airplanes, that the FAA was entitled to immunity based on a "system of compliance review in which it would 'spot-check' aircraft manufacturers' own inspections and tests to

establish that an aircraft design conformed to safety regulations." *Id*. at 171 (discussing *United States v. Varig Airlines*, 467 US 797, 799–803, 104 S Ct 2755 (1984)). Because the FAA had "determined that a program of spot-checking best accommodates the goal of air transportation safety and the reality of finite agency resources," the Court would not "second-guess" that decision. *Merando*, 517 F3d at 171 (internal quotation marks omitted).

Even if particularized consideration of all potential options might, in some circumstances, be required before immunity attaches, that level of specificity is unnecessary in the circumstances of this case. First, ODOT—like the Park Service in *Merando*—made a policy decision *not* to perform a particularized assessment of all potential needs, having concluded that a data-driven approach will better allow it to fulfill its obligations. The immunity that attaches to *that* particularized decision follows on to the consequences of that decision—including the omission of particularized assessments. *See Westfall*, 355 Or at 161 ("Once a discretionary choice has been made, the immunity follows the choice.").

Moreover, the choice to use data-driven decision must be permissible when an agency is charged with responsibilities as unusual and gigantic as those assigned to ODOT. Otherwise, ODOT will need to catalogue and consider all potential roadway defects, leaving few—if any—resources available for actually fixing and improving the safety of Oregon's highways. If

immunity attaches only upon particularized assessment of every potential need, then any agency with statewide supervisory obligations will be similarly paralyzed. Such a result is inconsistent with the purposes of discretionary immunity, which is intended to allow government agencies to implement policy decisions—especially policy decisions as routine as allocating budgets and setting priorities—without incurring tort liability for the consequences of those decisions.

Indeed, requiring a particularized decision is particularly illogical when, as here, the claims at issue "pertain to the continuation of or failure to change [certain roadway] conditions, and not to negligence in the original design" of the intersection. *Turner*, 270 Or App at 365 n 4 (explaining that ODOT is generally immune for the design of the intersection, citing *Smith v. Cooper*, 256 Or 485, 511, 475 P2d 78 (1970)). That is, the claims here rest not on any action by ODOT, but rather on an omission. Although a particularized assessment makes sense when ODOT is taking action, it makes little sense in the absence of action. ODOT should be able to claim immunity without having to repeatedly make particularized decisions *not* to change each roadway site within its authority.

To be clear, ODOT does not claim that any blanket immunity arises from its data-driven process for allocating safety improvement funds. The use of that process would not, by itself, immunize ODOT against claims of negligence in

the ministerial implementation of that process. Thus, ODOT might not be immune if it mistakenly omitted to improve an intersection because it miscalculated the SPIS score or otherwise incorrectly ranked the intersection's dangerousness. And the SPIS process could not, by itself, immunize ODOT from any negligence in performing improvements at the sites selected through that process. Thus, for example, if ODOT selected a site as needing a new traffic light and its workers installed that light negligently, ODOT likely could not claim immunity from any resulting injury.

Similarly, the SPIS process would not, by itself, immunize ODOT from liability for injuries or dangers not contemplated in the SPIS safety rankings. For example, because nothing in the SPIS crash data contemplates the danger from a deteriorating bridge, ODOT could not rely on the SPIS process to claim immunity from negligent maintenance claims arising from a bridge collapse.

But where, as here, a claim is premised on a failure to perform safety improvements, the SPIS process represents a policy decision sufficient to immunize ODOT.

C. ODOT's immunity in this case is not inconsistent with *Vokoun v. City of Lake Oswego*, 335 Or 19, 56 P3d 396 (2002).

As explained above, ODOT's process for allocating its safety improvement budget reflects a decision not to undertake improvements at the

intersection in question, and that decision entitles it to immunity from plaintiff's claims that ODOT should have made particular improvements at that location.

Moreover, that decision distinguishes this case from *Vokoun v. City of Lake Oswego*, 335 Or 19, 56 P3d 396 (2002), which the Court of Appeals mistakenly viewed as foreclosing ODOT's immunity claim in this case. *Vokoun* involved claims of negligence against a city for failing to inspect a storm drain outfall pipe and failing to discover and remedy erosion that led to the plaintiffs' injuries. 335 Or at 22–23. The plaintiffs presented evidence that the city could have prevented their injury by implementing remedial measures that would have cost more than $25,000. *Id.* at 24. The record also revealed that although the city used five-year plans to address capital improvement projects costing more than $25,000, the "city *did not consider* whether to place improvement of the storm drain and drainage course at issue * * * in the capital improvement plan." *Id.* at 22 (emphasis added). On that record, the Court of Appeals had held that the city was entitled to discretionary immunity as a result of its "choice about which capital improvement projects exceeding $25,000 to undertake, which did not include inspection, maintenance, or repair of the drainage outfall at issue in this case." *Id.* at 32. But this court reversed, concluding that the record did not establish that the capital improvements plan entitled the city to immunity. *Id.* at 33 ("*On this record*, we conclude that the fact that the city had adopted a capital improvements plan that did not include

purchasing and improving the drainage course does not establish the city's immunity from plaintiffs' negligence claim." (emphasis added)).

In this case—unlike in *Vokoun*—the record supports concluding that a global decision encompassed consideration and rejection of the improvements at issue. As noted above, the record in *Vokoun* specifically revealed that the city had not considered improving the storm drain when adopting its capital improvements plan. *Vokoun*, 335 Or at 22. Here, by contrast, ODOT established that, in allocating its safety improvement budget, it used crash data for all state roads. In that way, ODOT established that its process included consideration of safety improvements at the intersection at issue.

And although the Court of Appeals is technically correct that "the record does not show that *all of the Highway 101 modifications in question were considered and rejected*" in that process, *Turner*, 270 Or App at 367 (emphasis added), such a specific requirement is inconsistent with the purposes of discretionary immunity. Once ODOT decided, as a policy matter, that its safety improvement funds were better spent elsewhere, it was not required to senselessly consider and separately reject all possible improvements at the intersection in question. Indeed, the trouble in *Vokoun* was not that the city had, in devising its capital improvement plan, failed to consider the *specific* improvements advocated by the plaintiffs; rather, the trouble was that city had failed to consider whether its capital improvement plan should include *any*

improvement of the problematic drain. *Compare Vokoun*, 335 Or at 22 (explaining that the city "did not consider whether to place improvement of the storm drain * * * in the capital improvement plan"), *with id*. at 24 (explaining the particular improvements advocated by the plaintiffs).

Finally, ODOT is entitled to immunity notwithstanding the potential availability of other mechanisms for funding improvements to the intersection at issue. *See Turner*, 270 Or App at 367–68 ("Apart from the STIP, some highway safety construction projects that are immediately necessary can be considered and funded through ODOT's 'Quick Fix' program."). Again, *Vokoun* is not to the contrary. In *Vokoun*, the city had a policy permitting the adoption of a supplemental budget to pay for repairs that were not included in the five-year capital improvement plan but which cost more than $25,000. 335 Or at 33. In rejecting discretionary immunity, this court explained that the city presented no evidence that it had considered improvements to the storm drain via that supplemental budget procedure. *Id*. But the need to look to that process arose because the record was clear that the city had not considered improvements to the storm drain when adopting its normal capital improvements plan; in that circumstance, the question was whether the capital improvements plan barred improvements not previously considered, and the presence of a supplemental procedure served to answer that question in the negative. *See id*. at 33. Put differently, the analysis in *Vokoun* reflects a search

for a policy decision that considered the improvements at issue; after not finding one in the adoption of the capital improvement plan, this court looked elsewhere in supplemental procedures. But *Vokoun* is silent as to what result would have obtained if the record revealed an applicable policy decision in the adoption of the capital improvements plan.

In short, ODOT is entitled to immunity if it can identify *any* decision that included consideration of safety improvements to the intersection at issue. Having established such a decision, as explained above, ODOT cannot lose its resulting immunity simply because it has also—in an exercise of responsible stewardship—set aside additional funding for emergency work. Any rule to the contrary would encourage irresponsible stewardship—that is, allocating all funds at the beginning of each budget cycle, leaving no supplemental funds that a court could rely on to deprive ODOT of immunity but also leaving ODOT unable to respond to emergencies. This court should be wary of any rule that privileges irresponsible stewardship over responsible stewardship.

CONCLUSION

This court should reverse the decision of the Court of Appeals with respect to ODOT and affirm the trial court's grant of summary judgment in favor of ODOT.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on October 5, 2015, I directed the original Brief on the Merits of Petitioner on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and served upon Thomas M Christ, attorney for appellant Carol Colip, Janet M. Schroer and Gerald L. Warren, attorneys for respondents City of Depoe Bay/Lincoln County, and W Eugene Hallman, attorney for appellant Tyler Turner, by using the electronic filing system.

I further certify that on October 5, 2015 I directed the Brief on the Merits of Petitioner on Review, State of Oregon to be served upon William Keith Dozier and John M. Coletti, attorneys for appellant Tyler Turner, by mailing two copies, with postage prepaid, in an envelope addressed to:

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

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 5,071 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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