No. S069004

IN THE SUPREME COURT OF THE STATE OF OREGON

WILLIAM B. WALTON, an individual; JAMES JEFFERSON WALTON, JR., an individual; and VICTORIA K. WALTON, an individual, Petitioners on Review, v. NESKOWIN REGIONAL SANITARY AUTHORITY, Respondent on Review, and EVELYN A. HARRIS, Trustee of the Harris Living Trust; et al., Defendants.	Tillamook County Circuit Court No. 17CV10996 CA16835 N010273

PACIFIC LEGAL FOUNDATION'S *AMICUS CURIAE* SUBSTANTIVE BRIEF IN SUPPORT OF PETITION FOR REVIEW

Amicus Curiae brief in support of Petition for Review for review of the decision of the Court of Appeals on appeal from a limited judgment of the Circuit Court for Tillamook County, Honorable Jonathan R. Hill, Judge.

Opinion Filed: September 1, 2021

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized for the purpose of litigating matters affecting the public interest in private property rights, individual liberty, and economic freedom. Founded over 45 years ago, PLF is the most experienced legal organization of its kind. PLF attorneys have participated as lead counsel in numerous landmark United States Supreme Court cases generally in defense of the right to make reasonable use of property and the corollary right to obtain just compensation when that right is infringed. *See, e.g.*, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021); *Pakdel v. City and Cty. of San Francisco*, 141 S. Ct. 2226 (2021); *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019); *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). PLF also routinely participates in important property rights cases as amicus curiae. *See, e.g.*, *Horne v. Dep't of Agric.*, 576 U.S. 350 (2015); *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012). Additionally, PLF attorneys have extensive experience with the question here, having advocated in takings cases in which the statute of limitations was at issue. *See, e.g.*, *DW Aina Le'a Dev., LLC v. State of Hawai'i Land Use Comm'n*, 477 P.3d 836 (Haw. 2020) (establishing the statute of limitations governing state law takings

claims); *Coral Constr., Inc. v. City and Cty. of San Francisco*, 116 Cal. App. 4th 6 (2004) (stating the statute of limitations for a facial challenge to an ordinance accrues when the ordinance is adopted); *Wilkins v. United States*, 13 F.4th 791 (9th Cir. 2021) (finding the Quiet Title Act's statute of limitations was jurisdictional).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Waltons did not delay asserting their property rights against the uncompensated occupation of their land by the Neskowin Regional Sanitary Authority (the Authority). They instituted an inverse condemnation action in 2017, promptly after the Authority disavowed the free hook-up agreement upon which the Waltons' consent to the uncompensated installation of its sewer line was conditioned nearly two decades earlier. After repudiating the agreement, the Authority requested the full hook-up amount and maintained their sewer line on the Waltons' property. Until these actions, the Waltons' alleged that the Authority had never done anything in contravention of their property rights.

But instead of concluding that the statute of limitations governing their physical takings claim was triggered when the Authority's existing occupation of their property became contrary to the Waltons' rights, the Court of Appeals adopted a categorical rule that starts the statute of limitations too early: the clock always begins ticking when the occupation begins, even when that occupation is alleged to be permissive, and only later becomes adverse. As a result, the Court of Appeals

concluded that the Waltons must have filed their takings claim within six years of the Authority's installation of the sewer line back in the early 1990s, even though the actions claimed to be the taking—the Authority disavowing the agreement for a free sewer hook-up and denying any obligation to provide compensation—did not occur until much later.

This brief makes two main points why this Court should accept the Waltons' Petition for Review and reject the Court of Appeals' analysis:

1. A physical takings claim accrues—and the statute of limitations only begins to run—when a government occupation or invasion of private property becomes adverse to the owner's rights. Here, the Waltons' complaint alleged that the Authority disavowed their free hook-up agreement in 2014, making that the date of claim accrual relevant for the statute of limitations.

2. Courts must exercise great care before concluding that the self-executing right to just compensation may be lost merely by the passage of time.

ARGUMENT

I. A Claim for a Physical Occupation Taking Accrues When the Occupation Becomes Adverse to the Owner

A. Physical Occupation Takings

The takings clauses of the U.S. and Oregon Constitutions require just compensation when private property is taken for a public use. U.S. Const. amend. V; Or. Const. art. I, § 18. An exercise of eminent domain—in which the government

seizes property and also recognizes its obligation to provide just compensation—is not the only situation which this provision governs. A court may compel the government to provide compensation (1) when it causes a temporary invasion or permanent occupation of property; *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 322 (2002) (finding an uncompensated physical taking violates the Constitution regardless of the circumstances); (2) when it restricts the use of property by regulation so severely that it has, from the owner's perspective, the same effect as eminent domain; *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (regulation that "goes too far" in affecting use and value of property is a taking); and (3) when it exacts property or money in return for a land-use permit. *Koontz*, 570 U.S. at 613–15 (affirming the proposition that landowners are entitled to just compensation when government demanded owner pay money in exchange for a permit). To be clear, however: in a takings analysis, the unconstitutional act isn't necessarily the occupation or taking itself, but the taking coupled with the government's failure to provide just compensation. *Cedar Point Nursery*, 141 S. Ct. at 2071 ("When the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation."); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536–37 (2005) ("As its text makes plain, the Takings Clause 'does not prohibit the taking of private property, but instead places a condition on the exercise of that power.' In

other words, it 'is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.'") (internal citation omitted; emphasis in original).

Physical occupation or invasion takings claims arise from the idea that physically invading private property prevents the owner from using it in another capacity, resulting in a *de facto* taking. *See Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 181 (1871) ("[I]t remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectively destroy or impair its usefulness, it is a taking, within the meaning of the Constitution[.]"); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) ("We affirm the traditional rule that a permanent physical occupation of property is a taking."); *Cedar Point Nursery*, 141 S. Ct. at 2074–80 (any invasion of property is presumptively a taking requiring compensation). Consequently, whenever the government physically occupies or invades property that is not its own, whether that occupation is temporary or permanent, the government effects a *per se*, categorical taking requiring just compensation. *Cedar Point Nursery*, 141 S. Ct. at 2074 ("The upshot of this line of precedent is that government-authorized invasions of

property—whether by plane, boat, cable, or beachcomber—are physical takings requiring just compensation.").

B. Where a Physical Occupation Is Originally Permissive But Is Later Revealed to Be Contrary to the Owner's Rights, the Statute of Limitations Does Not Begin to Run at the Time of the Initial Occupation

Statutes of limitations define the time within which a claim must be brought, upon pain of losing it forever. *See Kambury v. DaimlerChrysler Corp.*, 185 Or. App. 635, 639 n.1, 60 P.3d 1103, 1105 n.1 (2003) ("The statute of limitations defines the period within which a [civil action] may be brought[.]"). Generally, a statute of limitations begins to run when a cause of action accrues. *Duyck v. Tualatin Valley Irrigation Dist.*, 304 Or. 151, 161, 742 P.2d 1176, 1181 (1987). A "cause of action accrues when the party owning it *has a right to sue on it*." *Id.* (emphasis added). This holding is key because in the physical takings context, the "right to sue" occurs when an individual's property has been occupied or invaded contrary to the owner's private property rights, *and* the government has not provided or committed to provide, just compensation. *Knick*, 139 S. Ct. at 2170 ("We have long recognized that property owners may bring Fifth Amendment claims against the Federal Government as soon as their property has been taken. . . . And we have explained that 'the act of taking' is the 'event which gives rise to the claim for compensation.'"); *Boling v. United States*, 220 F.3d 1365, 1370 (Fed. Cir. 2000) ("In general, a takings claim accrues when 'all events which fix the government's alleged

liability have occurred and the plaintiff was or should have been aware of their existence.'") (internal citation omitted). Obviously, a property owner has no "right to sue on" a government invasion or occupation if it is permissive. *See Duyck*, 304 Or. at 161, 742 P.2d at 1181.

The facts are such that, in most cases, the government occupation and the right to sue for a taking occur at or near the same time. *See, e.g.*, *Foster Group, Inc. v. City of Elgin*, 264 Or. App. 424, 442, 332 P.3d 354, 364 (2014) ("[T]he statute of limitations on plaintiff's takings claim . . . began to run when that physical occupation began."). But this rule cannot be applied to every circumstance, and in physical occupation takings cases, great care must be taken to focus on the operative action: it is not the invasion alone that accrues the inverse condemnation claim, it is a government invasion *contrary to the owner's private property rights*. In *Foster*, for example, the court was tasked with determining whether it was the city council's affirmative decision to build a road or the physical invasion of the road itself, separated by over a year in time, that began the six-year statute of limitations. *Id.* The court concluded, in this limited case, that it was the physical invasion itself that began the time, because any other holding would result in the plaintiff potentially having a new takings claim based on a different government action. *Id.* ("The city presents no support for its contrary view that a taking claim based on physical occupation accrues before the actual physical occupation. It is true, as the city points

out, that property owners may be able to fashion takings claims even if the government does not physically occupy their property . . . But that observation is beside the point. It does not follow that, where plaintiff alleged a takings claim based on physical occupation, the statute of limitations began to run at the point when plaintiff *could* have fashioned a takings claim based on a *different* government action that requires *different* evidence of loss. To the contrary, the statute of limitations on plaintiff's takings claim, based on the city's physical occupation of property, began to run when that physical occupation began.") (emphasis in original). A physical occupation of private property is not contrary to the owner's rights if the occupation is permissive, or if the government acknowledges its obligation to provide compensation. *Kirby Forest Indus., Inc. v. United* States, 467 U.S. 1, 10–19 (1984).

Underlying this distinction is the Supreme Court's repeated reminders that it is not unconstitutional for the government to occupy property with the owner's consent, or to take property, or even to physically occupy it. *See, e.g.*, *id.* (government may simply seize property). Instead, the unconstitutionality occurs upon *nonpermissive* invasions or occupations, or upon the government's refusal to provide compensation. In short, *takings* are not unconstitutional, only *takings without compensation*. *See, e.g.*, *Knick*, 139 S. Ct. at 2167 ("A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it.").

In contrast to the usual situation, the Waltons allege that the Authority's invasion and occupation of their property with the sewer line was not initially adverse to the Waltons' interests, but was accomplished with their consent conditioned on the Authority agreeing to allow them to connect to the sewer line without charge if, in the future, they were ever required to connect to the Authority's line. Consequently, the presence of the sewer line on the Walton property only became adverse to their rights later, when the Authority made clear it would not recognize the free hook-up agreement and that it would not provide compensation.

The Court of Appeals' categorical rule has resulted in an absurdity: the only timely physical takings claim the Waltons could have asserted must have been filed at a time when they believed the Authority's sewer line was on their property with their permission. They obviously did not know at that time that, decades later, the Authority would assert that the free hook-up agreement never existed. The Court of Appeals' rule would require the Waltons to have brought their physical invasion takings claim in the early 2000's, long before they even sought to connect to the Authority's sewer line.

II. This Court Should Exercise Great Care Before Recognizing That the Self-Executing Right to Compensation May Be Lost Merely by the Passage of Time

There is no "expiration on the Takings Clause." *Palazzolo*, 533 U.S. at 627. After all, an unconstitutional government action—in most takings, the failure to

provide just compensation—does not become constitutional by the mere passage of time. *Id*. ("Future generations, too, have a right to challenge unreasonable limitations on the use and value of land."). Indeed, the takings clauses in the U.S. and Oregon Constitutions are among the few instances where the constitutional text not only sets out the limitations on government's power but also specifies the remedy: just compensation. *See First English Evangelical Lutheran Church of Glendale v. Los Angeles Cty.*, 482 U.S. 304, 316 n.9 (1987) ("[I]t is the Constitution that dictates the remedy for interference with property rights amounting to a taking."); *Jacobs v. United States*, 290 U.S. 13, 16 (1933) ("The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution."). Consequently, any restrictions on that self-executing right must be viewed through an extraordinarily careful lens. *First English*, 482 U.S. at 2386 (just compensation requirement is "self-executing" and needs no further statutory authorization). This is especially critical when applying statutes of limitations because the consequence of not instituting a claim within the limitations period is severe—a "self-executing" constitutional claim is forever lost. *Federal Recovery of Washington, Inc. v. Wingfield*, 162 Or. App. 150, 158–59, 986 P.2d 67, 72 (1999) ("[B]ecause plaintiff's only claim was barred by the statute of limitations, plaintiff was not entitled to . . . relief.").

Thus, the question at bar may be viewed in several ways, none of which support the Court of Appeals' categorical rule. All of them get to the same conclusion: a takings or inverse condemnation claim based on a physical invasion or occupation does not accrue until the invasion or occupation is or becomes adverse to the owner's property rights.

1. Just compensation claims might not be subject to *any* statutory limits: separation of powers prohibits the legislature from limiting its own liability for the self-executing right to compensation. *See Jacobs*, 290 U.S. at 17 (the right to just compensation when property is taken is a right that cannot "be taken away by statute *or be qualified*" by the legislature) (emphasis added); *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 327 (1893) (Congress cannot both determine to take property and decide how much compensation is provided). Constitutional wrongs do not become right by the mere passage of time. The amount of compensation might be limited to that which is proven to occur during the statute of limitations window and cannot reach back indefinitely, but liability and the cause of action itself cannot be extinguished if the government occupation continues.

2. Physical occupations or invasions might also be viewed as "continuing violations" that accrue anew each day. *See, e.g.*, *Kerr v. City of South Bend*, 48 N.E.3d 348, 355 (Ind. Ct. App. 2015) (harm in a physical invasion inverse condemnation claim is "continual," and "as such trigger new limitations periods each

time they damage or interfere with the use and enjoyment of his property"). With no time expiration on government's duty to provide compensation for a taking, if there is a taking or damaging without contemporaneous compensation, the violation of the Constitution continues until compensation is provided or the invasion is abated.

3. When the government's affirmative conduct occurs *after* an initial invasion of property, the later conduct may be viewed as a new "affirmative, positive, aggressive act" that accrues a new inverse condemnation claim. *See, e.g.*, *Rav v. City of Rock Hill*, 862 S.E.2d 259, 264–65 (S.C. 2021) (concluding that the statute of limitations for a takings claim may be reinvigorated by a government's additional affirmative act after the initial limitation period has expired).

4. Adverse effects on property that are not the result of a one-time government action, but that occur over time, delay the accrual date of the takings claim until the effects "stabilize." *United States v. Dickinson*, 331 U.S. 745, 749 (1947); *Boling*, 220 F.3d at 1370–71. For example, in intermittent flooding cases—where the physical occupation occurs slowly over time—courts conclude that the accrual of the physical takings claim does not occur until "the situation had 'stabilized' such that the 'consequences of the inundation have so manifested themselves that a final account may be struck.'" *Boling*, 220 F.3d at 1370 (internal citation omitted). Stabilization occurs only when "it becomes clear that the gradual process set into motion by the government has effected a permanent taking, *not* when

the process has ceased or when the entire extent of the damage is determined." *Id.* at 1370-71 (emphasis added). And although this analysis is usually reserved for government occupations that occur over time, the reasoning is equally applicable where an invasion is alleged to be initially permissive, but only later becomes adverse to the owner's interests. The two-decade gap between the Authority's instillation of the sewer line and its disclaiming the Waltons' no-charge connection is akin to the slow continuous physical occupation the Federal Circuit depicted in *Boling* and *Dickinson* as the Walton Family was not aware a takings claim existed until their request was denied. *Id.* ("[T]he key date for accrual purposes is the date on which the plaintiff's land has been clearly and permanently taken . . . when it is uncertain the gradual process will result in a permanent taking, the plaintiff need not sue, but once it is clear that the process has resulted in a permanent taking and the extent of the damage is reasonably foreseeable, the claim accrues and the statute of limitations begins to run.").[1]

5. Finally, an inverse condemnation claim may be viewed as the "mirror image" of a straight condemnation—an affirmative exercise of eminent domain power—which is not subject to any statutes of limitations or time limits. It is the exercise of a sovereign power to which nearly all private property is subject, and the

[1] Upon that denial, the Walton Family timely brought their takings claim. *See Suess Builders Co. v. City of Beaverton*, 294 Or. 254, 264–68, 656 P.2d 306, 312–15 (1982) (finding a six-year statute of limitations applies to takings claims in Oregon).

government's ability to take property is generally not tied by time: it may choose if and most importantly when it institutes a condemnation lawsuit. It may choose to seize the property immediately. *See, e.g.*, Or. Rev. Stat. §§ 35.265, 35.352 (2021). Or it may choose to seize property only after determining the amount of compensation. *See, e.g.*, Or. Rev. Stat. §§ 35.245, 35.346 (2021). If the government may exercise its power to condemn property free of time constraints, a similar rule for inverse condemnation claims would be symmetrical.

Despite their variation, each of these approaches revolves around a core idea: applying a statute of limitations to a takings claim must be accomplished only after careful analysis and consideration of the interests at stake. Property owners face not only the loss of what is likely their largest asset but also the loss of the cornerstone of liberty. *Cedar Point Nursery*, 141 S. Ct. at 2071 ("The Founders recognized that the protection of private property is indispensable to the promotion of individual freedom. As John Adams tersely put it, '[p]roperty must be secured, or liberty cannot exist.'") (internal citation omitted); *Resource Invs., Inc. v. United States*, 85 Fed. Cl. 447, 470 n.31 (2009) ("[T]he right of property is the guardian of every other rights, and to deprive a people of this, is in fact to deprive them of their liberty.") (citation omitted). The categorical rule applied by the Court of Appeals eliminated the Waltons' ability to obtain relief for the Authority's physical invasion of their

property, without the required analysis of the interests at stake. This Court should review this important issue.

CONCLUSION

This Court should grant the Petition for Review and conclude that the statute of limitations governing a physical takings claim does not begin until the government's invasion or occupation of private property becomes adverse to the owner's rights or the government has failed to provide compensation.

DATED: November 15, 2021.

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND FONT SIZE REQUIREMENTS

I certify that this brief complies with the word-count limitation in ORAP 5.05, which word count is 3,595 words.

I 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.

DATED this 15th day of November, 2021.

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COMBINED CERTIFICATE OF FILING AND SERVICE

I hereby certify that on November 17, 2021, I electronically filed the foregoing document with the Supreme Court Administrator through electronic means via the Supreme Court's eFiling system.

I further certify that service of the foregoing will be accomplished upon the following participants in this case, who are registered users of the Supreme Courts' eFiling system, by the Supreme Courts' eFiling system at the participants' email address as recorded this date in the Supreme Courts' eFiling system:

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Subject: Walton AC Motion & Brief (4-1721)
Attachments: PLF Motion to File Brief Amicus Curiae 11-17-21.pdf; PLF Brief Amicus Curiae 11-17-21.pdf; OR SUPREME NOTICE TO RESUBMIT.pdf

We were directed to resubmit and edit the certificate of service to include all recipients and refile in OR Supreme case number. I'm also mailing service copies to attorneys not in the eFiling system. Please replace the ones sent yesterday with these updated versions filed today. Thanks!

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