

No. \_\_\_\_\_

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In The  
Supreme Court of the United States

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Russell L. Baldwin,

Petitioner,

v.

Suzanne Seida; David M. Seida; Kent Seida, Jr.; Kent Seida, Sr. &  
Mary Seida, husband and wife; and Seida Land and Livestock, LLC, an  
Oregon limited liability company,

Respondents.

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On Petition for Writ of Certiorari To  
The Oregon Supreme Court.

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PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

Petitioner is a solo practicing attorney who provided legal services to respondents in an eminent domain matter brought by the State of Oregon in its state court. He sought to collect his attorney fees under a written fee agreement and a statutory lien securing his right to be paid.

This petition arises from the separate state court proceeding for collection of the secured debt, and the court's failure to foreclose his lien.

Nearly seven years have passed since petitioner perfected his lien in the eminent domain matter, yet he remains unpaid. After a jury trial, the state court of general jurisdiction (circuit court) dismissed petitioner's complaint. It refused to enter judgment in favor of petitioner to disburse the fee the State owed, and which the court collected and continues to hold in its bank account. Petitioner has also been denied any remedy on appeal.

The questions presented are:

1. Did the state circuit court effectuate a "taking" for purposes of the Fifth and Fourteenth Amendments to the United States Constitution when it dismissed petitioner's lawsuit without exercising its judgment to disburse his fee from such court's bank account?
2. Did the state appellate court effectuate a "taking" as above when affirming such judgment of dismissal?

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### **Identification of Parties to the Proceedings Below.**

Petitioner is: Russell L. Baldwin, a member of the bar of this Court, proceeding *pro se*. He was the plaintiff in the Lincoln County Circuit Court proceeding wherein he sought to foreclose his lien for attorney fees filed in the earlier eminent domain proceeding brought by the Oregon Department of Transportation. There were no other plaintiffs.

Respondents are: Kent Seida, Sr.; his wife Mary Seida, since deceased; their adult children Kent Seida, Jr., Suzanne Seida, and David M. Seida; and the family's limited liability company Seida Land & Livestock, LLC. Each respondent was a defendant in the circuit court collection proceeding. There were no other defendants. Respondents (except for the adult children) were also defendants (among others) in the earlier related eminent domain matter brought by the State of Oregon.

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### **List of All State and Federal Proceedings**

#### **Directly Related to This Case.**

A. *State of Oregon v. SEIDA LAND & LIVESTOCK LLC, an Oregon Limited Liability Company; Kent R. Seida and Mary Seida, husband and wife, et al.* Lincoln County Circuit No. 140225. Judgments entered September 16, 2014 and July 2, 2015. No appeal was sought by any party. This was the eminent domain matter wherein petitioner provided legal

services to respondents, and perfected his lien to secure his compensation as allowed by Oregon law, ORS 87.445 *et seq.*

B. *Russell L. Baldwin v. Suzanne Seida, David M. Seida, Kent Seida Jr., Kent Seida Sr., Mary Seida, and Seida Land & Livestock LLC*, Lincoln County Circuit No. 15cv12902. Judgments entered May 23, 2016, June 23, 2017, June 26, 2017, December 15, 2017, and March 6, 2018. This was the collection and foreclosure matter in state court. Appellate review was sought from each such judgment. All were affirmed without opinion in Oregon Court of Appeals CA A162400 on April 1, 2020. The Oregon Supreme Court denied petitioner's request for reconsideration denying discretionary review on November 18, 2020, S067838. No appellate judgment has yet issued (as explained in the petition for writ of certiorari).

C. *Russell L. Baldwin v. Suzanne Seida, David M. Seida, Kent Seida Jr., Kent Seida Sr., Mary Seida, and Seida Land & Livestock LLC*, Lincoln County Circuit No. 15cv12902. This proceeding was a cross appeal for interlocutory review by respondents related to the proceeding stated in B above. Oregon Court of Appeals A162400; Oregon Supreme Court S065998. Cross petitioners there sought review from the Oregon Court of Appeals's denial of their appeal from the circuit court's judgment not disbursing the remaining proceeds of judgment collected by that court in Lincoln Circuit No. 140225 (eminent domain, approx.. \$227,000). The Oregon Supreme Court

denied respondents' petition for review by order October 18, 2018.

Respondents thereafter voluntarily dismissed their cross appeal in the Oregon Court of Appeals. No appellate judgment has yet issued (as explained in the petition below).

D. *Russell L. Baldwin v. Suzanne Seida, David M. Seida, Kent Seida Jr., David Bowser, Roger Lenneberg, and Jordan Ramis P.C.*, Washington County Circuit No. 17cv31416. Limited judgment was entered on November 15, 2017. This was a suit for wrongful execution after defendants allegedly violated an automatic stay under Oregon law by garnishing petitioner's general operating account to collect their limited judgment for attorney fees awarded in 15cv12092. Respondents sought dismissal in that circuit court, which was denied. They appealed, CA A166511, but lost. Next, petitioner resolved this matter with respondent Jordan Ramis P.C.'s professional liability insurer. The limited judgment has been satisfied. Settlement documents are in the process of being prepared and reviewed.<sup>1</sup> Although this case is directly related to the proceedings described in B and C above, no portion of this case is sought to be reviewed on writ of certiorari.

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<sup>1</sup> Petitioner had also sought to resolve the issue raised here, the Lincoln County Circuit Court's failure to disburse the proceeds of judgment, but without success.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for writ of certiorari to review the judgments of the Lincoln County Circuit Court for the State of Oregon, the order of the Oregon Court of Appeals affirming those judgments without opinion, and the order of the Oregon Supreme Court denying review.

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## OPINIONS BELOW

All Oregon appellate decisions in this action are reported only as line entries in the official Oregon Reports. That is, neither the Oregon Court of Appeals nor the Oregon Supreme Court issued a written opinion.

The orders and judgments of the Lincoln County Circuit Court are attached at Appendix A and B. The order of the Oregon Court of Appeals affirming those judgments without opinion is listed at 303 Or. App. 363 (2020), and such disposition is attached at Appendix C-1. The Oregon Supreme Court's denial of review is listed at 367 Or. 75 (2020). Such dispositions are attached at Appendix E-1 and E-3.

No appellate judgment has issued over the ensuing five months following denial of review by the state court of last resort, in large part because petitioner has objected to respondents' request for yet more supplemental attorney fees in the Oregon Court of Appeals. Under the applicable Oregon Rules of Appellate Procedure ("ORAP", Appendix F and G),

there will be no effective appellate judgment in this matter until after such court resolves petitioner's objections. They have been pending in the Court of Appeals without action since October 7, 2020. App. C-2 to C-16.

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## JURISDICTION

The Oregon Court of Appeals affirmed the circuit court without opinion on April 1, 2020. Petitioner timely petitioned for review in the Oregon Supreme Court, and it was denied on September 17, 2020. Petitioner timely sought reconsideration, and such petition was denied on November 18, 2020. On March 19, 2020, this Court extended the deadline to file petitions for writs of certiorari in all cases due after that order date to 150 days. The deadline in this case is thus April 16, 2021, so this petition is timely.

This Court has jurisdiction to review the decision of the Oregon Supreme Court on Writ of Certiorari pursuant to 28 U.S.C. §1257(a).

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## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States of America provides:

Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

Amendment XIII, Section 1:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Oregon Revised Statutes ("ORS") provide:

ORS 18.082 provides in relevant part:

(1) Upon entry of a judgment, the judgment:

(a) Becomes the exclusive statement of the court's decision in the case and governs the rights and obligations of the parties that are subject to the judgment;

\* \* \*

ORS 87.445 provides:

An attorney has a lien upon actions, suits and proceedings after the commencement thereof, and judgments, orders and awards entered therein in the client's favor and the proceeds thereof to the extent of fees and compensation specially agreed upon with the client, or if there is no agreement, for the reasonable value of the services of the attorney.

ORS 87.450 provides:

(1) When an attorney claims a lien under ORS 87.445, if the judgment is for a sum of money only, the attorney must file a notice of claim of lien with the clerk of the court that entered the judgment within three years after the judgment is entered. The clerk shall enter the notice in the register of the court and in the judgment lien record maintained by the court administrator under ORS 18.075.

(2) When an attorney files a notice of claim of lien under subsection (1) of this section, the attorney shall send forthwith a copy of the notice to the client by registered or certified mail sent to the client at the last-known address of the client.

(3) A lien under ORS 87.445 on a judgment for a sum of money only remains a lien on the judgment until the judgment remedies for the judgment expire under ORS 18.180 to 18.190.

(4) For purposes of this section, a "judgment for a sum of money only" does not include a judgment or order for the payment of money for the support of any person under ORS 107.095, 107.105, 108.120, 109.155, 419B.400 or 419C.590.

ORS 87.475 provides:

(1) Except as provided in subsections (3) and (4) of this section, the lien created by ORS 87.445 is not affected by a settlement between the parties to the action, suit or proceeding before or after judgment, order or award.

(2) Except as provided in subsections (3) and (4) of this section, a party to the action, suit or proceeding, or any other person, does not have the right to satisfy the lien created by ORS 87.445 or any judgment, order or award entered in the action, suit or proceeding until the lien, and claim of the attorney for fees based thereon, is satisfied in full.

(3) A judgment debtor may pay the full amount of a judgment into court and the clerk of the court shall thereupon fully satisfy the judgment on the record and the judgment debtor shall be thereby released from any further claims thereunder.

(4) If more than one attorney appears of record for a litigant, the satisfaction of the lien created by ORS 87.445 by any one of the attorneys is conclusive evidence that the lien is fully satisfied.

ORS 87.480 provides:

Attorneys have the same right and power over actions, suits, proceedings, judgments, orders and awards to enforce their liens as their clients have for the amount due thereon to them.

ORS 87.485 provides:

In suits to foreclose a lien created by ORS 87.445, the court shall allow a reasonable amount as attorney fees at trial and on appeal to the prevailing party.

ORS 87.490 provides:

(1) Except for tax liens, prior encumbrances and prior liens of record on the real or personal property subject to the lien created by ORS 87.445, the lien created by ORS 87.445 is superior to all other liens, including a lien created by ORS 147.285.

(2) When the lien of an attorney created under ORS 87.445 attaches to a judgment allowing or enforcing a client's lien, the attorney's lien has the same priority as the client's lien with regard to personal or real property subject to the client's lien.

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## STATEMENT OF THE CASE

### I. Federal question preserved below.

1. Petitioner first raised the federal question sought to be reviewed in circuit court, *i.e.* the court's alleged taking of petitioner's secured lien against the judgment proceeds in the eminent domain proceeding. App. B-97. There, petitioner cited the circuit court to this court's opinion on the takings issue in *Stop the Beach Renourishment, Inc. v. Fla. Dept. Env't'l Protection*, 560 U.S. 702, 130 S.Ct. 2592, 177 L.Ed.2d 184 (2010).

The circuit court passed on the federal question by not addressing it. It refused to allow petitioner to amend his complaint. That court concluded that petitioner's lien should not be foreclosed; and it dismissed the complaint rather than disbursing any of the remaining proceeds of judgment held in its account to any of the parties. App. B-113 (general judgment of dismissal). It did these things after confirming that the court was in fact holding petitioner's compensation paid into court by the state, for services he provided to his client in such court. Excerpt of Record (ER.-200 to ER.-201), attached to petitioner's opening brief in the Oregon Court of Appeals; App. A-2 line 9 (judgment acknowledging court's receipt of such funds).

The circuit court did these things notwithstanding Oregon's statutory regime requiring otherwise, *i.e.* that petitioner be paid before or at the time of

payment to the judgment creditor, and according to the priority of his perfected lien.

2. Petitioner next raised the federal question in the Oregon Court of Appeals, in his opening and reply briefs.

In his opening brief at page 23 n. 20, petitioner urged that the general judgment violated ORS 87.475(2), and that “[s]uch error, if not corrected, will result in the taking of [petitioner’s] secured claim without compensation in violation of ... the Fifth and Fourteenth Amendments to the United States Constitution.”

In his reply brief at page 15 and n. 5, petitioner again asserted that the circuit court “erred when denying [petitioner] of any judgment to the proceeds it continues to hold in violation of the constitutional provisions previously briefed,” with the following citation:

*Stop the Beach v. Florida DEQ*, 130 S. Ct. 2592, 560 U.S. \_\_\_, 177 L.Ed.2d 184 (2010) (“It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat. *See Stevens v. Cannon Beach*, 510 U.S. 1207, 1211-1212, 114 S.Ct. 1332, 127 L.Ed.2d 679 (1994) (SCALIA, J., dissenting from denial of certiorari).”).

The Oregon Court of Appeals passed on the federal question by not addressing it. It affirmed all of the judgments below (refusing to pay petitioner by judgment) without opinion. App. C-1. The federal question was raised again in supplemental proceedings on the issue of compensability of

alleged supplemental attorney fees sought by respondents.<sup>1</sup> App. C-5. As noted above, that issue also remains pending in the Oregon Court of Appeals since October 7, 2020 without resolution. (The deadline for this petition is April 16, 2021).

3. Petitioner next raised the federal question in the Oregon Supreme Court when petitioning for review, and when petitioning for reconsideration.

In his amended petition for review at page 19, petitioner urged that his right to a remedy was protected under *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978), and the Takings Clause, citing *Stop the Beach* and *Stevens*, as quoted *supra*.

Petitioner also preserved the federal question when asking for reconsideration:

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<sup>1</sup> Oregon follows the American rule, whereby litigants are responsible for their own attorney fees in the absence of a statute providing prevailing party attorney fees. ORS 87.485 provides a basis for prevailing party attorney fees on the foreclosure of an attorney's lien.

The litigation below and on appeal has been driven in large part by respondents' desire for ever increasing attorney fees, which they have used as a cudgel. To date, respondents have sought and have been awarded approximately \$300,000 in fees to obtain dismissal of petitioner's complaint in circuit court, and to defend that (error in) judgment on appeal. For his part, petitioner has sought to settle the entire controversy, without success. App. B-135 ("Part III") to B-137 (awaiting settlement authority from opposing counsel).

Denying plaintiff any remedy in the foreclosure proceeding is a serious mis-carriage of justice. If not corrected, such error will effectuate an unconstitutional taking by the judiciary under federal law.

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The circuit court's failure to foreclose plaintiff's lien, and the intermediate appellate court's failure to correct that legal error, is an error in judgment—not in discretion. And such failures if not corrected will undoubtedly result in an uncompensated (unconstitutional) taking of two types of property: (1) plaintiff's perfected security interest (the lien itself), and (2) the money it secures—which remains in the sole possession and control of the court some five years after it identified those proceeds as owing for unpaid services provided by plaintiff in Case B (Judge Leonard).

Each wrong is a grievous legal error of constitutional magnitude under Or. Const. Art. I, section 10 and the Fifth and Fourteenth Amendments to the United States Constitution—*i.e.* if not corrected by this court of last resort on issues of state law.

*Pet. for Reconsid.* at pp. 12 and 17-18.

The Oregon Supreme Court passed on the federal question by ignoring it, thus denying review and reconsideration. App. E-1 and E-3.

## **II. Fundamental Facts Essential To Resolution Of Question Presented**

1. This case was a collection and foreclosure proceeding brought to judgment at the insistence of the Lincoln County Circuit Court in a related case, No. 140225 ("eminent domain case"). App. A-1 to A-4 (so requiring).

Circuit court is the court of general jurisdiction in Oregon.

In the eminent domain case, petitioner had represented respondents Kent & Mary Seida and the family's limited liability company, as their

attorney. They employed petitioner to challenge the value the State had placed on their real property, after the State had elected to take it by eminent domain. Petitioner was to be paid by such respondents out of the proceeds of judgment, on a contingent fee basis. App. B-1 (Complaint); App. B-14 (fee agreement); App. B-58 (petitioner's amended lien); App. B-67 (respondents' formerly alleged lien).

2. Petitioner was required to withdraw from further representation prior to judgment in the eminent domain matter, due to a conflict of interest caused by respondent Kent Seida, Sr. when tendering to petitioner a check for \$5,000.00 drawn on insufficient funds as payment for services rendered in an unrelated foreclosure of other real property (his residence). App. B-5 at ¶12.

3. Petitioner initially sought his compensation in the eminent domain matter—where his lien was filed—during post-judgment proceedings there. The circuit court determined that the State be obligated to pay \$2,000.00 for services rendered by petitioner, *i.e.* expressly not deciding whether respondents also owed petitioner additional amounts to be paid from the proceeds of judgment. App. A-1 to A-2. Rather than order the State to pay petitioner the amount the court had awarded, it instead instructed the State to pay it into court (subject to petitioner's lien). *Id.* It also required petitioner to proceed to judgment in Lincoln Circuit No. 15cv12092 to be paid

any amount from the proceeds of judgment subject to his lien. App. A-3 to A-4 (order).

4. Suit was filed in Lincoln County Circuit No. 15cv12092. Money damages and disbursement of the proceeds of judgment were sought. Prior to trial, that court dismissed respondents Suzanne Seida, Kent Seida Jr., and David M. Seida after finding that they were not necessary parties, and that suit against them was “superfluous” under Oregon statute because petitioner knew his lien had the highest priority. It found:

Plaintiff, as an attorney with 20+ years of experience in civil litigation, and having handled the ODOT condemnation case, well knew, or at a minimum may be charged with knowing, that there were no tax liens, prior encumbrances or prior liens of record on the settlement funds. Thus, Plaintiff knew that his attorney lien had the highest priority to the settlement funds.

App.B-73.

Incongruously, the court next entered approximately \$62,000 in attorney fees and costs *against petitioner* to those dismissed parties by limited judgment—i.e. because petitioner “knew” he would prevail. App. B-77 to B-81. Petitioner timely appealed such judgment to the Oregon Court of Appeals on June 15, 2016. (This petition arises from that court’s subsequent affirmance without opinion of all judgments below, App. C-1).

5. About a year after entering such limited judgment, the circuit court bifurcated the case on the remaining claims and parties. A bench trial was

had on plaintiff's request for foreclosure of his lien and disbursement of the proceeds of judgment in the eminent domain matter. Petitioner requested that the court determine the priority and amount of petitioner's and respondents' competing claims to the proceeds of judgment, and to enter judgment accordingly. The circuit court refused to do so. It instead ordered that it would deny foreclosure due to petitioner's allegedly insufficient pleading. Petitioner requested leave to amend his complaint to remedy the ambiguity identified by the court, but it refused for the stated reason to deny petitioner prevailing party status (by judgment).<sup>2</sup> Transcript of Proceedings, Lincoln County Circuit Court August 25, 2017, pp. 583 to 598, quoted here in relevant part:

11                    PLAINTIFF MOVES TO AMEND PLEADING

12 MR. NORMAN: Well, the \$2,000 is still in court,  
13 so I suppose we need to move to amend under 23(B) to add the  
14 \$2,000 to the attorney fee foreclosure claim so that we can get  
15 that money out of court.

16                    COURT DENIES MOTION TO AMEND PLEADING

17 THE COURT: Um, I'm going to deny that motion,  
18 because that could, uh, trigger, as Mr. Bowser said, a claim  
19 that Mr. Baldwin was the prevailing party on the lien

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<sup>2</sup> ORS 87.485 provides for reimbursement of attorney fees on the foreclosure of an attorney's lien.

The court's refusal to allow the petitioner to amend his complaint under the applicable court rule, ORCP 23, should be understood as an attempt to undergird its earlier limited judgment [erroneously] determining the adult children respondents "prevailing parties" without foreclosing petitioner's lien. The circuit court indicated a willingness to disburse the \$2,000, *i.e.* without disturbing its earlier limited judgment against petitioner.

20 foreclosure.

*Id.* at 591.

6. The circuit court next dismissed petitioner's complaint with prejudice by general judgment—after trial—instead of determining the relative priorities of the competing claims to the judgment proceeds elsewhere. App. B-103 to B-115. It then entered more supplemental judgments awarding nearly two hundred thousand dollars in additional attorney fees and costs to respondents for “prevailing” by judgment of dismissal (without reaching the merits of the controversy). App. B (each judgment amount listed in the table of contents for the appendices).

7. The circuit court failed and refused to award petitioner any of the money that it had expressly collected from the State of Oregon to pay him for his services—for which that court had earlier found the State liable in the eminent domain matter (a nominal \$2,000). The circuit court also refused to pay over to *respondents* the remaining money it held subject to petitioner's lien (approximately \$227,000). App. B-113 at lines 15 to 20 (ordering dismissal of suit rather than disbursement).

8. Petitioner appealed from all judgments, and respondent cross appealed from the general judgment not paying over the proceeds of judgment elsewhere. (Respondents later elected to dismiss their cross appeal



after having been denied a post-judgment remedy in the Oregon Court of Appeals and in the Oregon Supreme Court, App. D-1).

9. On April 1, 2020, the Oregon Court of Appeals affirmed without opinion each of the circuit court judgments. App. C-1.

10. The circuit court's general judgment of dismissal does not allow for the disbursement of any money held by it in the eminent domain matter. App B-113 lines 15-21. More than 6 years after judgment in the eminent domain matter, the state court indisputably holds approximately \$227,000 in judgment proceeds paid into court by the Oregon Department of Transportation, as a judgment debtor under ORS 87.475(3). Two thousand dollars of the amount held by that court was expressly paid into court to reimburse respondents for attorney fees they owed petitioner, but which they had refused to pay him until after trial.

11. Petitioner timely sought discretionary review from the Oregon Supreme Court. Review was denied September 17, 2020. App. E-1. Petitioner requested reconsideration of that denial, and reconsideration was denied November 18, 2020. App. E-3.

12. Following denial of reconsideration, respondents sought supplemental attorney fees in the Oregon Supreme Court and in the Court of Appeals. Petitioner objected to all such requests for additional fees because

his statutory lien has never been foreclosed: suit was merely dismissed instead.

13. The Oregon Supreme Court awarded supplemental fees to respondents,. App. E-2. The Court of Appeals has not acted on petitioner's objections filed on October 7, 2020. App. C-2 to C-33.

14. Under the applicable Oregon Rules of Appellate Procedure ("ORAP"), there will be no appellate judgment entered to effectuate the affirmance of the judgments without opinion, the denial of review in the Oregon Supreme Court, or the decisions awarding attorney fees and costs on appeal, until after petitioner's objections are heard and determined by the Court of Appeals. ORAP 13.10 and ORAP 14.05(2)(a), App. F & App. G.

15. Petitioner now petitions this Court for a writ of certiorari within the time allowed.

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## REASONS FOR GRANTING THE WRIT

### (Argument).

#### 1. Judicial taking under the "Takings Clause"

The writ of certiorari should be granted to affirmatively resolve that a State court may effectuate an unconstitutional taking by refusing to grant a remedy that the State's legislature has afforded its citizens. Allowing the writ will resolve, in clear and plain terms, whether a State's judiciary violates

the “takings” clause of the Fifth Amendment (as applied to States by the Fourteenth) by entering a judgment that is incompatible with property rights defined by state law.

A. Oregon state law defines the property right.

Oregon law is well defined on the property rights and priorities of attorneys providing services to their clients in court for compensation. For example, the United States Ninth Circuit Court of Appeals has applied the Oregon statutory regime as construed by the Oregon Supreme Court.

In *Banaitis v. Commissioner of Internal Revenue Service*, 340 F.3d 1074 (9<sup>th</sup> Cir., 2003), judgment from the United States Tax Court was affirmed in part and reversed in part. Among the issues resolved there was whether amounts paid to tax-payer’s attorneys under a contingent fee agreement to successfully litigate a wrongful discharge claim to judgment were properly includable as tax-payer’s gross income total. As pertinent here, that question was resolved by how Oregon law defines the attorney’s rights in the action, and how federal tax law operates in light of that state definition. *Id.*, 340 F.3d at 1081, citing *United States v. Mitchell*, 403 U.S. 190, 197, 91 S.Ct. 1763, 29 L.Ed.2d 406 (1971).

Ultimately, the *Banaitis* court found that Oregon law mirrors Alabama law to provide such lawyers with a statutory lien “superior to all other liens”

except "tax liens." *Id* at 1082, quoting ORS 87.490. As pertinent here,

*Banaitis* surveyed Oregon law pertaining to attorney fee liens and held:

Under Oregon law, "a party to the action, suit or proceeding, or any other person, does not have the right to satisfy the lien ... or any judgment, decree, order or award entered in the action, suit or proceeding until the lien, and claim of the attorney for fees based thereon, is satisfied in full." O.R.S. § 87.475. And Oregon law, like Alabama law, provides that attorneys shall have "the same right and power over actions, suits, proceedings, judgments, decrees, orders and awards to enforce their liens as their clients have for the amount of judgment due thereon to them." O.R.S. § 87.480. Indeed, Alabama and Oregon law are almost identical in their treatment of the interest attorneys have in legal actions.

In some respects, in fact, Oregon goes even further than does the Alabama law at issue in *Cotnam* [*v. Commissioner*, 263 F.2d 119 (5th Cir.1959)]. As the Oregon Supreme Court stated in *Potter v. Schlessner Co.*, 335 Or. 209, 63 P.3d 1172, 1174 (2003):

The lien is a charge on the action, and the parties to the action cannot extinguish or affect the attorney's lien by any means (such as settlement) other than by satisfying the underlying claim of the attorney for the fees incurred in connection with the action.

The Oregon Supreme Court, thus, has recognized that an attorney has a right to sue a third party for attorneys fees that were left unsatisfied by a private settlement with the attorney's clients. *Id.* at 215, 63 P.3d 1172. In this sense, the case *sub judice* presents a different issue than the one we discussed in *Sinyard v. Commissioner*, 268 F.3d 756 (9th Cir.2001), in which we held that a third party's discharge of a debt held by a particular plaintiff constituted income to the plaintiff. *Id.* at 758-59. Put simply, Oregon law vests attorneys with property interests that cannot be extinguished or discharged by the parties to the action except by payment to the attorney; as a result, Banaitis'

claim under Oregon law is akin to — and even stronger than — the claim in *Cotnam*.

Because of the unique features of Oregon law, we conclude that fees paid directly to Merten were not includable in Banaitis' gross income for the relevant year. Accordingly, we reverse the judgment of the Tax Court on this question.

*Id.*, 340 F.3d at 1082-1083 (emphasis added).

Thus, Oregon law properly applied as construed by its court of last resort vests in attorneys a property right which cannot be extinguished except by payment as first in priority.

**B. State court error contrary to legislative enactment.**

The Lincoln County Circuit Court erred, and by extension the Oregon Court of Appeals also erred by affirming the circuit court's judgment contrary to the requirements of ORS 87.450(3), ORS 87.475, and ORS 87.490. Those errors have resulted in a taking of petitioner's valuable property right defined by Oregon law. Those courts have thus decided an important federal question in a way that conflicts with relevant decisions of this court, namely *Stop the Beach Renourishment, Inc. v. Fla. Dept. Env't'l Protection*, 560 U.S. 702, 130 S.Ct. 2592, 177 L.Ed.2d 184 (2010) and the authorities set forth there at Part II of that plurality opinion. Supreme Court Rule 10(c).

**C. Prior decisions of this court have passed on the federal question whether a state can do by judgment that which its legislature and executive**

are forbidden to do under the Takings Clause to the Fifth and Fourteenth Amendments to the United States Constitution. In *Stop the Beach, supra*, certiorari was granted to consider a claim that a State's court of last resort took property without compensation in violation of the Fifth Amendment, as applied against States through the Fourteenth. *Id.*, citing *Dolan v. City of Tigard*, 512 U.S. 374, 383-384, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).<sup>3</sup>

## **2. Judicial "Takings" jurisprudence is in need of refinement.**

Unfortunately, *Stop the Beach* was only resolved by a plurality. There, Justice Scalia announced the judgment of this Court, and he delivered the opinion with respect to Parts I, IV, and V, and an opinion with respect to Parts II and III, which the Chief Justice, Justice Thomas, and Justice Alito joined. *Stop the Beach* concerned a Florida state agency's administrative action which arguably changed the character of affected real property from "ocean front" to less valuable "ocean view." Part I of the opinion detailed Florida's law of "littoral" land, and how the character of property might change gradually or abruptly over time, through natural phenomena or by artificial means by dredging and the like.

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<sup>3</sup> Certiorari to Oregon Supreme Court.

The related question posed, as relevant for this petition, was whether a State court of last resort could effectuate an unconstitutional taking by its judgment quashing the remand given in the proceedings below.<sup>4</sup>

Part II A of this Court's opinion in *Stop the Beach* is understood to survey this Court's takings jurisprudence. As relevant here, it observed:

The Takings Clause (unlike, for instance, the Ex Post Facto Clauses, see Art. I, § 9, cl. 3; § 10, cl. 1) is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the governmental actor ("nor shall private property be taken" (emphasis added)). There is no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation. Nor does common sense recommend such a principle. It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat. See *Stevens v. Cannon Beach*, 510 U.S. 1207, 1211-1212, 114 S.Ct. 1332, 127 L.Ed.2d 679 (1994) (SCALIA, J., dissenting from denial of certiorari [to the Oregon Supreme Court]).

Our precedents provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment, and in fact suggest the contrary. [Citations omitted, primarily

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<sup>4</sup> This petition urges that the circuit court's judgment refusing to pay petitioner his compensation it had collected from the state agency (not less than the \$2,000 it had collected)—and secured by his attorney's fee lien—was a taking of petitioner's personal property. In the same vein, the Court of Appeal's failure to correct that error and the Oregon Supreme Court's denial of discretionary review were also a taking of the money the circuit court collected by judgment for petitioner's benefit.

At trial, when petitioner requested the circuit court to disburse the \$2,000 by judgment in his favor, it refused, and dismissed the complaint instead of granting petitioner any relief. That was assigned as error below, and attributed as a "Taking" in the state appellate courts.

discussing *Prune Yard Shopping Center v. Robbins* and *Webb's Fabulous Pharmacies*].

\* \* \*

In sum, the Takings Clause bars the State from taking private property without paying for it, no matter which branch is the instrument of the taking. To be sure, the manner of state action may matter: Condemnation by eminent domain, for example, is always a taking, while a legislative, executive, or judicial restriction of property use may or may not be, depending on its nature and extent. But the particular state actor is irrelevant. If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation. "[A] State, by *ipse dixit*, may not transform private property into public property without compensation." *Ibid.*

*Stop the Beach*, 130 S.Ct. at 2601-2602.

### **3. The record below presents the desired issue.**

The federal question raised by this petition squarely presents the desired issue. It is the same issue which Justice Breyer's concurrence in *Stop the Beach* opined need not be decided there, *viz:* may a state court's judgment effectuate an unconstitutional taking by the state (judiciary) under federal law? Here, unquestionably, the circuit court's judgment refusing to pay petitioner by final judgment the proceeds of its earlier judgment it had collected for his explicit benefit was a taking in two senses.

First, it took personal property that such court had earlier identified to the contact between petitioner and respondents Kent & Mary Seida, and



their limited liability company. App. A-2 lines 6-14; App. A-3 (last paragraph).

Second, it arguably made petitioner's lien ineffectual by dismissing the complaint with prejudice. App. B-113 (general judgment dismissing complaint). This second point is only arguable, because Oregon's statutory regime does not require a lien claimant against the proceeds of judgment to foreclose (absent a court directive to do so). ORS 87.450(3); ORS 87.480. Simply, the lien remains until the judgment creditor is paid, or until the judgment expires. *Id.*<sup>5</sup>

The federal question was explicitly raised in the circuit court prior to its entry of judgment, with citation to *Stop the Beach*, but to no avail. The circuit court denied plaintiff any remedy by dismissing the lawsuit it had earlier required when refusing to disburse proceeds of judgment to petitioner in the eminent domain matter. Petitioner' challenged the state court's disposition first under state law because the federal constitutional challenge is alternative to, not cumulative of, Oregon constitutional law. Linde, Hans

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<sup>5</sup> As of the date of this petition, the Oregon Court of Appeals has not entered an appellate judgment because it has not acted on petitioner's objections to imposition of yet more supplemental attorney fees following the Oregon Supreme Court's denial of discretionary review. The proceeds of judgment remain subject to petitioner's lien which has never been foreclosed. The judgment creditors have not been paid the amount of the judgment, nor has petitioner been paid the value of his lien.

A, WITHOUT “DUE PROCESS” UNCONSTITUTIONAL LAW IN OREGON, 49

Or.L.Rev. 125, 133-135 (1970).

**4. The Oregon Judiciary has inexplicably left petitioner  
without a remedy.**

The right to be paid for services rendered is a most basic right, and it is foundational to civil law in our “free” society. U.S. Const. Amend. XIII, sec. 1 and Amend. XIV, sec. 1.

Oregon statute, ORS 87.445 *et seq*, allowed petitioner to secure his right to be paid for services he rendered in the eminent domain proceeding, by filing a lien against the proceeds of judgment there. He followed the statute, he perfected his lien, and after the circuit court required him to proceed to judgment in a newly filed case (separate from the eminent domain matter) he dutifully obliged.

What happened next was shocking to this advocate. The circuit court dismissed persons who had made written demands to petitioner to “release” their judgment proceeds. In so doing, that court ordered those dismissed persons prevailing parties, and it awarded them attorney fees of about \$62,000, nearly half of petitioner’s lien amount. This occurred well prior to trial, and without the court having foreclosed the attorney’s lien.

At trial, the circuit court refused to determine the relative priorities of the claimants to the proceeds to judgment, i.e. between petitioner and

respondents Kent & Mary Seida and their limited liability company (defendants in the former eminent domain proceeding). *Compare* block quote above at page 11, where that same court (and judge) determined petitioner's lien had the *highest* priority. Instead of providing petitioner with the remedy of disbursement according to law, it instead awarded more attorney fees *against petitioner*, and it refused to disburse the proceeds of judgment. That court is still holding petitioner's money (and lien) nearly four years after trial, and seven years after such lien was perfected in that court.

Petitioner did the work for respondents in circuit court. Such court collected his fee among the proceeds of judgment. But at this late date, petitioner remains unpaid for any of his services rendered in the eminent domain proceeding.<sup>6</sup> And he has been unjustly saddled with “prevailing party” attorney fees by successive supplemental judgments totaling well more than twice the amount of his secured lien.

Petitioner should not be punished<sup>7</sup> for commencing suit and proceeding to judgment as the circuit court required for him to be paid under state law.

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<sup>6</sup> Petitioner also urged in circuit court that it violated the Thirteenth Amendment (*i.e.* forbidding indentured servitude without prior conviction of a crime). Petitioner's *Opposition to Defendants' Motion to Disburse* dated December 23, 2020, at page 2 line 13. His objections there have not been heard.

<sup>7</sup> Note 6, *ante*.

As noted for the Oregon Supreme Court in petitioner's [unsuccessful] petition for review, his "right to a remedy by due course of law is similarly protected under applicable federal law.

To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is patently unconstitutional.

*Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)."

*Amended Petition for Rev.*, pp. 18-19.

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**CONCLUSION.**

Petitioner most respectfully requests that writ of certiorari be granted to resolve whether a state court effectuates an unconstitutional taking when refusing to disburse proceeds of judgment it has collected from a state agency in an eminent domain matter to pay the landowner's attorney fees secured by a statutory lien, a well-defined property interest under state law.

Respectfully submitted,

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