IN THE SUPREME COURT OF THE STATE OF ALASKA

HAGELAND AVIATION SERVICES, INC., L. MICHAEL HAGELAND and JAMES TWETO, Appellants, vs. JOHN HARMS and OTHER PILOTS SIMILARLY SITUATED, Appellees.	Trial Court Case No. 3AN-02-08561 CI Case No. S-12871 S-12881

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE PETER A. MICHALSKI, PRESIDING

REPLY BRIEF OF APPELLANTS HAGELAND AVIATION SERVICES INC., L. MICHAEL HAGELAND AND JAMES TWETO

Peter J. Maassen (8106032)
INGALDSON, MAASSEN &
FITZGERALD, P.C.
813 West Third Avenue
Anchorage, AK 99501
(907) 258-8750
Attorney for Appellants
L. Michael Hageland and James Tweto

Thomas M. Daniel (8601003)
James N. Leik (8111109)
Jacob Nist (0211051)
PERKINS COIE LLP
1029 West Third Avenue, Suite 300
Anchorage, AK 99501
(907) 279-8561
Attorneys for Appellant
Hageland Aviation Services, Inc.

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Deputy Clerk

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PROVISIONS PRINCIPALLY RELIED UPON

Constitutional Provisions:

U.S. Const., Art. I, § 10 [excerpt]:

> Restrictions upon powers of states.
>
> No state shall enter into any treaty, alliance or confederation; grant letters of marquee and reprisal; coin money, emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law or law impairing the obligation of contracts, or grant any title of nobility.

* * * * *

U.S. Const., Amendments, Art. V:

> Rights of accused in criminal proceedings; due process; eminent domain.
>
> 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 offense to be twice put in jeopardy of life or limb; nor shall he 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.

Alaska Const., Art. I, § 15:

> Prohibited State Action.
>
> No bill of attainder or ex post facto law shall be passed. No law impairing the obligation of contracts, and no law making any irrevocable grant of special privileges or immunities shall

be passed. No conviction shall work corruption of blood or forfeiture of estate.

Alaska Const., Art. I, § 18:

Eminent Domain.

Private property shall not be taken or damaged for public use without just compensation.

Alaska Statutes

AS 23.10.060:

Payment for overtime.

(a) An employer who employs employees engaged in commerce or other business, or in the production of goods or materials in the state, may not employ an employee for a workweek longer than 40 hours or for more than eight hours a day.

(b) If an employer finds it necessary to employ an employee for hours in excess of the limits set in this subsection, overtime compensation for the overtime at the rate of one and one-half times the regular rate of pay shall be paid. An employee is entitled to overtime compensation for hours worked in excess of eight hours a day. An employee is also entitled to overtime compensation for hours worked in excess of 40 hours a week; in determining whether an employee has worked more than 40 hours a week, the number of hours worked shall be determined without including hours that are worked in excess of eight hours in a day because the employee has or will be separately awarded overtime compensation based on those hours.

(c) This section is considered included in all contracts of employment.

(d) This section does not apply with respect to

(1) an employee employed by an employer employing less than four employees in the regular course of business, as

"regular course of business" is defined by regulations of the commissioner;

(2) an employee employed in handling, packing, storing, pasteurizing, drying, preparing in their raw or natural state, or canning agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products;

(3) an employee of an employer engaged in small mining operations where not more than 12 employees are employed if the employee is employed in excess of 12 hours a day or 56 hours a week during a period or periods of not more than 14 workweeks in the aggregate in a calendar year during the mining season, as the season is defined by the commissioner;

(4) an employee engaged in agriculture;

(5) an employee employed in connection with the publication of a weekly, semiweekly or daily newspaper with a circulation of less than 1,000;

(6) a switchboard operator employed in a public telephone exchange that has fewer than 750 stations;

(7) an employee in an otherwise exempted employment or proprietor in a retail or service establishment engaged in handling telegraphic, telephone, or radio messages for the public under an agency or contract arrangement with a telegraph or communications company where the telegraph message or communications revenue of the agency does not exceed $500 a month;

(8) an employee employed as a seaman;

(9) an employee employed in planting or tending trees, cruising, or surveying, or bucking, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal if the number of employees employed by the employer in the forestry or lumbering operations does not exceed 12;

(10) an individual employed as an outside buyer of poultry, eggs, cream, or milk in their raw or natural state;

(11) casual employees as may be liberally defined by regulations of the commissioner;

(12) an employee of a hospital whose employment includes the provision of medical services;

(13) work performed by an employee under a flexible work hour plan if the plan is included as part of a collective bargaining agreement;

(14) work performed by an employee under a voluntary flexible work hour plan if

(A) the employee and the employer have signed a written agreement and the written agreement has been filed with the department; and

(B) the department has issued a certificate approving the plan that states the work is for 40 hours a week and not more than 10 hours a day; for work over 40 hours a week or 10 hours a day under a flexible work hour plan not included as part of a collective bargaining agreement, compensation at the rate of one and one-half times the regular rate of pay shall be paid for the overtime;

(15) an individual employed as a line haul truck driver for a trip that exceeds 100 road miles one way if the compensation system under which the truck driver is paid includes overtime pay for work in excess of 40 hours a week or for more than eight hours a day and the compensation system requires a rate of pay comparable to the rate of pay required by this section;

(16) an individual employed as a community health aide by a local or regional health organization as those terms are defined in AS 18.28.100;

(17) work performed by a mechanic primarily engaged in the servicing of automobiles, light trucks, and motor homes if the mechanic

(A) is employed as a flat-rate mechanic by a nonmanufacturing establishment primarily engaged in the business of selling or servicing motor vehicles;

(B) has signed a written agreement with the employer that specifies the mechanic's flat hourly rate of pay and the automotive manual or manuals on which the flat rate is to be based;

(C) is compensated for all hours worked in any capacity for that employer up to and including eight hours a day and 40 hours a week at an hourly rate that is not less than the greater of

(i) 75 percent of the flat hourly rate of pay agreed upon by the employer and employee under (B) of this paragraph; or

(ii) twice the state minimum wage; and

(D) is compensated for all hours worked in any capacity for that employer in excess of eight hours a day or 40 hours a week at one and one-half times the rate described in (C) of this paragraph;

(18) work performed by an employee under a voluntary written agreement addressing the trading of work shifts among employees if

(A) the employee is employed by an air carrier subject to subchapter II of the Railway Labor Act (45 U.S.C. 181-188), including employment as a customer service representative;

(B) the trading agreement is not a flexible work hour plan entered into under (13) or (14) of this subsection;

(C) the trading agreement is filed with the employee's employer; and

(D) the trading agreement states that the employee is not entitled to receive overtime for any hours worked by the employee when the employee voluntarily works those hours under a shift trading practice under which the employee has the opportunity in the same or other work weeks, to reduce

hours worked by voluntarily offering a shift for trade or reassignment;

(19) work performed by a flight crew member employed by an air carrier subject to 45 U.S.C. 181-188 (subchapter II of the Railway Labor Act); in this paragraph, "flight crew" means the pilot, co-pilot, flight engineer, and flight attendants.

(e) The minimum amount due an employee under (d)(17)(C) and (D) of this section shall be figured on a weekly basis.

Legislation:

Chapter 11, SLA 2003:

AN ACT

Exempting flight crew members of certain air carriers from overtime pay requirements.

_____

*** Section 1.** AS 23.10.060 (d) is amended by adding a new paragraph to read:

(19) work performed by a flight crew member employed by an air carrier subject to 45 U.S.C. 181 - 188 (subchapter II of the Railway Labor Act); in this paragraph, "flight crew" means the pilot, co-pilot, flight engineer, and flight attendants.

Chapter 19, SLA 2005:

AN ACT

Relating to the retrospective application and applicability of the overtime compensation exemption for flight crew members; and providing for an effective date.

_____

*** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

OVERTIME COMPENSATION EXEMPTION FOR FLIGHT CREW WORK PERFORMED AFTER JANUARY 1, 2000. The provisions of AS 23.10.060(d)(19), as enacted by sec. 1, ch. 11, SLA 2003, apply to work performed on or after January 1, 2000.

*** Sec. 2.** The uncodified law of the State of Alaska is amended by adding a new section to read:

RETROSPECTIVE APPLICATION. This Act applies retrospectively to all actions and proceedings under AS 23.10.060(b) that are based on a claim for overtime compensation for employment as a flight crew member on or after January 1, 2000, and that are not determined by final court judgment or administrative decision on or before the effective date of this Act. For purposes of this section, "flight crew member" means a person performing work under AS 23.10.060(d)(19), as enacted by sec. 1, ch. 11, SLA 2003.

*** Sec. 3.** This Act takes effect immediately under AS 01.10.070(c).

I. APPELLEES' STATEMENT OF THE CASE MISCHARACTERIZES SEVERAL WHOLLY IRRELEVANT ASPECTS OF THE BACKGROUND

The only issue in this appeal is a legal one: the constitutionality of an amendment to the Alaska Wage and Hour Act ("AWHA"). Plaintiffs nevertheless rail about the proceedings below in a way that is not only inaccurate but also, as shown by its total irrelevance, absent any purpose except to prejudice the Court against Hageland and its attorneys.

Plaintiffs imply that some Hageland pilots were paid less than the minimum wage. As Plaintiffs are well aware, the 14-hour duty period on which they base this argument simply reflects the portion of each day when FAA regulations allowed the pilots to fly – not the amount of time they actually worked. *See* Exc. 416-467. It is undisputed that Hageland pilots regularly stopped flying and went home well before their 14-hour duty period expired. *See* Exc. 413-414; Exc. 410-412. Plaintiffs did make a half-hearted argument below that the entire 14 hours should be compensable because of the possibility, rarely occurring, that pilots would be called back to work. But this issue was never resolved by the trial court and became moot when the parties stipulated to a judgment that calculated only overtime.

Plaintiffs' most insidious mischaracterization is their repeated insistence that Hageland's counsel "misrepresent[ed] the history of past AWHA enforcement and the position of the DOL" to the Alaska legislature. Appellees' Brief at 2. But the legislature heard from both Hageland's counsel and Plaintiffs' counsel, along with many other

witnesses who had no stake in this particular lawsuit. The legislature reached its own conclusions about the facts and the public good, as it was entitled to do.

There is no dispute that in 1986, DOL informed the Alaska Air Carriers Association ("AACA") that Part 135 air carriers were exempt from the AWHA "if involved in interstate transportation of passengers and/or substantial hauling of the mail." Exc. 19. There is no dispute that Hageland is a Part 135 air carrier and hauled mail. *See* Exc. 76. There is no dispute that most other Alaska carriers, like Hageland, conformed their pay practices to DOL's advice. *See, e.g.*, Exc. 88-89; 149 (Grant Aviation); 158 (Alaska Central Express); 159 (Cape Smythe Air Service). There is no dispute that the two documents on which Plaintiffs rely for their contrary interpretation – a 1983 letter from the AG to DOL and a 2006 letter from DOL to Plaintiffs' counsel (Exc. 16, 22, 353-55) – were not shared with the regulated industry.

Moreover, when the legislature first considered the pilot exemption in 2003, before Hageland ever became involved in the process, the legislature heard testimony from a representative of the AACA who made the same point Hageland witnesses later made in 2005, *i.e.*, that the exemption for pilots was justified by DOL's long-time enforcement position of exempting pilots of air carriers who hauled mail. The AACA representative testified that *"the current practice among the majority of association members is to accept the interpretation by the Alaska [DOL] that flight crews are exempt from overtime rules. . . . Passage [of Chapter 11] will ensure that the state's executive branch interpretation of wage and hour overtime law is the same as that applied by Alaska courts.*" Exc. 50-51 (emphasis added). Hageland's testimony to the legislature in

2005 – on which Plaintiffs base much of their argument – merely reiterated the common understanding in the industry.

Nor is it accurate, as Plaintiffs claim, that Hageland was guilty of spoliation of evidence. Although Plaintiffs asserted such a claim in the trial court, the trial court *rejected* the assertion once (Exc. 415), and never reached the question when Plaintiffs brought it up again at the time of trial.

Plaintiffs' accusation that Hageland bullied pilots into opting out of the class is simply not true. Over two-thirds of Hageland's pilots opposed the lawsuit and opted out because they thought Hageland had treated them fairly and paid them well. *See e.g.*, Exc. 38-39, 210, 139-140. The trial court did restrict communications between the parties in part because of alleged "past mistreatment of plaintiff class members," (Exc. 388-389) but the record was devoid of any evidence of this. Plaintiffs' sole basis for the serious charge was a paralegal's hearsay affidavit that he had received calls from three unidentified pilots, two of whom only reported, correctly, that the company feared bankruptcy. Exc. 298-299. No class member ever testified that he felt coerced. Like Plaintiffs' other accusations of misconduct, this is irrelevant to the issue on appeal.

II. ARGUMENT

A. Chapter 19 Was Clarifying Legislation

Without citing any authority, Plaintiffs argue first that the "clarifying legislation" analysis is restricted to statutes that are "not expressly retroactive." Appellees' Brief at 36. This narrow categorization begs the question before the Court: What did the legislature intend? It may seem a redundancy to Plaintiffs, but a legislature wanting to be

perfectly clear about its intentions may well make "clarifying legislation" expressly retroactive.[1] The Court's task is the same whether the law is expressly retroactive or not: "to determine whether the Amendment is in fact a clarification[.]" *Honeywell*, 518 N.W.2d at 562 n.12.

Plaintiffs' second argument against the "clarifying legislation" analysis is that Hageland waived the issue by not appealing from an order in which the trial court briefly addressed it. Exc. 86-87; Appellees' Brief at 36-37. But Hageland did not appeal from any "orders;" it appealed from a Final Judgment (Exc. 214), and its first Point on Appeal was that "[t]he trial court erred in ruling that Senate Bill 105 (Chapter 19, SLA 2005) is unconstitutional." Chapter 19 is not unconstitutional if it is "clarifying legislation," an argument that Hageland made below and may therefore pursue on appeal.

Plaintiffs' third argument is the substantive one. They argue that Chapter 19 cannot have been "clarifying legislation" because it changed the law. The legislature thought differently, however. Chapter 11 (2003) was expressly intended to "put[] in statute what is existing [DOL] policy" (Exc. 40), and Chapter 19 (2005) was expressly intended to "clarif[y] [the] legislative intent" of Chapter 11 by ensuring that it applied to existing cases. Exc. 131. The legislature's own characterization of what it has done deserves "considerable weight," especially where, as here, the new law comes shortly

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[1] *See, e.g., Sherbo v. Comm'r of Internal Revenue*, 255 F.3d 650, 654-55 (8th Cir. 2001) ("This 1998 amendment was expressly made retroactive to 1990[;] its retroactivity was constitutional because the amendment merely clarified prior law"); *Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Ass'n*, 518 N.W.2d 557, 562 n.12 (Minn. 1994); *Turner v. Turner*, 595 A.2d 297, 304 (Conn. 1991); *Graczyk v. Workers' Comp. Appeals Bd.*, 229 Cal.Rptr. 494, 501 (Cal. App. 1986).

after the first and "soon after the controversy arose concerning the proper interpretation of the statute." *Valles v. Ivy Hill Corp.*, 410 F.3d 1071, 1079-80 (9th Cir. 2005).[2]

Plaintiffs argue, however, that the Court must disbelieve the legislature's own description of its intent because "every known application of the AWHA to air carriers prior to 2003 found that the AWHA did in fact apply to intrastate air carriers lacking collective bargaining agreements." Appellees' Brief at 37. But this is simply not true, as already described above. DOL's 1986 letter to the AACA confirmed what the carriers believed to be the case (as they later testified unanimously before the legislature): that pilots were exempt from the AWHA if their employers were "involved in interstate transportation of passengers and/or substantial hauling of the mail." Exc. 19. Plaintiffs' argument for a different policy relies on an internal memo from the AG to DOL, and a letter from DOL to Plaintiffs' counsel, 23 years apart (Exc. 16, 22; Exc. 353-55); these are practically irrelevant given DOL's public pronouncement and the industry's decades of conforming practice. But even if Plaintiffs' position had more evidentiary support, what matters is that the legislature has, in the due exercise of its separate power, weighed the evidence on both sides and reached a conclusion that it believed was consistent with the evidence and sound public policy. This was the legislative prerogative. *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1053-54, 1055 (Alaska 2002).

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[2] Many cases endorse the proposition that when the legislature amends a statute in the midst of controversy over its meaning, "it is logical to regard the amendment as a legislative interpretation of the original act." *See, e.g., Turner*, 595 A.2d at 304, quoting 1A J. Sutherland, *Statutory Construction* (4th ed. Sands 1984) § 22.31, pp. 184-86); *ABKO Music, Inc. v. Lavere*, 217 F.3d 684, 690 (9th Cir. 2000).

B. <u>Chapter 19 Was Not an Unconstitutional Taking</u>

1. Plaintiffs Have Not Met Their Burden of Proving that the State Will Not Compensate Them for the Alleged Taking

The Alaska Constitution does not prohibit the State from taking property, only from taking property without fair compensation.[3] Plaintiffs have not met their burden on this issue; they concede they have never sought compensation from the State.

Plaintiffs treat this as an issue involving federal jurisdiction under the Tucker Act, but they miss the point. If the law provides a compensatory remedy for the alleged taking, there is no *constitutional* violation. In the federal system, this compensatory remedy is provided by the Tucker Act, and thus many of the federal cases focus on the availability of this federal remedy. But the underlying principle is constitutional and applies under state law as well. *Beverly Bank* illustrates the point.[4] In that case, the plaintiff alleged that an Illinois flood control statute violated the U.S. Constitution's takings clause. Illinois law provided a compensatory remedy, but the plaintiff had not pursued it, and thus there was no basis for finding that the flood control statute was unconstitutional. Similarly, Alaska law gives Plaintiffs the right to sue the State for compensation for the alleged taking. As a result, Chapter 19 does not violate the Alaska Constitution's takings provision.

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[3] *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536-37 (2005); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-95 (1985); *Bay View, Inc. v. Ahtna, Inc.*, 105 F.3d 1281, 1285 (9th Cir. 1997).

[4] *Beverly Bank v. Illinois Dep't of Transportation*, 579 N.E.2d 815 (Ill. 1991). Similarly, *Williamson County, supra*, is not a Tucker Act case. It involved a takings claim against a county planning commission, not a claim against the United States.

Plaintiffs argue that they could not pursue a compensation claim against the State because Alaska's *statutes* do not recognize a cause of action against the State for taking property other than real property.[5] But Plaintiffs ignore the cases cited in Hageland's opening brief, recognizing that Alaskans have a *non-statutory* cause of action against the State for inverse condemnation.[6] Plaintiffs identify no impediment to their pursuit of such an action for the taking they allege here. The court in such an action will either determine that Chapter 19 constituted a taking and require the State to pay compensation or find that no taking occurred. In either case, Chapter 19 is not unconstitutional.[7]

Plaintiffs argue that Hageland waived this issue by not raising it in the trial court. But this Court will address questions of law that are critical to a proper and just decision.[8] The parties have fully briefed the issue. Respect for the legislature dictates that this Court decide the constitutionality of Chapter 19 based on substance, not waiver.

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[5] Appellees' Brief at 34. Plaintiffs inaptly refer to AS 09.55.240-460, which do not address inverse condemnation claims by property owners but rather the affirmative assertion of eminent domain by a government entity.

[6] Appellants' Brief at 20 n.10. This cause of action flows from the "self-executing" nature of the takings clause. *See State v. Crosby*, 410 P.2d 724, 728 (Alaska 1966).

[7] Plaintiffs claim that several U.S. Supreme Court cases support their position. But in two of these cases, *Babbitt v. Youpee* and *Hodel v. Irving*, the United States conceded that it would not pay compensation to the property owner. Brief for Petitioners in *Youpee* at 13 n.5 (1996 WL 435925); Brief for Appellants in *Irving* at 25 n.16 (1986 WL 728351). *See* 27 Hastings Const. L. Q. 1, 48 (1999). This concession established the futility of a compensation remedy and explains the Court's willingness to address constitutionality. The third case, *Eastern Enterprises*, is explained in Appellants' Brief at 19 n.9.

[8] *Vest v. First Nat. Bank of Fairbanks*, 659 P.2d 1233, 1233 n.2 (Alaska 1983). *See also Garner v. State*, 63 P.3d 264, 269 n.21(Alaska 2003); *John v. Baker*, 982 P.2d 738, 746 n.28 (Alaska 1999).

2. Plaintiffs' Statutory Cause of Action Is Not a Property Interest that Is Immune from Legislative Action

Plaintiffs ask this Court to depart from the overwhelming weight of authority and hold that an accrued cause of action is property protected against taking by the Alaska Constitution. Plaintiffs do not address the decisions that decline to recognize a property interest in a cause of action. *See* Appellants' Brief at 22. Nor do they address the well-established principle that courts adjudicating a claim must apply the law as it exists at the time of adjudication. *Id.* at 17-18.

Plaintiffs rely on the argument that the Alaska Constitution's takings provision is broader than its federal counterpart. But the greater breadth of Alaska's takings provision lies in its requirement that the State compensate owners for mere *damage* to property, not just a *taking*. *See* Appellants' Brief at 18 n.7. This difference has no bearing on whether a cause of action is property. Plaintiffs also assert that this Court has decided the issue. But in *Anderson* and *Reust*, the legislature passed the tort reform statute *before* plaintiffs' causes of action accrued. Thus, the issue was whether plaintiffs had a constitutionally-protected interest in claiming punitive damages *prior to* the date their cause of action accrued, and the straightforward holding of these cases is that "an unaccrued claim is not property." *Anderson*, 78 P.3d 710, 715. These cases did not decide if, or when, an accrued cause of action becomes property for takings clause purposes.[9]

[9] Thus, Plaintiffs are wrong when they assert that "Hageland's contention that a cause of action is not property short of final judgment is directly contrary to this Court's holdings in *Reust* and *Anderson*." Appellees' Brief at 16. To test this proposition, assume a rule that a cause of action is not property prior to final judgment, and apply that rule to the facts in *Reust* and *Anderson*. The outcomes are unchanged.

3. Chapter 19 Did Not Accomplish a Taking of Plaintiffs' Property

a. The "categorical" takings concept does not apply

Plaintiffs argue that Chapter 19 accomplishes a so-called "categorical" taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1013, 1015 (1992). *Lucas* held that there is a "categorical" taking when "regulation denies all economically beneficial or productive use of land."[10] That the rule of *Lucas* applies only to interests in land[11] is reinforced by its corollary, *i.e.*, that there is no "categorical taking" when the regulation duplicates results that could be obtained under other state laws governing the use of real property, like nuisance laws. 505 U.S. at 1029-31. Plaintiffs cite no cases applying *Lucas* to intangible property interests.[12]

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[10] Plaintiffs did not argue below that Chapter 19 accomplished a categorical taking under *Lucas*, and the trial court made no findings to support such a determination.

[11] The limitation of this concept to interests in land is demonstrated throughout *Lucas*: The Court indicated that a categorical taking takes place when regulation "denies all economically beneficial or productive use *of land*", "in the extraordinary circumstance where *no* productive or economically beneficial use *of land* is permitted", in "the relatively rare situations where the government has deprived *a landowner* of all economically beneficial uses", when regulations "leave the owner *of land* without economically beneficial or productive options", "when the *owner of real property* has been called upon to sacrifice *all* economically beneficial uses in the name of the common good", and "[w]here the State seeks to sustain regulation that deprives *land* of all economically beneficial use." 505 U.S. at 1015, 1017-19, 1027 (emphases added).

[12] Plaintiffs cite *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), but *Brown* did not involve an alleged *Lucas* "categorical" taking. It involved an alleged *per se* taking by means of a physical invasion of property. *Id.* at 235.

Plaintiffs erroneously argue that that this Court "engaged in *per se* taking analysis" of intangible property rights (trade secrets) in *State v. Arctic Slope Regional Corp.*[13] To the contrary, this Court *rejected* the oil companies' arguments that it should use a *per se* analysis. The Court said that the case did not involve a physical interference with real property, as in the cases where the U.S. Supreme Court had found a *per se* taking. 834 P.2d at 142. And the Court stated it was "unable to comprehend how one can 'physically' occupy or invade intangible property." *Id.* n.10. Similarly, Plaintiffs are wrong in claiming that this Court used a *"per se"* analysis to evaluate an alleged taking of intangible property in *Tlingit-Haida Regional Electric Authority v. State*, 15 P.3d 754 (Alaska 2001). Appellees' Brief at 18. *Tlingit-Haida* involved takings claims related to two alleged property interests: real property and a utility's certificate of public convenience. The Court concluded that the certificate was *not* a vested property interest protected by the takings provision. 15 P.3d at 765. The Court had no reason to consider whether APUC's action accomplished a *per se* or categorical taking of the certificate.

b. Proof of Plaintiffs' subjective expectations and reliance is essential to regulatory takings analysis

Plaintiffs had the burden to establish all elements of a regulatory taking.[14] One of these elements is whether the law interferes with reasonable investment-backed expectations. The trial court refused to consider Plaintiffs' subjective expectations with

[13] 834 P.2d 134 (Alaska 1992).

[14] *Cienega Gardens v. U.S.*, 503 F.3d 1266, 1288 (Fed. Cir. 2007). *See also Spinell Homes, Inc. v. Municipality of Anchorage*, 78 P.3d 692, 702 (Alaska 2003); *Joseph M. Jackovich Revocable Trust v. State*, 54 P.3d 294, 303 (Alaska 2002).

respect to their alleged property interest, and it therefore made no finding that Plaintiffs had any subjective expectations or acted in reliance on them. Exc. 189.

Plaintiffs argue that their subjective expectations are irrelevant to the analysis. Plaintiffs rely on two cases decided by the Federal Circuit,[15] but that Circuit has repeatedly stated, and recently confirmed, that a plaintiff claiming a regulatory taking must prove that it had actual, subjective expectations and that it acted in reliance on those expectations.[16] *See Cienega Gardens,* 503 F.3d at 1288. The statements in *Chancellor Manor* and *Commonwealth Edison* relied upon by Plaintiffs do not make the property owner's subjective expectations irrelevant. They only demonstrate that the existence of subjective expectations is irrelevant to whether those expectations were reasonable:

> Although *Commonwealth Edison* . . . states that "subjective expectations are irrelevant" to the question of "reasonable expectations" we do not think this prevents our subjective inquiry here. We of course agree that a party's subjective expectation is irrelevant to *whether that expectation is reasonable*. . . . The subjective inquiry we make here concerns *not whether a party's expectations were reasonable, but rather whether a party actually had investment-backed expectations and, if so, what those expectations were.*

Cienega Gardens, 331 F.3d at 1346 n.42 (emphasis added). *Accord, Appolo Fuels, Inc. v. U.S.,* 381 F.3d 1338, 1349 n.5 (Fed. Cir. 2004).

Plaintiffs also claim that two U.S. Supreme Court cases demonstrate that

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[15] Appellees' Brief at 23-24 (quoting *Chancellor Manor v. U.S.*, 331 F.3d 891, 904 (Fed. Cir. 2003) and citing *Commonwealth Edison v. U.S.*, 271 F.3d 1327, 1348 (Fed. Cir. 2001)).

[16] *E.g.*, *Cienega Gardens v. U.S.*, 331 F.3d 1319, 1346 (Fed. Cir. 2003); *Norman v. U.S.*, 429 F.3d 1081, 1093 (Fed. Cir. 2005).

reasonable investment-backed expectations are evaluated solely on an objective basis.[17] Plaintiffs' reliance on these cases is misplaced. They simply reflect that if the expectations asserted by the property owner are objectively unreasonable, a court can reject the claim on that basis alone without reaching the question of subjective expectations. That does not mean that the plaintiff is not required to prove that it had subjective expectations and acted in reliance on them.

c. Plaintiffs did not meet their burden of demonstrating their subjective reasonable investment-backed expectations

Unable to prove that they had formed any subjective investment-backed expectations regarding a cause of action for overtime pay, Plaintiffs argue that their expectations should be assessed on the date Chapter 19 was enacted, in 2005. This argument fails for two reasons.

First, the argument fails as a matter of law, because Plaintiffs' "investment-backed expectations" are not determined on the date of taking. By definition, the focus must be on the property owner's expectations at the time he made the investment (most frequently, the date he bought the property).[18] Focusing on the property owner's expectations on the date of the taking will only produce self-serving statements of expectations that are fueled by the proposed taking, and it entirely omits the significance

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[17] Appellees' Brief at 24 (discussing *Connolly* and *Ruckelshaus*).

[18] "The third [regulatory takings] criterion, interference with distinct investment-based expectations, was a way of limiting takings recoveries to owners who could demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime." *Loveladies Harbor, Inc. v. U.S.*, 28 F.3d 1171, 1177 (Fed. Cir. 1994).

of the investment made in reliance on the then-existing regulatory environment. Here, the "property" claimed by Plaintiffs is their cause of action for overtime. Plaintiffs acquired this "property" when their cause of action accrued, in 2000-2003. That is the proper time for assessing their subjective expectations and reliance.

Second, even assuming that Plaintiffs' reasonable investment-backed expectations should be assessed as of the date Chapter 19 was enacted, this does not cure the infirmity in the trial court's judgment. The trial court made no findings about Plaintiffs' subjective expectations as of the date the law was enacted. And Plaintiffs cite no evidence in the record from which the trial court *could have* made such a finding. *See* Appellees' Brief at 28. Consequently, even if Plaintiffs' "reasonable investment-backed expectations" should have been assessed at the time Chapter 19 was enacted, the judgment must be reversed because there were no facts from which the trial court could find they existed.

C. <u>Chapter 19 Does Not Violate the Contract Clause</u>

Plaintiffs' counter to Hageland's Contract Clause argument relies almost exclusively on misdirection and exaggeration. Focusing on the "substantial impairment" element of the Contract Clause analysis, Plaintiffs characterize "Hageland's first line of defense" as an argument "that the total deprivation of Class Members' contractual rights was only a 'slight' modification," when in actuality, according to Plaintiffs, Chapter 19 represented "the total deprivation of Class Members' contractual rights." Appellees' Brief at 39. This characterization necessarily pretends that the only "contractual right" Plaintiffs had was overtime pay – when actually they had a highly competitive pay scale

that Harms himself considered fair. Exc. 118, 136; Exc. 110 (Harms Depo.). Chapter 19 left intact every element of the contract that the parties actually agreed to.[19]

Plaintiffs also contend that the impairment at issue must be "substantial" because "the judgment Hageland must pay if Chapter 19 is invalidated" is a big number – $1.6 million. Appellees' Brief at 40. But whether an impairment is "substantial" has nothing to do with a dollar amount. "The primary consideration in determining whether the impairment is substantial is the extent to which reasonable expectations under the contract have been disrupted." *Sanitation & Recycling Industry, Inc. v. City of New York*, 107 F.3d 985, 993 (2nd Cir. 1997); *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 437-38 (8th Cir. 2007). If Plaintiffs never reasonably expected any overtime pay, then the impairment cannot have been "substantial" for purposes of Contract Clause analysis regardless of the amount of money at stake. This is fundamental. "Laws which restrict a party to those gains reasonably to be expected from the contract are not subject to attack under the Contract Clause, notwithstanding that they technically alter an obligation of a contract." *City of El Paso v. Simmons*, 379 U.S. 497, 515 (1965).

Conceding that they never subjectively expected overtime pay (Appellees' Brief at 29), Plaintiffs summarily reject Hageland's "reasonable expectations" argument as "simply a repeat of the 'subjective expectation' argument" in their takings analysis (Appellees' Brief at 39-40). This too is incorrect. Hageland explained in its opening

[19] Plaintiffs' contention that Chapter 19 "totally eliminated" their contract claim and therefore must be a "substantial impairment" is ultimately meaningless. A statute that withheld a penny from pilots' paychecks would "totally eliminate" the contract right to that one penny, but it would still be difficult to term it a "substantial impairment."

brief (at 36-37) that "[t]he parties' reasonable expectations [in a Contract Clause analysis], and the extent of their actual reliance on the affected contract term, are determined by reference to objective factors," and it showed how each of these objective factors supports Hageland's argument. *See City of Charleston v. Public Service Comm'n of West Virginia*, 57 F.3d 385, 392-94 (4th Cir.), *cert. denied*, 516 U.S. 974 (1995).

First, there is no indication in "the terms of the original contract" that the "abridged term" – overtime pay – was immune from legislative interference. Plaintiffs do not dispute this. Second, the industry is a regulated one (and wages and hours are generally regulated regardless of industry), and changes to a regulatory scheme are to be expected. Plaintiffs counter that "the air carrier industry . . . is not regulated in the area of compensation." Appellees' Brief at 41. This is a strange argument indeed coming from a party whose central claim is that DOL for decades imposed specific compensation terms on pilots' employment contracts. Either Plaintiffs "reasonably expected" government-imposed contract terms, in which case they could reasonably expect their modification, or Plaintiffs did not "reasonably expect" government-imposed contract terms, in which case both their existence *and* their modification would be equally unanticipated.

The third objective factor that helps assess "reasonable expectations" is "*how* [the] contract has been changed, *i.e.*, whether a covenant was abolished or 'merely modified.'" *Charleston*, 57 F.3d at 393, citing *U.S. Trust*, 431 U.S. at 19 (emphasis in original). Plaintiffs argue that the overtime provision was "abolished," but plainly the contract as a whole was "merely modified," returning pilots to the exempt status and flexible workday that most of them preferred.

Finally, "reasonable expectations" depend on "the character of the abridged right – whether it was by its nature 'the central undertaking' or 'primary consideration' of the parties." *Charleston*, 57 F.3d at 393. Plaintiffs contend that overtime pay must have been their "central undertaking" or "primary consideration" because it is an important aspect of the AWHA. Appellees' Brief at 40. This is a *non sequitur*. A "central undertaking" is one that can be said to have "substantially induced" Plaintiffs to enter into their contract. *Charleston*, 57 F.3d at 394, quoting *City of El Paso*, 379 U.S. at 514. Plaintiffs were not "induced to enter [their] contract on the basis of" a promise of overtime pay; they concede that they did not expect it at all. Appellees' Brief at 29.

Plaintiffs also dispute Hageland's contention that there is no "substantial impairment" of a contract when the legislature removes a term that was legislatively imposed in the first place. According to Plaintiffs, this principle does not apply to their claim to overtime pay because it was "a right already realized by full performance." Appellees' Brief at 41. This argument confuses two separate things: interference with a contract, which implicates the Contract Clause, and interference with a cause of action, which implicates the takings and due process clauses (discussed *supra* and *infra*).

The law on which Plaintiffs rely thus does not support their argument. Plaintiffs cite *Ewell v. Daggs*, 108 U.S. 143, 151 (1883), for the proposition that the legislature "cannot retroactively destroy a right already realized by full performance" (Appellees' Brief at 41), but *Ewell* held that "whatever the statute gives . . . may, by subsequent statute, be taken away" as long as the right is "*in fieri*." A cause of action is "*in fieri*" until final judgment and before then is subject to change. *Black's Law Dictionary* (5th ed.

1979) at 700 ("Legal proceedings are described as *in fieri* until judgment is entered"); *Johnson v. Byars*, 86 So.2d 371, 374 (Ala. 1956).[20] The remaining cases Harms cites for its "vested rights" analysis (Appellees' Brief at 42) do not involve the Contract Clause.[21]

As Hageland pointed out in its opening brief, the legislature found Chapter 19 to be reasonable and necessary to serve an important public purpose, a finding to which this Court should ordinarily defer. *See Evans*, 56 P.3d at 1053-54, 1055. Plaintiffs argue that the law was "inherently unreasonable" because "[t]he fact employees were stripped of valuable rights guaranteed by Alaska law was simply ignored." This argument is circular, since whether Plaintiffs lost "rights guaranteed by Alaska law" is the question posed by this appeal. In any event, the argument that the legislature "ignored" Plaintiffs' position is false. It heard testimony from many witnesses, including Plaintiffs' counsel, and it decided that Hageland's position was more compelling. It was not obliged to compromise between good public policy and bad.

Finally, Plaintiffs argue that the legislature's judgment is due no deference because it was clouded by Hageland's efforts "to fabricate the legislative justification for Chapter

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[20] *Ewell* also uses the term "vested rights" to refer to those that cannot be unsettled by retroactive legislation. 108 U.S. at 150. Federal law does not consider rights in causes of action to be "vested" until final judgment. *See* Appellants' Brief at 21-23. In short, *Ewell* holds the opposite of what Harms cites it for.

[21] *Sanders v. Loomis Armored, Inc.*, 614 A.2d 320 (Penn. Super. 1992), was a due process case. It relied heavily on *Gibson v. Commonwealth*, 415 A.2d 80 (Penn. 1980), which, as a federal judge later observed, "seems to have erred in its understanding of the federal Constitution." *Friedrich v. U.S. Computer Systems, Inc.*, 1996 U.S.Dist.LEXIS 775 (E.D. Penn. 1996). There was no contract clause issue in either *Talmedge v. District School Board of Lake County*, 406 So.2d 1127 (Fla. App. 1981), or *Dua v. Comcast Cable of Maryland, Inc.*, 805 A.2d 1061, 1072 (Md. App. 2002).

19." Appellees' Brief at 43-45. This is desperate, insulting, and wrong, as already described above. As a legal matter it is irrelevant, because it asks the Court to second-guess the legislature's fact-finding, which the Court will not do, even in the face of claims that legislative testimony was "false or misleading." *Evans*, 56 P.3d at 1055.

D. <u>Chapter 19 Does Not Violate Alaska's Equal Protection Provision</u>

Chapter 19 distinguishes between AWHA claimants who have litigated their case to final judgment and those who have not. Plaintiffs apparently recognize that this statutory classification survives review under the minimum scrutiny standard, so they argue that the statute should be subjected to strict scrutiny, because it restricts "access to the courts," which Plaintiffs argue is a "fundamental right." Appellees' Brief at 46.

The right of access to the courts "is impaired only by state action that actually limits or blocks access to the courts." *Evans*, 56 P.3d at 1052; *see also In re KAH*, 967 P.2d 91, 95 (Alaska 1998) (court access cases "involved direct impediments to court access"). Examples of such statutes include one requiring a non-resident to post a bond before filing suit[22] and one prohibiting parolees from suing.[23] Chapter 19 did not impose any such impediments to filing suit and thus does not limit "access to the courts." Instead, it enacted substantive law that governed the court's disposition of the claim.[24]

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[22] *Patrick v. Lynden Transport, Inc.*, 765 P.2d 1375, 1379 (Alaska 1988).

[23] *Bush v. Reid*, 516 P.2d 1215, 1220-21 (Alaska 1973).

[24] Plaintiffs also err in arguing that access to the courts is a "fundamental" right for equal protection purposes. This Court has very recently reaffirmed that access to the courts is an "important" right. *State v. Native Village of Nunapitchuk*, 156 P.3d 389, 405 (Alaska 2007). Plaintiffs cite *PERS v. Gallant*, 153 P.3d 346 (Alaska 2007), for the proposition

Statutes that define who may sue for damages in a civil action implicate economic interests and are subject to minimum scrutiny. *Evans*, 56 P.3d at 1052-53.[25] Under minimum scrutiny, the inquiry is whether the ends are legitimate and bear a fair and substantial relationship to the purposes of the statute.[26] Plaintiffs have the burden on this issue, and they present no argument why Chapter 19 does not satisfy this standard.

E. <u>Chapter 19 Does Not Violate Alaska's Due Process Provision</u>

Plaintiffs argue briefly that Chapter 19 violates their substantive due process rights under the Alaska Constitution, but they fail to analyze the issue under the applicable test: "Substantive due process is denied when a legislative enactment has no reasonable relationship to a legitimate governmental purpose." *State v. Neidermeyer*, 14 P.3d 264, 267 (Alaska 2000). A law will be upheld as long as there is a tenuous nexus between it and a legitimate government purpose. *Id.* "[I]f any conceivable legitimate public policy for the enactment is apparent on its face or is offered by those defending the enactment, the opponents of the measure must disprove the factual basis for such a justification." *Id*.

Plaintiffs have not met their burden. The legislative history of Chapter 19 indicates that the legislature was concerned with the following: (1) correcting the overtime law so that it conformed to what the air carrier industry understood to be the law

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that "litigating" is a "fundamental interest." But *Gallant* did not involve access to the courts, and cannot be read as contradicting the Court's consistent declarations that the right of access to the courts is not "fundamental" but "important."

[25] *See also Reid v. Williams*, 964 P.2d 453 (Alaska 1998); *Chokwak v. Worley*, 912 P.2d 1248, 1255 (Alaska 1996); *Gilmore v. Alaska Workers' Compensation Bd.*, 882 P.2d 922 (Alaska 1994).

[26] *Premera Blue Cross v. State*, 171 P.3d 1110, 1122 (Alaska 2007).

(Exc. 19, 131); (2) protecting the viability of Alaska air carriers whose viability was threatened by overtime lawsuits, so they could continue to serve rural Alaska (Exc. 131);[27] (3) conforming the law to the actual agreement between the pilots and the air carriers (Exc. 132-52);[28] and (4) eliminating a perceived unfairness by which class action lawyers could exploit technical violations of the AWHA and create a windfall for themselves and their clients (Exc. 157-58).[29] Each of these legislative purposes is legitimate, and Plaintiffs offer no evidence disproving any of them. Plaintiffs' due process claim must therefore be denied.

CONCLUSION

The trial court correctly ruled against Plaintiffs on their claims that Chapter 19 violated due process and equal protection. However, it erred when it accepted Plaintiffs' other arguments and ruled Chapter 19 unconstitutional. Proper deference to the legislature requires reversal of the judgment below.

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Thomas M. Daniel Peter J. Maassen

[27] Retroactively eliminating wage and hour liability because of the negative impact such liability would have on the defendant is a legitimate purpose. *Austin v. City of Bisbee*, 855 F.2d 1429, 1434-35 (9th Cir. 1988).

[28] Retroactively eliminating wage and hour liability to conform the law to the actual agreement of the parties is a legitimate purpose. *Baker v. GTE North*, 110 F.3d 28, 30 (7th Cir. 1997).

[29] "[I]t is reasonable to amend a statute to eliminate unforeseen consequences or windfall benefits, even if [the amendment] impairs existing contracts." *Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Ass'n*, 110 F.3d 547, 559 (8th Cir. 1997)

CERTIFICATE OF TYPEFACE

The undersigned hereby certifies that pursuant to Appellate Rule 513.5, the attached Reply Brief of Appellant is proportionally spaced and is Times New Roman 13 point.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the ____ day of June, 2008, a true and correct copy of the Reply Brief of Appellants was served via mail on the following parties:

Timothy J. Petumenos
Birch Horton Bittner and Cherot
1127 W. Seventh Avenue
Anchorage, AK 99501

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