S248141

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IN THE SUPREME COURT, STATE OF CALIFORNIA

EVAN WEISS, BELINDA HENRY, MICHAEL HAYES, MICHEALE HAYES, ROSS SHAW, DEBBIE SHAW, AND 1819 MSC, LLC,
Plaintiffs and Appellants

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, ACTING BY AND THROUGH THE DEPARTMENT OF TRANSPORTATION; AND ORANGE COUNTY TRANSPORTATION AUTHORITY,
Defendants and Respondents

After a Published Decision by the Court of Appeal
Fourth Appellate District, Division Three, Case No. G052735

Appeal from the Superior Court of the State of California
County of Orange, Case No. 30-2012-00605637
Honorable Kirk H. Nakamura, Judge Presiding

APPLICATION TO FILE SUPPLEMENTAL BRIEF; SUPPLEMENTAL RESPONDENTS' BRIEF

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APPLICATION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

To the Honorable Chief Justice Tani Cantil-Sakauye:

Pursuant to California Rules of Court, rule 8.520(d), Defendant and Respondent Orange County Transportation Authority ("OCTA") respectfully requests leave to file the attached Supplemental Brief to address an issue of constitutional import unaddressed by the principal briefing — the inherent authority of the judiciary under article VI, section 1 of the California Constitution to devise procedures to administer justice. That principle has unique application here; inverse condemnation arises under article I, section 19, a self-executing provision of our Constitution. The courts have historically played a vital role in developing inverse condemnation law and are uniquely qualified to develop its procedures.

The opinion on review here, *Weiss v. People ex rel. Dept. of Transportation* (2018) 20 Cal.App.5th 1156 (*Weiss*), disapproves of the common law development of inverse condemnation procedure, fearing its potential to degrade protections of the Code of Civil Procedure. This gets it exactly backwards. The judiciary's inherent constitutional power — which courts are to "maintain vigorously" — exists to ensure no statutory degradation of **constitutional** rights. (*People v. Engram* (2010) 50 Cal.4th 1131, 1146 (*Engram*).) *Weiss* overlooks, too, that the common law affords adequate protection to litigants, ensuring the development of common law inverse condemnation procedures does not impair this constitutional right.

(*In re Amber S.* (1993) 15 Cal.App.4th 1260, 1264–1265 [court must weigh and protect constitutional rights when devising common law procedures].)

Courts' inherent authority to adapt procedure from statute (or other sources) is central to the question on review — whether courts may adapt Code of Civil Procedure section 1260.040 for use in inverse condemnation. The omission from the briefing was discovered by appellate counsel recently retained by OCTA, and this application is brought shortly after that discovery.

OCTA believes this brief — and any response to it Plaintiffs and Appellants may file — will aid resolution of this case. Therefore, it respectfully requests leave to file it.

DATED: January 14, 2020

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INTRODUCTION

OCTA has retained appellate counsel and, on review of the principal briefs, they conclude the Court can benefit from briefing on a further basis to affirm the trial court as to the availability of a motion under Code of Civil Procedure section 1260.040 ("Section 1260.040") in inverse condemnation — the judiciary's plenary power under article VI[1] to establish litigation procedures.

THE PROPOSED RULE

In addition to the arguments of the principal briefing, OCTA proposes this Court establish a rule, as an exercise of its article VI authority to establish common law case management procedures, to allow motions under Section 1260.040 in inverse condemnation whether or not the Legislature intended to limit the motion to eminent domain.

ARGUMENT

I. THE LIMIT OF THE RULE

Common law developments have deep roots in inverse condemnation law. (Smith-Chavez, Stratton & Trembath, Cal. Civil Practice Real Property Litigation (Nov. 2019) Actions Involving Eminent Domain and Inverse Condemnation, § 15.128 ["[The law of inverse condemnation is largely judicial, rather than legislative, in

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[1] References to "articles" are to the California Constitution.

origin"].) Article VI cases teach that courts which develop and apply common law case resolution procedures must ensure constitutional rights are not infringed. (*In re Amber S.* (1993) 15 Cal.App.4th 1260, 1264–1265 [stating test]; *Department of Forestry & Fire Protection v. Howell* (2017) 18 Cal.App.5th 154, 173–174 (*Howell*) [applying test].) Two rights limit the rule OCTA urges here — due process and the limited jury right in inverse condemnation.

A. DUE PROCESS IS EASILY RESPECTED

All common law procedures raise due process concerns. (See *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1096–1097, 1108–1109 (*Le Francois*) [parties must have notice and "reasonable opportunity to litigate" for court to exercise inherent authority to rehear summary judgment]; see also *Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal.4th 1233, 1250 (*Brown, Winfield*) [same when reconsidering ruling following *Palma* notice]; *Amtower v. Photon Dynamics* (2008) 158 Cal.App.4th 1582, 1595 (*Amtower*) [same as to non-statutory motion in limine].) But these concerns should not be overstated: they are not unique to the common law; statutory procedures raise them, too. (E.g., Code Civ. Proc., § 473c, subd. (h); *Dee v. Vintage Petroleum, Inc.* (2003) 106 Cal.App.4th 30, 34–35 (*Dee*) [summary judgment inappropriate when essential facts may exist but could not be timely presented].) Moreover, they can be easily accommodated here.

Due process only requires a non-moving party be given meaningful notice of a Section 1260.040 motion and a full and fair opportunity to oppose it. (*McDonald v. Severy* (1936) 6 Cal.2d 629, 631 (*McDonald*); *Le Francois, supra,* 35 Cal.4th at pp. 1096–1097, 1108–1109; *Brown, Winfield, supra,* 47 Cal.4th at p. 1250; *Amtower, supra,* 158 Cal.App.4th at p. 1595; *Howell, supra,* 18 Cal.App.5th at pp. 174–175.)

Dina v. People ex rel. Dept. of Transportation (2007) 151 Cal.App.4th 1029 (*Dina*), considered this carefully, noting the Section 1260.040 motion there was brought a year and a half into the litigation, the plaintiff had months to defend it, and received a continuance to complete outstanding discovery before she was required to do so. (*Id.* at pp 1035–1036, 1038, 1040.) The motion here was not brought until three years after Weiss sued. (*Weiss v. People ex rel. Dept. of Transportation* (2018) 20 Cal.App.5th 1156, 1164 (*Weiss*).) Indeed, neither Weiss nor the Court of Appeal claim Weiss' constitutional rights were impaired. (Cf. *In re Amber S., supra,* 15 Cal.App.4th at pp. 1264, 1266 [constitutional objection to common law procedure waived].) Nor could they, as he was due only notice and hearing. (*McDonald, supra,* 6 Cal.2d at p. 631.) He had both.

In any event, courts are sensitive to due process and have inherent authority to deny a Section 1260.040 motion without prejudice if brought so early or otherwise under circumstances that do not allow fair opportunity to respond. (E.g., *Howell, supra,* 18 Cal.App.5th at pp. 174–175 [reversing as non-statutory procedure

violated due process]; see also *Dina, supra,* 151 Cal.App.4th at p. 1040 [hearing continued to allow non-moving party to complete discovery].) Courts need not allow trial by ambush even though efficient trial to the bench is good public policy.

B. THE LIMITED JURY RIGHT IS PRESERVED

Dina carefully considered, too, Section 1260.040's effect on the jury right. (*Id.* at pp. 1044–1045.) *Dina* explained the jury right in inverse is narrower than in general civil litigation — it is limited to compensation, with liability tried to the bench, even where liability raises mixed questions of fact and law, as it commonly does in inverse. (*Ibid.*; *People v. Ricciardi* (1943) 22 Cal.2d 390, 402 ["all issues except the sole issue relating to compensation are to be tried by the court"].)

The rule OCTA advocates preserves this limited jury right because Section 1260.040 limits such motions to "evidentiary or other legal issues affecting the determination of compensation" — excluding "the determination of compensation" itself. As to that, a jury right lies in inverse condemnation, but the court tries other factual issues. (*Dina, supra,* 151 Cal.App.4th at pp. 1044–1045.) Thus, the statute to be imported as common law into inverse practice itself neatly limits the motion's reach to the scope the jury right permits.

II. RATIONALES FOR THE RULE AND ITS LIMIT

A. THE LEGISLATURE DEFERS TO THE JUDICIARY TO REGULATE INVERSE CONDEMNATION

As the principal briefing demonstrates, unlike eminent domain (Code Civ. Proc., § 1230.010 et seq.), the Legislature has infrequently regulated inverse proceedings, either as to substance or process. (E.g., Reply Brief at pp. 7–9.) With but few exceptions (e.g., Civ. Code, § 5980 [representational standing]), the Legislature has expressly refrained from regulating inverse procedures, leaving development of those rules to the judiciary, despite occasional calls from the courts and the California Law Revision Commission for legislative guidance. (Compare *Dorow v. Santa Clara County Flood Control Dist.* (1970) 4 Cal.App.3d 389 [former Gov. Code, § 905 imposing claim presentation requirement on inverse], with Gov. Code, § 905.1 [eliminating claim filing requirement for inverse]; see California Inverse Condemnation Law, 88 Cal. Law Revision Com. Rep. (1971) ("Van Alstyne"), p. 11 [Van Alstyne's compendium of law review articles intended to assist the Legislature in formulating a "consistent and predictable statutory inverse scheme" recognized task likely to be left to courts because statute "may not be politically feasible"]; *id.* at pp. 64–71 [discussing judicial development of substantive rights under what is now art. I, § 19 absent statutory guidance]; *id.* at pp. 71–72 [advocating legislation on inverse condemnation procedure to "solve problems of inverse

condemnation liability, facilitate out-of-court settlements, and discourage unfounded claims"]; *Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550, 558–559 [Van Alstyne's law review articles recognized as generative works on inverse liability].)

Courts have often looked to statute when fashioning procedure. (E.g., *In re Amber S., supra,* 15 Cal.App.4th at p. 1264 [using Penal Code provision to devise procedure in civil dependency]; see also *Tide Water Associated Oil Co. v. Superior Court of Los Angeles County* (1955) 43 Cal.2d 815, 825–826 [permitting non-statutory cross-complaints in special proceedings] ("*Tide Water*").) The Commission was undoubtedly aware of this when crafting the Eminent Domain Law. (Gov. Code, § 8289 [Cal. Law Revision Com.'s duty to survey common law and judicial decisions to recommend reform].)

The Eminent Domain Law thus supports the exercise of article VI power in inverse condemnation. This naturally includes the judiciary's inherent power to fashion procedure from statute. The Commission acknowledged the point. (Tentative Recommendation on the Eminent Domain Law, 105 Cal. Law Revision Com. Rep. (1974) at p. 24, fn. 2, emphasis added; *id.* at p. 81, § 1230.020.) The Legislature seems to have, too, enacting the Commission's recommendations but leaving inverse condemnation procedure largely unaddressed. (*Citizens Utilities Co. of Cal. v. Superior Court of Santa Cruz County* (1963) 59 Cal.2d 805, 812–813

(*Citizens Utilities*) [1963 recognition of court's inherent and statutory authority to fashion non-statutory inverse procedures].) None of the Commission, the Legislature, or judicial precedents voice concern about such common law development.

Instead, experience has been what one court labelled "cross-pollination." (*Chhour v. Community Redevelopment Agency* (1996) 46 Cal.App.4th 273, 279–281 ("*Chhour*") ["the judiciary and the Legislature frequently cross-pollinate in the area"]; *id.* at p. 282 [common law extension to inverse plaintiffs condemnees' statutory entitlement to lost good-will].)

B. EFFICIENT INVERSE CONDEMNATION PROCEDURE IS ESPECIALLY APPROPRIATE AS GOVERNMENT PAYS BOTH LAWYERS

As the principal briefs also show, the Legislature thought Section 1260.040 good public policy in eminent domain, a close cousin of inverse condemnation, and no reason appears not to allow it in both settings. (E.g., Opening Brief, at pp. 32–37, Reply Brief at pp. 23–25.) The Legislature intended Section 1260.040 to supplement existing procedure to facilitate settlement of eminent domain disputes through early rulings on "an evidentiary or other legal issues affecting the determination of compensation." (*Weiss, supra,* 20 Cal.App.5th at pp. 1170–1171; *Dina, supra,* 151 Cal.App.4th at p. 1042.)

As Professor Van Alstyne observed in 1967, the bench and bar would benefit from the similar assistance in inverse cases:

> [C]arefully worked out procedures which balance private against public interests may serve significantly to solve problems of inverse condemnation liability, facilitate out-of-court settlements, and discourage unfounded claims.

(Van Alstyne, *supra,* 88 Cal. Law Revision Com. Rep. (1971) at p. 72.)

The public interest in efficient litigation is particularly weighty in inverse cases, as taxpayers pay both lawyers if liability is established. (Code Civ. Proc., § 1036.) Inverse cases lend themselves to more efficient procedure, too, because they are meaningfully different from ordinary civil litigation — i.e., the jury trial is limited to compensation and such cases frequently raise mixed questions of fact and law tried to the bench. (*Dina, supra,* 151 Cal.App.4th at pp. 1044–1045.)

These peculiarities justify importing the Section 1260.040 motion into inverse to allow efficient resolution of those mixed questions to facilitate both litigation and settlement, just as in eminent domain. (Cf. *Breidert v. Southern Pac. Co.* (1964) 61 Cal.2d 659, 663, fn. 1 [inverse condemnation is an eminent domain proceeding; same principles apply].) Moreover, the limited jury right makes these more efficient procedures less problematic than elsewhere. Section 1260.040 has already proven useful to bench and

bar. (Cf. Van Alstyne, *supra,* 88 Cal. Law Revision Com. Rep. at p. 11 ["inverse condemnation is one of the most complex and rapidly developing areas of California law"]; e.g., *City of Oroville v. Superior Court* (2019) 7 Cal.5th 1091, 1099 & fn. 1 [inverse condemnation liability resolved on § 1260.040 motion].)

Alternatives suggested by case law are not apt. *Dina* applied nonsuit standards on review of a judgment entered after a Section 1260.040 motion found no liability. Although perhaps appropriate on the record there, this can be read to prevent use of a such a motion to address evidentiary issues the statutory text plainly includes. (*Dina, supra,* 151 Cal.App.4th at pp. 1045–1046.) *Weiss'* unexplained preference for the expensive, cumbersome summary judgment procedure is unwarranted, too. (*Weiss, supra,* 20 Cal.App.5th at pp. 1172–1173.) Most of the expense and complexity of that process is its search for issues of fact that must be tried to a jury. (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 395.) The summary judgment statute is intended to protect the broad jury right applicable in ordinary civil litigation. (*Ibid.*) As no jury right applies to the facts to be resolved in inverse (other than compensation), the cumbersome, expensive summary judgment process is unwarranted there.

C. ARTICLE VI EMPOWERS COURTS TO CRAFT EFFICIENT PROCEDURES IN INVERSE CONDEMNATION

Article VI, section 1 provides, "the judicial power of this State is vested in the Supreme Court, courts of appeal, superior courts, all of which are courts of record." This Court recently explained:

> Our courts are set up by the Constitution without any special limitations; hence the **courts have and should maintain vigorously all inherent and implied powers** necessary to properly and effectively function as a separate department in the scheme of our state government.

(*People v. Engram* (2010) 50 Cal.4th 1131, 1146, emphasis added.) "A court's inherent powers are wide." (*People v. Castello* (1998) 65 Cal.App.4th 1242, 1247, 1248.)

Among these are courts' authority:

- to control their dockets (*Briggs v. Brown* (2017) 3 Cal.5th 808, 852 ("*Briggs*")),
- to adopt suitable methods of practice (*Bauguess v. Paine* (1978) 22 Cal.3d 626, 636–637),
- to resolve controversies (*Le Francois, supra,* 35 Cal.4th at pp. 1102–1103),

- to "fashion a remedy as necessary to protect defendants' rights" (*Huang v. Hanks* (2018) 23 Cal.App.5th 179, 182, abridgements and internal quotation omitted), and
- to fashion new forms of procedure. (*In re Amber S.*, *supra*, 15 Cal.App.4th at p. 1264.)

The Legislature has long respected inherent judicial authority. (Code Civ. Proc, § 128, subds. (a)(3) & (a)(8), § 187; Civ. Code, § 22.2 [adopted 1951]; e.g., *Tide Water, supra,* 43 Cal.2d at pp. 825–826 ["Courts have inherent power, as well as power under section 187 of the Code of Civil Procedure, to adopt any suitable method of practice, both in ordinary actions and special proceedings, if the procedure is not specified by statute or by rules adopted by the Judicial Council"]; *People v. Superior Court* (1970) 13 Cal.App.3d 672, 679–680 ["The Legislature has not attempted to define the expression 'in further of justice', and therefore it is left for judicial discretion, exercised in view of the constitutional rights of the defendants and the interests of society, to determine what particular grounds warrant the dismissal."].)

Courts exercise that power in inverse, given the dearth of statutory guidance. (E.g., *Luce v. Clear Water Co.* (1968) 266 Cal.App.2d 123, 124 ["inherent [judicial] power to devise suitable ancillary procedures in inverse condemnation cases"], citing *Citizens Utilities, supra,* 59 Cal.2d at pp. 812–813; e.g., *Chhour, supra,* 46

Cal.App.4th at p. 282 [Code Civ. Proc. § 1263.510 applies in inverse by common law development].) Indeed, inverse condemnation is more common law than statutory. (Smith-Chavez, Stratton & Trembath, Cal. Civil Practice Real Property Litigation (Nov. 2019) Actions Involving Eminent Domain and Inverse Condemnation, § 15.128.)

But even in eminent domain — well defined by statute — courts have exercised article VI power to establish common law procedures. *Citizens Utilities*, for example, directed courts to apply flexibly former Code of Civil Procedure section 1249, fixing the valuation date as the date of summons, inviting them to devise procedure to ensure just compensation when statute did not. (59 Cal.2d at pp. 811–812, 815–818.)

Saratoga Fire Protection Dist. v. Hackett (2002) 97 Cal.App.4th 895 restated the rule more recently as to another eminent domain statute:

> [S]ection 1263.120 — 'like 'all condemnation law, procedure and practice[]is but a means to the constitutional end of just compensation to the involuntary seller, the property owner.' [Citation.]" (*Edison, supra*, 22 Cal.4th at p. 800.) [¶] ... [¶] "In the absence of an applicable statute, equity must 'operate' [citation], and courts must devise their own procedure for ensuring just compensation [citation]." (*Edison,*

supra, 22 Cal.4th at p. 803.) Under these circumstances, the trial court had the inherent power "'to adopt working rules in order to do substantial justice in eminent domain proceedings.' [Citation.]" ([*U.S. v.*] *Fuller, supra*, 409 U.S. [488] at p. 492.)

(*Id.* at p. 906 [all abridgements but last by *Hackett* court].)

Thus, this Court may import Section 1260.040 into inverse, irrespective of Legislature's intent to limit it to eminent domain. (Cf. *Briggs, supra*, 3 Cal.5th at pp. 849, 859 [statutory time limit on judicial action phrased in mandatory terms deemed discretionary to avoid separation of powers concerns].) Indeed, if the bench and bar are to have the same tools in inverse condemnation the Legislature thought necessary to promote settlement and efficient litigation in eminent domain, this Court must create them by exercise of its article VI power.

CONCLUSION AND DISPOSITION

Accordingly, OCTA respectfully urges this Court to review this brief and any timely reply Weiss may file and, for the additional reasons stated in the principal briefs:

a. Reverse *Weiss*'s conclusion Section 1260.040 motions do not lie in inverse condemnation, establishing a contrary common law rule;

b. Affirm the trial court's order for OCTA and Caltrans on their Section 1260.040 motion except as to its inclusion of Weiss' nuisance claim, which OCTA's principal briefs concede ought not to have been resolved on that motion; and

c. Remand for further proceedings on Weiss' nuisance claim.

DATED: January 14, 2020

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CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed Supplemental Brief is produced using 13-point type including footnotes and contains approximately 2,718 words, within the 2,800 words permitted by the Rules of Court, rule 8.520(d)(2). Counsel relies on the word count of the Microsoft Word program used to prepare this brief.

DATED: January 14, 2020

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PROOF OF SERVICE

Evan Weiss, et v. v. The People of The State of California, et al.
Supreme Court Case No. S248141
Court of Appeal, Fourth Appellate District, Div. 3, Case No. G052735
Orange County Superior Court Case No. 30-2012-00605637

I, Holly M. Mills, declare:

I am employed in the County of Nevada, State of California. I am over the age of 18 and not a party to the within action. My business address is 420 Sierra College Drive, Suite 140, Grass Valley, California 95945. On January 14, 2020, I served the document described as **APPLICATION TO FILE SUPPLEMENTAL BRIEF; SUPPLEMENTAL RESPONDENTS' BRIEF** on the interested parties in this action as by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 14, 2020, at Grass Valley, California.

Holly M. Mills

Holly M. Mills

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Evan Weiss, et al. v. The People of The State of California, et al.
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Court of Appeal, Fourth Appellate District, Div. 3, Case No. G052735
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