IN THE SUPREME COURT OF THE STATE OF OREGON

ELLEN ROSENBLUM, the Attorney General for the State of Oregon; STATE OF OREGON, by and through Ellen Rosenblum, the Attorney General for the State of Oregon, the Oregon Health Authority, and the Oregon Department of Human Services; and the OREGON HEALTH INSURANCE EXCHANGE CORPORATION, dba Cover Oregon, an Oregon public corporation,

Plaintiffs-Adverse Parties,

v.

ORACLE AMERICA, INC., a Delaware corporation; RAVI PURI, an individual; and MYTHICS, INC., a Virginia corporation,
Defendants,

and

STEPHEN BARTOLO, an individual; THOMAS BUDNAR, an individual; KEVIN CURRY, an individual; SAFRA CATZ, an individual; and BRIAN KIM, an individual,

Defendants-Relators.

Supreme Court Case No. S063490
Marion County Circuit Court Case No. 14C20043
MANDAMUS PROCEEDING

MEMORANDUM OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, TECHNET, IT ACQUISITION ADVISORY COUNCIL, AND IT ALLIANCE FOR PUBLIC SECTOR IN SUPPORT OF RELATORS' PETITION FOR ALTERNATIVE WRIT OF MANDAMUS

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INTRODUCTION

Amici Curiae the Chamber of Commerce of the United States of America, TechNet, the IT Acquisition Advisory Council, and the IT Alliance for Public Sector appear in support of Relators' petition for an alternative writ of mandamus seeking review of the trial court's denial of Relators' motion to dismiss. Relators' petition raises two issues of immense significance to national and global companies doing business in Oregon—issues for which this Court's guidance is sorely needed. First, the trial court, relying on a misconstruction of applicable law, exercised personal jurisdiction over the out-of-state Relators based on nothing more than conduct that was within the scope of their employment and for their employer's benefit. Second, the trial court adopted a broad reading of the Oregon False Claims Act ("OFCA") that exposes employees of companies doing business with public bodies in Oregon to expansive and unprecedented individual liability.

Both of these rulings raise issues of first impression warranting this Court's mandamus review, insofar as the trial court erroneously exercised personal jurisdiction over Relators and misconstrued the plain language of the OFCA. *See N. Pac. S. S. Co. v. Guarisco*, 293 Or 341, 346 n 3, 647 P2d 920 (1982) ("Where a trial court holds that it has personal jurisdiction over a defendant, we have permitted the defendant to challenge such a ruling * * * through petition for mandamus"); *Wong v. Wong*, 134 Or App 13, 16, 894 P2d

519 (1995), *rev den*, 322 Or 167 (1995) (same); *State ex rel. Circus Circus Reno, Inc. v. Pope*, 317 Or 151, 854 P2d 461 (1993) (granting mandamus review of trial court's personal jurisdiction ruling); *Longo v. Premo*, 355 Or 525, 531, 326 P3d 1152 (2014) (mandamus review appropriate to correct "fundamental legal error[s]"); *Lindell v. Kalugin*, 353 Or 338, 347, 297 P3d 1266 (2013) (mandamus is a "statutory remedy aimed at correcting errors of law for which there is no other 'plain, speedy and adequate remedy in the ordinary course of the law.'") (quoting ORS 34.110).

If these important issues of law are not addressed by this Court, the trial court's rulings will create great uncertainty for all companies operating in Oregon. This uncertainty may well deter companies from doing business in Oregon and, in particular, with the State of Oregon, its counties, cities, public universities and hospitals, and all other public agencies. *See* ORS 180.750 (3) (broadly defining "public agency" for purposes of OFCA's applicability). To avoid this outcome, this Court should grant Relators' petition and issue a writ requiring the trial court to vacate its order denying dismissal, or to show cause why it refuses to dismiss the claims against Relators.

ARGUMENT

I. This Court Should Review the Trial Court's Personal Jurisdiction Ruling Because It Exposes Employees of Out-of-State Companies to Massive Personal Liability in Oregon

The trial court held that Relators—five Oracle employees—could be haled into the courts of a state where none of them works or resides in order to face more than half a *billion* dollars' worth of personal liability, on the basis of at most one or two comments made solely in the course of their employment.[1] That holding distorts the law of personal jurisdiction, and, if allowed to stand, would have profoundly troubling implications for every national and global company that does business or considers doing business in Oregon. This Court should grant mandamus.

A. The Trial Court's Ruling Distorts the Law of Personal Jurisdiction

As a matter of constitutional due process, a non-resident defendant is not subject to specific personal jurisdiction unless the defendant has "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 US 235, 253, 78 S Ct 1228, 2 L Ed 2d 1283 (1958); *see also Daimler AG v. Bauman*, __ US __, __, 134 S Ct 746, 755, 187 L Ed 2d 624 (2014). Only

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[1] With one exception not applicable here, the trial court's order summarily "adopt[ed] [the State's] arguments and authority" without setting forth its own reasoning. ER 394-95. Thus, for purposes of this petition, the State's arguments and the trial court's holdings are one and the same.

where the defendant has purposefully taken advantage of "'the benefits and protections' of the forum's laws" is it "presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." *Burger King Corp. v. Rudzewicz*, 471 US 462, 476, 105 S Ct 2174, 85 L Ed 2d 528 (1985). Personal jurisdiction is thus a "quid pro quo"; it is the cost a state can reasonably exact when a non-resident purposefully avails itself of the opportunity to do business within the state. *Robinson v. Harley-Davidson Motor Co.*, 354 Or 572, 592, 316 P3d 287 (2013); *see also Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F3d 1063, 1078 (10th Cir 2008); *Schwarzenegger v. Fred Martin Motor Co.*, 374 F3d 797, 802 (9th Cir 2004).

This is, importantly, a bargain that must be entered willingly: The Constitution protects the right of "potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 US 286, 297, 100 S Ct 559, 62 L Ed 2d 490 (1980). In order for a defendant to be subjected to personal jurisdiction, the Due Process Clause requires that the defendant "expressly aim[]" his conduct at the forum state. *Calder v. Jones*, 465 US 783, 789, 104 S Ct 1482, 1487, 79 L Ed 2d 804 (1984). Moreover, the Due Process Clause requires that each defendant's contacts with a forum state "must be assessed individually." *Id.* at 790. For this reason, courts have held that it is "improper to impute contacts to

employees." *Newsome v. Gallacher*, 722 F3d 1257, 1276 (10th Cir 2013); *see also id.* at 1275 ("Jurisdiction over a corporation in a particular forum does not automatically confer jurisdiction over that corporation's employees.").

This foundational rule of personal jurisdiction—that in order for personal jurisdiction to lie, defendants must expressly aim *their own* conduct at the forum state—is at odds with the trial court's exercise of jurisdiction here. When employees act to benefit their *employers*, in the ordinary course of business, they have not expressly aimed *their own* conduct at a given state.

Even to the extent the defendants in this case had *some* individual contacts with the State of Oregon, numerous courts recognize "that it is unfair to force an individual to defend a suit brought against him personally in a forum with which his only relevant contacts are acts performed not for his own benefit but for the benefit of his employer." *Marine Midland Bank, N.A. v. Miller*, 664 F2d 899, 902 (2d Cir 1981); *see Kendall v. Turn-Key Specialists, Inc.*, 911 F Supp 2d 1185, 1195 (ND Okla 2012) (quoting *Marine Midland*); *Bible Way Church of Our Lord Jesus Christ World Wide, Inc. v. Showell*, 578 F Supp 2d 164, 169 (DDC 2008) ("The fiduciary shield is an equitable doctrine that 'serves to prevent the perceived unfairness of forcing an individual to defend a lawsuit brought against him personally in a forum in which he performed the only relevant contacts for the benefit of his employer and not for his own benefit.'"); *Marlyn Nutraceuticals, Inc. v. Improvita Health Products*, 663

F Supp 2d 841, 852 (D Ariz 2009) ("[T]he Defendants' contacts with Arizona cannot reasonably be said to have been for their benefit, instead they were for the benefit of their employer. Similarly, this Court cannot find that these Defendants have conducted business in Arizona, only that their employer has."); *Armstrong World Indus., Inc. v. Allibert*, 97-CV-3914, 1998 WL 966017, at *6 (ED Pa Nov. 19, 1998) ("It would be repugnant to notions of fair play and substantial justice to make an individual subject to jurisdiction on the basis of acts done in a fiduciary capacity for an employer's benefit."); *Hudgins v. Hudgins*, 80 Ohio App 3d 707, 716, 610 NE2d 582, 588 (1992) ("Although appellant enters Ohio several times a year as required by his employer for the purpose of maintaining data processing equipment, it is the employer who has potentially established business activity in Ohio. Thus, the employer, if anyone, has availed itself of the protection and the benefits of Ohio."); *Saktides v. Cooper*, 742 F Supp 382, 387 (WD Tex 1990) ("[I]t would offend traditional notions of fair play and substantial justice to force employees who have occasion to do business by telephone or mail with any number of given States, to require that they defend lawsuits in those States in their individual capacity based on acts performed not for their own benefit, but for the benefit of their employer.").

This is not to say that employees are categorically immune from suit when they act in the capacity of their employment. They are not; the Supreme

Court made that clear in *Calder v. Jones*, 465 US at 790. But *Calder* also held, as have numerous other courts, that employees' contacts with a forum state "are not to be judged according to their employer's activities there"; what matters are the employees' *individual* contacts with the forum. *Id.*; *see also, e.g.*, *Newsome*, 722 F3d at 1275-76.

The circumstances of individual employee conduct that gave rise to personal jurisdiction in *Calder*, and in the other cases on which the State relied before the trial court, are distinct from run-of-the-mill conduct in the course of employment. In *Calder*, for example, the Supreme Court observed that the defendants—the editor and reporter of an allegedly libelous article—had been "primary participants" in the alleged tort. *Id.*; *see also LaDue v. City of Talent*, 1:14-CV-1421-CL, 2015 WL 1636655, at *2 (D Or Apr. 10, 2015) ("A corporate officer may be subject to personal jurisdiction if he was a 'primary participant' in the alleged wrongdoing."). And in *Davis v. Metro Prods., Inc.*, 885 F2d 515 (9th Cir 1989), the Ninth Circuit suggested that personal jurisdiction over employees could be proper where "the corporation is the agent or alter ego of the individual defendant." *Id.* at 520; *see also Ott v. Mortgage Investors Corp.*, 3:14-CV-00645 ST, 2015 WL 1648702, at *3 (D Or Apr. 14, 2015) (similar).

These exceptions prove the rule. If an employee is a "primary participant" in a tortious course of corporate conduct, or if the corporation is his

"alter ego," then the employee may in effect be *personally* availing himself of the benefits of doing business in the forum state. But none of the State's cases disturbs the general proposition that where an employee is acting in the ordinary course of his employment—for the benefit of his employer—the employee cannot be said to have entered knowingly into the "quid pro quo" of personal jurisdiction. *See, e.g., LaVallee v. Parrot-Ice Drink Products of Am., Inc.*, 193 F Supp 2d 296, 301 (D Mass 2002) (distinguishing *Calder*, where "the reporter and the editor * * * derived a direct benefit from the publication of the article," from the ordinary situation in which employees "do not personally benefit from actions in a foreign forum."). It is manifestly unfair in such circumstances to subject the employee to personal jurisdiction.

B. The Trial Court's Ruling Will Deter Companies from Doing Business in Oregon

If allowed to stand, the trial court's holding—which subjects employees to the threat of personal liability in Oregon courts simply for doing their jobs—will cause companies to think twice before they do business in Oregon.

Even if an employer chooses to indemnify employees against ultimate liability, it is difficult to overstate the extent to which a lawsuit may disrupt the lives of employees and their families. Defendants may see their reputations dragged through the mud in public legal filings. They may be unable to qualify for credit, such as a personal mortgage or car loan, given the specter of financial liability. They may suffer crushing stress, which can harm their health and

well-being. And these consequences will arise not because they consciously chose to avail themselves of the privilege of doing business in Oregon (a choice that can reasonably bear the cost of amenability to suit) but merely because they did their jobs at the behest of their employer.

In addition, exposing employees to the personal risks created by the trial court's ruling—in this case, exposure to the tune of half a *billion* dollars—would inhibit an employer's ability to attract and retain the best talent in a highly competitive marketplace. And, of course, it would create costs for the employer itself—both the legal costs of defending employees against suit in out-of-state courts and the potential costs of indemnifying any resulting damages.

In sum, an out-of-state company's employees should not be subjected to suit in another state's courts merely because they happen to have some contact with that state solely while doing their jobs for the benefit of their employer.

II. This Court's Review Is Necessary to Resolve Uncertainty Over the Scope of the OFCA

There are no Oregon appellate cases interpreting the OFCA, which was adopted in 2009. *See* Or Laws 2009, ch 292. And under the trial court's broad reading of the statute, employees working for state and public agency contractors face expansive and unprecedented false claims liability. Absent guidance from this Court, the trial court's ruling and the resulting uncertainty

over the OFCA's scope will discourage companies from doing business with the State of Oregon.

A. Mandamus Relief Is Necessary to Resolve Matters of First Impression Concerning the Meaning of ORS 180.755(1)(b) and to Correct the Trial Court's Overbroad Ruling

ORS 180.755(1)(b) provides that a person may not, "[i]n the course of presenting a claim for payment or approval, make or use, or cause to be made or used, a record or statement that the person knows to contain, or to be based on, false or fraudulent information." Relators' petition asserts that the trial court misinterpreted this provision in two ways: (1) by holding that a statement is made "in the course of presenting a claim for payment," so long as the statement is "related to, associated with, or linked to" the claim, and that the statement need not be made "in the same progression of events" as the claim; and (2) by ignoring the statute's requirement that the same "person" who "makes a false statement" must also "present the claim." Mem. in Supp. of Pet. at 28-37.

Amici emphasize two points that demonstrate why Relators' arguments warrant mandamus review.

First, Relators' petition raises significant issues of first impression about the OFCA. As noted, there is no appellate case law interpreting ORS 180.755(1)(b). And the provision is unique to Oregon: *Amici* are aware of no other false claims law in the country that contains the "in the course of

presenting a claim" language. Thus, absent this Court's intervention, the trial court's ruling will stand as the only decision interpreting ORS 180.755(1)(b), and companies doing business with the State of Oregon will have no other case law (from Oregon or elsewhere) to consult for guidance as to the meaning of this critical provision.

Second, allowing the trial court's ruling to stand would be particularly troubling because it exposes corporate employees to broad and unprecedented false claims liability. For instance, under the trial court's reading of ORS 180.755(1)(b), an employee with an "executive title" and "managerial role" faces personal liability for making an allegedly false statement that is only tangentially "associated" with a claim for payment subsequently submitted to the State, even if that employee had no actual knowledge of or involvement in the submission of the claim. *See* ER 231, 233. The State, unsurprisingly, can point to no false claims act case where individual liability was imposed under similar circumstances. This unprecedented liability risk to employees may well deter companies from doing business with the State and all other Oregon public bodies.

Accordingly, because Relators' petition raises issues of first impression about the OFCA that have broad implications for employees of state and public agency contractors, mandamus relief is warranted. *See Schlagenhauf v. Holder*, 379 US 104, 110-11, 85 S Ct 234, 13 L Ed 2d 152 (1964) (deeming mandamus

jurisdiction appropriate to address "issue of first impression" about the application of Fed R Civ P 35 in a new context); *Perry v. Schwarzenegger*, 591 F3d 1147, 1158 (9th Cir 2010) (identifying "the need to resolve a significant question of first impression" as a factor weighing in favor of mandamus jurisdiction); *In re Prudential Ins. Co. of Am.*, 148 SW 3d 124, 138 (Tex 2004) (deeming mandamus review "necessary" to address "an issue of law," that was "one of first impression" and "likely to recur").

B. The Trial Court's Interpretation of the OFCA's Knowledge Requirement Conflicts with Case Law Construing a Parallel Provision of the Federal False Claims Act

All parties acknowledge that the OFCA is modeled after the Federal False Claims Act ("Federal FCA"), and that courts construing the OFCA should be guided by cases interpreting parallel provisions of the Federal FCA. *See* ER 177 (Relators' brief); ER 219 (State's brief). This includes the OFCA's definition of "knowledge," which mirrors the federal definition. *Compare* ORS 180.755(2), *with* 31 U.S.C. § 3729(b)(1).

The trial court, however, adopted a broad reading of the OFCA's knowledge requirement that clashes with the Federal FCA. Under the trial court's reading, a court may *presume* that a corporate employee knew or should have known of certain facts based solely on the employee's "management responsibilities" and the employer's "control" of projects. *See* ER 225. Federal FCA case law rejects such an expansive formulation of the knowledge

requirement. *See, e.g.*, *U.S. ex rel. Landis v. Tailwind Sports Corp.*, 51 F Supp 3d 9, 52 (D DC 2014) (dismissing FCA claims against individual defendant where relator relied on defendant's "high-ranking position in [the defendant corporation] to argue that he was likely aware of the doping * * * [T]he Court declines to accept the theory that the FCA's scienter requirement can be established solely because an individual had a high-ranking position within the corporation that submitted an allegedly false claim. Such a theory substitutes the FCA's scienter requirement with 'a type of loose constructive knowledge that is inconsistent with the Act's language, structure, and purpose.'") (quoting *United States v. Sci. Applications Int'l Corp.*, 626 F3d 1257, 1274 (DC Cir 2010)); *U.S. ex rel. Dyer v. Raytheon Co.*, No. 08-01341-DPW, 2013 WL 5348571, at *26 (D Mass Sept. 23, 2013) *appeal dismissed* (Jan. 31, 2014) ("The 'collective knowledge' doctrine does not apply to FCA claims, therefore [plaintiff] must show that a single individual, acting on behalf of [defendant] had the requisite knowledge and approved the false claims.").

Insofar as the trial court's reading of the OFCA's knowledge requirement conflicts with the Federal FCA's identical knowledge requirement, it should be rejected. Interpreting OFCA provisions in harmony with parallel Federal FCA provisions is not only consistent with the Oregon's legislature's intent, it also minimizes compliance burdens and uncertainty for companies doing business in Oregon that are already familiar with Federal FCA standards.

CONCLUSION

The Court should grant Relators' Petition for an Alternative Writ of Mandamus.

DATED this 31st dayof August 2015.

KEATING JONES HUGHES, P.C.

s/Lindsey H. Hughes

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CERTIFICATE OF COMPLIANCE

I certify that this memorandum complies with the word count limitation for briefs pursuant to ORAP 5.05(2)(b)(ii); the word count is 4,526 words. I further certify that this memorandum is produced in a type font not smaller than 14 point in both text and footnotes pursuant to ORAP 5.05(4)(g).

In addition, I certify that this document was converted into a searchable PDF format from the original Word document for electronic filing and was scanned for viruses.

s/Lindsey H. Hughes
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the date below I filed the foregoing **MEMORANDUM OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, TECHNET, IT ACQUISITION ADVISORY COUNCIL, AND IT ALLIANCE FOR PUBLIC SECTOR IN SUPPORT OF RELATORS' PETITION FOR ALTERNATIVE WRIT OF MANDAMUS** with the Appellate Court Administrator through the appellate efiling system.

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The Hon. Courtland Geyer
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DATED this 31st day of August 2015.

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