No. 90120-1

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

10 NORTH WASHINGTON AVENUE, LLC,
a Washington limited liability company,

Petitioner,

v.

CITY OF RICHLAND, a municipal corporation,

Respondent.

On Petition for Review from Division I of the
Washington State Court of Appeals

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR REVIEW

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ISSUE ADDRESSED BY AMICUS

This Court has held that decisions of the U.S. Supreme Court interpreting the Takings Clause of the U.S. Constitution "set[] a minimum floor of protection, below which state law may not go." *Orion Corp. v. State*, 109 Wn.2d 621, 652, 747 P.2d 1062 (1987). Last term, the U.S. Supreme Court held that a temporary interference with private property may give rise to a compensable taking under the Fifth Amendment to the U.S. Constitution. *Arkansas Game & Fish Comm'n v. United States*, __ U.S. __, 133 S. Ct. 511, 519, 184 L. Ed. 2d 417 (2012). Washington courts, however, adhere to a contrary rule that an interference with private property must be "permanent or recurring" in order to effect a taking under Article I, Section 16, of the Washington State Constitution. Applying that rule, Division I of the Court of Appeals dismissed 10 North Washington Avenue LLC's (NWA's) inverse condemnation claim as a matter of law and without regard to the claim's merits. Opinion at 9-10. The issue presented is:

Whether a temporary interference with private property may give rise to a compensable taking under the Takings Clause of the Washington State Constitution.

REASONS WHY REVIEW SHOULD BE GRANTED

NWA's petition for review raises an important issue concerning the protections provided by the Takings Clause of the Washington State Constitution. Wash. Const. art. I, § 16. Specifically, the petition asks whether a government decision that results in a temporary interference with one's rights in private property should be categorically excluded from the protections of the Takings Clause. It should not. The U.S. Supreme Court recently confirmed that "a taking need not be permanent to be compensable." *Arkansas Game & Fish*, 133 S. Ct. at 519. And since "the federal constitution sets a minimum floor of protection, below which state law may not go," *Orion Corp*, 109 Wn.2d at 652, a rule that is contrary to takings decisions from the U.S. Supreme Court creates unacceptable conflicts between state and federal constitutional law, as well as conflicts within state law.

This Court should grant NWA's petition to resolve those conflicts by reaffirming that the Takings Clause obligates the government to pay just compensation when it appropriates an interest in private property, regardless of duration. *See First English Evangelical Lutheran Church v. Cnty. of L.A.*, 482 U.S. 304, 318, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987) (" 'temporary' regulatory takings . . . are not different in kind from permanent takings

. . . ."); *see also Arkansas Game & Fish*, 133 S. Ct. at 519 (Once a taking has been established, " 'no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.' ") (quoting *First English*, 482 U.S. at 321).

I

THE LOWER COURT'S TEMPORARY TAKINGS RULE CONFLICTS WITH U.S. SUPREME COURT PRECEDENT AND SHOULD BE OVERTURNED

The Court of Appeals affirmed the trial court's dismissal of NWA's takings claim under a court-created rule that a government interference with private property must be perpetual in duration to give rise to a compensable taking:

> A "taking" occurs when government invades or interferes with the use and enjoyment of property, and its market value declines as a result . . . . "*There must be an invasion [or interference] that is permanent or recurring*, or an invasion [or interference] that involves 'a chronic and unreasonable pattern of behavior by the government.' " The invasion or interference is "permanent if the property may not be restored to its original condition."
>
> . . . Even if the City interfered with NWA's use of its property when it terminated [the] temporary service agreement, this interference is not permanent or recurring.

Opinion at 9-10 (emphasis added) (citing *Gaines v. Pierce Cnty.*, 66 Wn.

App. 715, 725, 834 P.2d 631 (1992); *Moitke v. Spokane*, 101 Wn.2d 307, 334, 678 P.2d 803 (1984)).

The rule is an artifact of the courts' early attempts to distinguish takings from torts. *See Wong Kee Jun v. City of Seattle*, 143 Wash. 479, 480-81, 255 P. 645 (1927) (recognizing that Washington courts struggled to devise a workable and meaningful method to distinguish between government torts and takings). The "permanent or recurring" test sought to use duration as a touchstone to separate constitutional takings, requiring the payment of just compensation, from tortious activity like trespass. *See, e.g.*, *Phillips v. King Cnty.*, 87 Wn. App. 468, 490, 943 P.2d 306 (1997) ("A constitutional taking requires a permanent or recurring invasion, whereas a claim of trespass does not."); *Olson v. King Cnty.*, 71 Wn.2d 279, 284, 428 P.2d 562 (1967) ("Every trespass upon, or tortious damaging of real property does not become a constitutional taking or damaging simply because the trespasser or tort feasor is the state."). Over time, the "permanent or recurring" test turned into a categorical rule that precluded courts from analyzing any of the factors that are essential to a takings inquiry. *See* Opinion at 9-10.

Washington's "permanent or recurring" rule is almost identical to the rule invalidated in *Arkansas Game & Fish*. In that case, the U.S. Supreme

Court considered whether the U.S. Army Corps of Engineers (Corps) was liable, under a temporary takings theory, for damage it caused to state-owned property by inundating land with flood waters.[1] 133 S. Ct. at 515 ("The question presented is whether a taking may occur, within the meaning of the Takings Clause, when government-induced flood invasions, although repetitive, are temporary."). The Court of Federal Claims found the Corps' actions constituted a taking and awarded the Commission just compensation for the value of the damaged timber growing on the land and the cost of restoring the property. *Id.* at 517. But the Federal Circuit reversed because it believed that takings liability could only attach to government action that was "permanent or inevitably recurring."[2] *Id.* The U.S. Supreme Court rejected that categorical rule and held that the government-induced flooding, although temporary in duration, was not exempt from the Takings Clause. *Id.* at 522.

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[1] For a full discussion of the case, *see* Brian T. Hodges, *Will* Arkansas Game & Fish Commission v. United States *Provide a Permanent Fix for Temporary Takings?*, 41 B.C. Envtl. Aff. L. Rev. 365 (2014).

[2] Like Washington's test, the federal "permanent or inevitably recurring" test grew out of an early attempt to distinguish takings from torts. *Sanguinetti v. United States*, 264 U.S. 146, 150, 44 S. Ct. 264, 68 L. Ed. 608 (1924). But, prior to *Arkansas Game & Fish*, the Federal Circuit had largely abandoned that test in favor of an "intent or foreseeability" test applied on a case-by-case basis. *See Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355-56 (Fed. Cir. 2003), *cited favorably by Arkansas Game & Fish*, 133 S. Ct. at 522.

Just like the rule invalidated in *Arkansas Game & Fish*, Washington's categorical "permanent or recurring" rule impermissibly removes an entire category of government activity from constitutional protection. *See Arkansas Game & Fish*, 133 S. Ct. at 519 ("No decision of this Court authorizes a blanket temporary-flooding exception to our Takings Clause jurisprudence, and we decline to create such an exception in this case."). Washington's rule conflicts not only with federal constitutional law, but also with state law, which recognizes that once government activity is deemed to be a taking, a property owner may be entitled to just compensation, even if the government ultimately ends the offending activity. *See Orion Corp.*, 109 Wn.2d at 668-69.

The "permanent or recurring" rule, moreover, does not take into account any of the factors that are essential to the takings inquiry. Takings claims must typically be adjudicated on their individual merits and are not subject to per se exclusionary rules:

> We have recognized . . . that no 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 can affect property interests, the Court has recognized few invariable rules in this area.

Arkansas Game & Fish, 133 S. Ct. at 518. Because of that, the Court emphasized that it is "incumbent on courts to weigh carefully the relevant factors and circumstances in each case, as instructed by our decisions." *Id.*

The Court of Appeals' reliance on the "permanent or recurring" rule has left Washington with a constitutionally insufficient doctrine that harms property owners by lowering the floor of protection from that offered by the Federal Constitution. *See* Roger D. Wynne, *The Path Out of Washington's Takings Quagmire: The Case for Adopting the Federal Takings Analysis*, 86 Wash. L. Rev. 125, 160-63 (2011). Not only does the "permanent or recurring" rule directly conflict with *Arkansas Game & Fish*, but, due to the rule's *per se* nature, the lower court rejected NWA's takings claim without considering any of the facts necessary to determine "the actual burden imposed on property rights, [] how that burden is allocated, [or] when justice might require that the burden be spread among taxpayers through the payment of compensation." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542-43, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005); *see also Arkansas Game & Fish*, 133 S. Ct. at 518.

II

REVIEW IS NECESSARY TO ASSURE THAT WASHINGTON LAW IS HARMONIZED WITH DECISIONS OF THE U.S. SUPREME COURT INTERPRETING THE TAKINGS CLAUSE

Property owners have an interest in clear, predictable, and workable rules for determining takings. Conflicting rules of law create uncertainty for property owners, regulators, and courts alike.

In this case, for example, the Court of Appeals acknowledged that the "permanent or recurring" rule required summary judgment dismissal of NWA's takings claims despite evidence that the City "interfered with NWA's use of its property when it terminated [the] temporary service agreement." Opinion at 10; *see also* Answer at 9 (City conceded that it was "only guilty" of interfering with rail access to NWA's rail yard). But for the *per se* nature of the "permanent or recurring" rule, that evidence would have been more than sufficient to overcome the city's motion for summary judgment. *See, e.g.*, *Keiffer v. King County*, 89 Wn.2d 369, 372, 572 P.2d 408 (1977) (landowners have a property right in maintaining reasonable access to their land, and have an entitlement to just compensation if the government substantially interferes with the right of access); *see also Arkansas Game & Fish*, 133 S. Ct. at 519 ("A temporary takings claim could be maintained

. . . when government action occurring outside the property gives rise to 'a direct and immediate interference with the enjoyment and use of the land.'") (quoting *United States v. Causby*, 328 U.S. 256, 266, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946)). Thus, the only reason why the lower court upheld the order of dismissal was because it embraced an out-of-date rule that conflicts with decisions from the U.S. Supreme Court and decisions of this court. Opinion at 9-10.

For decades, Washington courts have striven to bring the state's constitutional takings law into alignment with its federal counterpart. *See, e.g., Orion Corp.*, 109 Wn.2d at 657-58 (applying the federal approach to regulatory takings claims "in order to avoid exacerbating . . . confusion . . . and because the federal approach may in some instance provide broader protection . . . ."); *Presbytery of Seattle v. King Cnty.*, 114 Wn.2d 320, 327-37, 787 P.2d 907 (1990); *see also* Wynne, *supra*, at 160-63. And that effort includes adopting federal standards for temporary takings. *See Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 656-57, 935 P.2d 555 (1997) (citing *First English*, 482 U.S. 304); *Orion Corp.*, 109 Wn.2d at 626 ("Because the taking is 'temporary' and reversible, we hold that the State has the option of curing the taking or maintaining the status quo by exercising eminent domain."). The "permanent or recurring" test leaves a large gap in these efforts because

it directly conflicts with federal takings law. In order to close that gap, and to redress the internal inconsistency in the state's temporary takings law, this Court should grant the petition and affirm that the "permanent or recurring" test holds no place in Washington's takings jurisprudence.

CONCLUSION

For the above reasons, Amicus Curiae urges this Court to grant the petition for review.

DATED: May 14, 2014.

Respectfully submitted,

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Dear Clerk:

Please file the attached documents in *10 North Washington Ave. LLC v. City of Richland*, No. 90120-1:

1. Notice of Appearance of Brian T. Hodges for Amicus Curiae applicant Pacific legal Foundation
2. Motion for Leave to file Brief Amicus Curiae
3. Brief Amicus Curiae
4. Declaration of Service

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Thank you,

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