

IN THE SUPREME COURT OF THE STATE OF OREGON

HECTOR MACPHERSON; BANNOCKBURN FARMS, INC.; CLACKAMAS COUNTY FARM BUREAU; LINN COUNTY FARM BUREAU; WASHINGTON COUNTY FARM BUREAU; MARION COUNTY FARM BUREAU; YAMHILL COUNTY FARM BUREAU; DAVID T. ADAMS; MARK TIPPERMAN; JAMES D. GILBERT; NORTHWOODS NURSERY, INC.; DAVID A. VANASCHE; KEITH FISHBACK; FISHBACK NURSERY, INC.; JACK CHAPIN and 1000 FRIENDS OF OREGON,

Plaintiffs-Respondents,

v.

DEPARTMENT OF ADMINISTRATIVE SERVICES, Risk Management Division, by and through Laurie Warner, its Acting Director; LAND CONSERVATION AND DEVELOPMENT COMMISSION, Department of Land Conservation and Development, by and through Lane Shetterly, its Director; THE STATE OF OREGON DEPARTMENT OF JUSTICE, by and through its Attorney General, Hardy Myers,

Defendants-Appellants,

and

CLACKAMAS COUNTY; MARION COUNTY; and WASHINGTON COUNTY,

Defendants,

and

BARBARA PRETE; EUGENE PRETE; DOROTHY ENGLISH; and HOWARD MEREDITH,

Intervenors-Defendants-Appellants,

and

JACKSON COUNTY,

Intervenor-Defendant.

Marion County Circuit
Court Case No. 05C10444

SC No. S52875

BRIEF OF PROPERTY RIGHTS ALLIANCE; AMERICAN ASSOCIATION OF SMALL PROPERTY OWNERS; AMERICANS FOR TAX REFORM; AMERICAN LAND RIGHTS ASSOCIATION; BLUEGRASS INSTITUTE FOR PUBLIC POLICY SOLUTIONS; CITIZENS AGAINST GOVERNMENT WASTE; CITIZENS' ALLIANCE FOR PROPERTY RIGHTS; DEFENDERS OF PROPERTY RIGHTS; ILLINOIS POLICY INSTITUTE; NATIONAL CENTER FOR PUBLIC POLICY RESEARCH; NATIONAL TAXPAYERS UNION; OREGON LIVESTOCK PRODUCERS ASSOCIATION; SMALL BUSINESS AND ENTREPRENEURSHIP COUNCIL; THE AMERICAN FAMILY BUSINESS INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS/INTERVENOR-APPELLANTS

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Rights; Illinois Policy Institute; National
Center for Public Policy Research;
National Taxpayers Union; Oregon
Livestock Producers Association; Small
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The American Family Business Institute*

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Amici Curiae Property Rights Alliance; American Association of Small Property Owners; Americans for Tax Reform; American Land Rights Association; Bluegrass Institute for Public Policy Solutions; Citizens Against Government Waste; Citizens' Alliance for Property Rights; Defenders of Property Rights; Illinois Policy Institute; National Center for Public Policy Research; National Taxpayers Union; Oregon Livestock Producers Association; Small Business and Entrepreneurship Council; and The American Family Business Institute respectfully submit this brief *amicus curiae* in support of Appellants/Intervenor-Appellants. *Amici* urge reversal of the judgment of the Circuit Court.

INTERESTS OF *AMICUS CURIAE*

Property Rights Alliance (“PRA”) is an advocacy organization dedicated to the protection of physical and intellectual property rights. PRA’s efforts to protect private property are all encompassing, covering both domestic and international matters including: Federal and state law for “takings” and the use of eminent domain; federal government land and building ownership; U.S. environmental policy and its effect on private property ownership; piracy and counterfeiting of intellectual property on a domestic and international front; property law and protections in developing countries in order to foster economic growth and democracy; strong intellectual and physical property safeguards for all trade agreements with the United States; and the patent system, including copyrights, patents and trademarks.

In support of all these goals, PRA seeks a government that adheres to constitutional norms and this Nation’s founding principles of protecting property rights. Measure 37 supports these goals. Measure 37 restores the property rights of owners who

have been subject to numerous land use regulations, which reduced the fair market value of and restricted the use of the affected properties.

American Association of Small Property Owners (“AASPO”) is a nonpartisan, nonprofit corporation that has been working since 1993 for the right of small property owners to prosper freely and fairly—to make possible the American dream of building wealth through real estate. Based in Washington, DC, AASPO has chapters or affiliates in more than 25 states.

Americans for Tax Reform (“ATR”) is a coalition of individuals, taxpayer groups and businesses concerned with promoting a vibrant economy through tax policy, spending reduction, a balanced budget and restoring accountability to elected officials. In support of these goals, ATR believes that the protection of private property is essential in defending the rights of taxpayers across this nation from government intrusion. Without protections in place such as those passed by voters in Measure 37, taxpayers will once again fall victim to the government abrogation of property rights that eradicates free markets and the rule of law. ATR recently participated in a property rights case before the United States Supreme Court: *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. ___, 125 S. Ct. 2764 (2005).

The American Land Rights Association (“ALRA”) is a national membership association with 22,000 members that networks with hundreds of other organizations concerned about physical and intellectual property rights nationwide. ALRA has fought for 28 years to prevent the use of eminent domain by Federal, state and local entities. ALRA led a nationwide effort to defeat giant Federal and state land

acquisition proposals. ALRA has participated in many local, state and national campaigns to prevent ill conceived land use controls from taking property rights away from landowners and has fought for compensation for those landowners who have suffered injury due to aggressive Federal, state and local land use regulation.

The Bluegrass Institute for Public Policy Solutions is an independent research and educational institution offering free-market solutions to Kentucky's most pressing problems. The Bluegrass Institute for Public Policy Solutions champions the idea that the 'pursuit of happiness' established as an inalienable right in our Declaration of Independence is the bulwark of our prosperity. It is the supreme responsibility of government to defend any and all attacks on private property so every citizen can peacefully pursue happiness in whatever shape it becomes. The strength of Measure 37 as seen in the view of Oregonians is a clear testament to this principle.

Citizens Against Government Waste ("CAGW") is a private, non-partisan, non-profit organization representing more than one million members and supporters nationwide. CAGW's mission is to eliminate waste, mismanagement, and inefficiency in the federal government. Founded in 1984 by the late industrialist J. Peter Grace and syndicated columnist Jack Anderson, CAGW is the legacy of the President's Private Sector Survey on Cost Control, also known as the Grace Commission.

CAGW is nationally recognized as the source of information on government waste. CAGW representatives appear frequently on television, radio talk shows, and in print highlighting wasteful government spending. Among the many issues CAGW is concerned with is the protection of intellectual and physical property rights and

that protection of these rights are essential to prosperity. The Founding Fathers' belief in the importance of property rights is demonstrated in Article I, section 8 and in the Fifth Amendment of the U.S Constitution. The safeguarding of intellectual and private property has been integral to America's economic success from its earliest days.

In light of CAGW's concern for private property rights, CAGW supports Measure 37. Currently, land use regulations in the State of Oregon impose rigid prohibitions against the development of private property, which raises costs and burdens, and devalues the property. Measure 37 represents an important step in the right direction for those who believe in the sanctity of property rights, not only nationally, but in Oregon. It will assure that property owners in Oregon will be fairly compensated for land that has been devalued due to over-regulation.

Citizens' Alliance for Property Rights ("CAPR") was organized in 2003 as a non-partisan political action committee where individual citizens and existing organizations can work together defending property rights. CAPR is based in King County, Washington. CAPR will support equitable and scientifically sound land use regulations that do not force minority groups of private property owners to pay for public benefits enjoyed by all. After observing environmental conditions around the world CAPR has concluded that private owners are far better stewards of this earth than collectivist central planners are. Measure 37 supports these goals.

Defenders of Property Rights ("Defenders") is the only national legal defense foundation dedicated exclusively to protecting private property rights. Based in Washington, D.C., Defenders was founded as a non-profit, public interest legal

foundation in 1991 and has 23,000 members. Its mission is to protect vigorously those rights considered essential by the Framers of the Constitution, and to promote a better understanding of the relationship between private property rights and individual liberty.

Defenders engages in litigation across the country on behalf of its members and the public interest to prevent government incursion into protections guaranteed by the Bill of Rights. Since its inception, Defenders has participated in every major property rights case before the U.S. Supreme Court. *See, e.g., Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. ___, 125 S. Ct. 2764 (2005); *Kelo v. City of New London*, 545 U.S. ___, 125 S. Ct. 2655 (2005); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. ___, 125 S. Ct. 2491 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. ___, 125 S. Ct. 2074 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. ___, 125 S. Ct. 1517 (2005); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Bennett v. Spear*, 520 U.S. 154 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Keene Corp. v. United States*, 508 U.S. 200 (1993); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

The Illinois Policy Institute's mission is to preserve and strengthen critical societal institutions. It does this through the promotion of competitive free enterprise and limited government via rigorous research, writing and debate. The Institute is a tax-

exempt, not-for-profit corporation under 501c(3) that engages in non-partisan public policy education and research in the state of Illinois.

The Illinois Policy Institute believes property rights are one of the foundations of the competitive free enterprise system and therefore protecting property rights are necessary to preserving our critical political and societal institutions. Measure 37 accomplishes this by restoring the property rights of owners who have been subject to numerous land use regulations that have reduced the fair market value of their property.

The National Center for Public Policy Research is a communications and research foundation that promotes free markets, individual liberty and personal responsibility. The National Center for Public Policy Research believes property rights are not only a foundation for our nation's economic success, but the cornerstone of American liberty.

The National Center for Public Policy Research agrees with the late William Rehnquist, who wrote in the majority opinion in *Dolan v. City of Tigard* that there is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation." 512 U.S. 374, 392 (1994). The National Center for Public Policy Research believes the Takings Clause should be given equal weight and that Measure 37 is a step in the right direction.

The 350,000-member National Taxpayers Union ("NTU") is a nonpartisan citizen group founded in 1969 to work for lower taxes, smaller government, and more accountable elected officials at all levels. NTU favors preserving the personal and

property safeguards included in the United States Constitution and espouses the principle that private property rights are the foundation upon which a free society is built. The use of government power to unfairly “take” private property without compensating its owners, is, to NTU's membership, simply another form of taxation.

Oregon Livestock Producers Association is a grassroots organization representing livestock producers in the state of Oregon on issues of trade, markets, water rights, and property rights. Oregon Livestock Producers Association believes property rights are the cornerstone of American liberty and the foundation for the economic success of American farmers and ranchers. As such, Oregon Livestock Producers Association supports Measure 37 passed by Oregon voters. Measure 37 restores the property rights of owners who have been subject to land-use regulations, which have interfered with the use of affected properties and reduced the fair market value of these properties. Oregon Livestock Producers Association feels Measure 37 is vital to ensure the continued profitability and viability of independent Oregon livestock producers.

Small Business & Entrepreneurship Council (“SBE Council”) is a nonpartisan, nonprofit advocacy organization dedicated to protecting small business and promoting entrepreneurship. Protection of physical and intellectual property rights is central to the vitality and survival of small firms, and is a cornerstone issue with respect to maintaining a healthy environment for sustained entrepreneurship. The SBE Council’s work to protect private property—as well as educating the public, lawmakers and policymakers about its importance—is comprehensive. The SBE Council addresses domestic and international matters including: Federal and state law for “takings” and the use of eminent domain; environmental and other policy and its impact on private property

ownership, business growth and expansion, and its effect on land values and urban development; piracy and counterfeiting of intellectual property both overseas and at home; the importance of property protections in developing countries and their relationship to creating an environment for micro-business development and small business growth; reform of the U.S. patent system to make it more small business friendly; and strong property rights protections in U.S. trade agreements to help foster global market expansion and penetration by small businesses.

The American Family Business Institute ("AFBI") is an organization of family business owners, large and small, throughout America. As a group AFBI owns 507 businesses, provides 107,000 jobs and conducts \$43 billion in annual business volume. AFBI's mission is to defend the property rights of family business owners and their ability to pass their businesses on to future generations as they see fit.

INTRODUCTION AND BACKGROUND

On November 2, 2004, the people of the State of Oregon overwhelmingly enacted Measure 37. Over 60 percent of all voters, one million people overall, supported the initiative. Measure 37 ultimately received more votes than any other ballot measure in the history of the State.

Measure 37 represents a critical victory for those who believe in the sanctity of property rights in Oregon. Present land use regulations within the State impose rigid prohibitions against the development of private property. These regulations impose substantial costs and burdens on private property rights. Many of these restrictions deprive owners of the use, enjoyment, and virtually all economic benefit of

their property. By approving Measure 37, the people of the State of Oregon expressed their conviction that property owners should be protected against these excessive and suffocating State and local laws, and that the burden—like the benefits—should be shared by the populace as a whole. In other words, the people of Oregon have done nothing more than expressed their willingness to fairly compensate property owners for the property values that are destroyed as a result of land use regulations imposed to benefit the community as a whole.

To achieve this goal, Measure 37 protects property owners from regulations that restrict the use of the property and reduce its fair market value. The standards imposed by Measure 37 are straightforward and not in dispute. If a property owner proves the land use regulation impairs a beneficial use of his property and reduces its value, the State or local government responsible for the regulation has a choice: pay the owner of the property an amount equal to the reduction in fair market value or modify, change or not apply the regulation to the owner's property.

Opponents of Measure 37—property owners and interest groups that seek to continue the regime of imposing government regulation on other people's property without paying for the associated harm—challenged Measure 37 as unconstitutional under the Oregon and federal constitutions. Even though land use regulations might deprive almost all economic value in their neighbors' property, plaintiffs assert that *their* properties and property rights will be adversely affected by the *removal* of land use regulations on neighboring lands through the Measure 37 claim process, because the peace and serenity they now enjoy will be disturbed if land use regulations are no longer applied. Thus, plaintiffs contend that they are entitled to maintain the restrictive burdens

of government regulation on their neighbors' properties, so that they may enjoy the rural character of Oregon at the expense of others. Indeed, it is the height of irony that plaintiffs complain that they are unconstitutionally harmed by the *removal* of land use regulations from their neighbors' property, while also arguing that neither the federal nor State constitutions previously afforded their neighbors—individuals whose ownership interests predate the imposition of the regulations—any relief.

On October 14, 2005, the Circuit Court declared Measure 37 unconstitutional under both the Oregon and federal constitutions. Judgment was entered on October 24, 2005. *Amici* will focus on plaintiffs' Fourteenth Amendment procedural due process claim.

The Fourteenth Amendment to the federal Constitution requires that no "State [shall] deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. But as broad as the Due Process Clause is framed, it does not protect every interest, no matter how remote, from erroneous deprivations. To that end, "[w]here a state law ... is challenged on due process grounds, [the Court] inquires whether the State has deprived the claimant of a protected property interest, and whether the State's procedures comport with due process." *Lujan v. G&G Fire Sprinklers, Inc.*, 532 U.S. 189, 195 (2001).

With respect to the claim that Measure 37's protection of property rights is unconstitutional, the Circuit Court held that plaintiffs were entitled to a hearing on the propriety of any claim for compensation that their neighbors filed under Measure 37. In other words, the court held that all of a land owners' neighbors have a constitutionally

