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 No.
05C10444

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS

SC No. S52875

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INTEREST OF *AMICUS CURIAE*

Amicus Washington Legal Foundation (WLF) is a non-profit public interest law and policy center founded in 1977 and based in Washington, D.C., with supporters in Oregon and nationwide. WLF supports vigorous protection of property rights and has frequently filed briefs in support of property rights in state and federal courts, including in *San Remo Hotel v. City and County of San Francisco*, 125 S. Ct. 2491 (2005); *Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); and *Machipongo Land and Coal Co., Inc. v. Commonwealth of Pennsylvania*, 569 Pa. 3, 799 A.2d 751 (Pa. 2002).

WLF is concerned that if the decision below is upheld, landowners in Oregon will be adversely affected by the loss of a democratically-enacted measure for the protection of their rights. In addition, WLF is concerned that such a decision by this Court would set a precedent for invalidation of protective measures for landowners that may be enacted in other states, and would invite excessive and sweeping judicial scrutiny of legitimate economic enactments in jurisdictions across the country.

Although WLF believes Ballot Measure 37 is constitutional with regard to all of the grounds presented by the plaintiffs in this litigation, this brief is limited to the issue of the Equal Privileges and Immunities Clause of the Oregon Constitution. The brief presents WLF's position as to the correct rule of law and does not affect a private interest of its own.

ARGUMENT

I. The Equal Privileges and Immunities Claim Here Is Not Justiciable

In upholding the Equal Privileges and Immunities claim in this case, the Circuit Court determined that Ballot Measure 37 unlawfully discriminates against "post-owner" claimants – landowners who obtained their property after the land use regulations at issue became effective. Slip op. at 13. Under Ballot Measure 37, only "pre-owner" claimants are entitled to compensation. The Circuit Court found that this distinction violates the Equal Privileges and Immunities Clause because it does not further a legitimate state interest and because the availability of compensation only to "pre-owner" claimants is not reasonably related to a state interest.

In particular, the Circuit Court found the distinction unreasonable because, in the Court's view, (a) it is not rational to peg compensation to the present-day value of the land; and (b) more recent pre-owners "will not receive the same 'windfall'" under Ballot Measure 37 as longer-term pre-owners. Slip op. at 14.

The plaintiffs must, of course, have standing to assert such claims before the courts can grant relief on those bases. This Court has stated that "declaratory relief is available 'only when it can affect *in the present* some rights between the parties. . . .' That tenet applies with particular force when issues involve questions of constitutional importance. In those situations, we have cited with approval the United States Supreme Court's policy of 'avoiding constitutional decisions until

the issues are presented with clarity, precision and certainty. . . .'" *TVKO v. Howland*, 335 Ore. 527, 535, 73 P.3d 905, 909 (Or. 2003) (citations omitted).

One component of standing is that the plaintiff must be asserting his or her own legal rights. "Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights. . . ." *Allen v. Wright*, 468 U.S. 737, 751 (1984). With regard to the Equal Privileges and Immunities specifically, this Court has explained that the Clause "may be invoked by an individual who demands equality of treatment with other individuals as well as by one who demands equal privileges or immunities for a class to which he or she belongs." *State v. Clark*, 291 Ore. 231, 237, 630 P.2d 810, 814 (Or. 1981).

Here, no plaintiff has standing to bring an Equal Privileges and Immunities challenge to Ballot Measure 37. The Circuit Court has not identified a single plaintiff who is alleged to have been injured by any discrimination in Ballot Measure 37 – nor could the Circuit Court have done so. It appears that not one plaintiff in this case is either (a) a post-owner whose property has lost value on account of a legal restriction and who has allegedly been injured by the absence of compensation for post-owners under Ballot Measure 37, or (b) a recent pre-owner who is a claimant and who has allegedly been injured by inadequate compensation on account of Ballot Measure 37's compensation standard. In the absence of such a plaintiff, the Circuit Court's entire discussion of Equal Privileges and Immunities is an abstraction, untethered to any actual case or controversy. The Circuit Court's grant of relief, to the extent it is based on the

Equal Privileges and Immunities Clause, is improper because it does not affect "some rights between the parties." *TVKO*, 335 Ore. at 535, 73 P.3d at 909.

II. Ballot Measure 37 Does Not Violate the Equal Privileges and Immunities Clause

The Equal Privileges and Immunities Clause of the Oregon Constitution provides, "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." Or. Const. art. I, § 20. Ballot Measure 37 does not violate this provision.

As an initial matter, this Court has explained that a claim under the Equal Privileges and Immunities Clause is valid only if the distinction at issue involves a true class – that is, one based on the "personal or social characteristics of the asserted 'class.'" *Crocker & Crocker*, 332 Ore. 42, 55, 22 P.3d 759, 766 (Or. 2001). Thus, for example, accident victims whose claims are partially barred by a sovereign immunity law "are not an identifiable 'class' who under Article I, section 20, are given special privileges by virtue of antecedent personal or social characteristics or societal status, i.e., they could not already be singled out from the general population before their various accidents." *Hale v. Port of Portland*, 308 Ore. 508, 525, 783 P.2d 506, 515-16 (Or. 1989).

Here, no true class is benefited or burdened by the distinction in Ballot Measure 37 between pre-owners who object to land-use regulations and post-owners who object to such regulations. Some pre-owners may find a given land-use regulation burdensome, others may find it beneficial, and indeed a single pre-

owner may move from one position to the other as his or her plans for the property change over time. Members of the public may enter or leave the class of post-owners at will by buying or selling property. The fluidity of the classes, and the lack of any connection to "antecedent personal or social characteristics or societal status," *Hale*, *supra*, undermines the Equal Privileges and Immunities claim here.

Assuming *arguendo,* however, that a true class is present in this case, the Court must determine whether Ballot Measure 37 gives heightened privileges to one class while discriminating against a "suspect class" based on immutable personal characteristics such as race, alienage, nationality, or gender. *Hewitt v. State Accident Ins. Fund Corp. (In re Williams)*, 294 Ore. 33, 45-46, 653 P.2d 970, 977-78 (Or. 1982). Legal distinctions of this kind are subject to heightened scrutiny. As the Circuit Court correctly determined, however, this case involves no suspect class, and thus the applicable standard is rational basis review. Slip op. at 13. That is, this Court "reviews the classification for whether the legislature had a rational basis for making the distinction." *Crocker & Crocker*, 332 Ore. at 55, 22 P.3d at 766 (Or. 2001). This Court has long extended great latitude in assessing economic regulations and other enactments under this standard of review:

> It is well established that the courts will not undertake to disturb a legislative classification unless the legislature could not have had any reasonable grounds for believing that there were valid public considerations for the distinction made. . . . [A] classification having some reasonable basis does not offend against the Federal Constitution or the Constitution of this state merely because it is not made with mathematical nicety or because in practice it results in some inequality.

Mallatt v. Luihn, 206 Ore. 678, 702 (Or. 1956) (citations omitted).

"[I]n the equal protection context, rational basis review is deferential, requiring the challenging party to disprove any conceivable state of facts that could provide a rational basis for the classification." *Sherman v. Dep't of Revenue*, 335 Ore. 468, 474, 71 P.3d 67, 70 (Or. 2003).

In short, the issue is not whether courts agree with a classification as a matter of policy, neither is the issue whether courts can envisage a different and putatively superior way to write the enactment. Judged in that light, the distinction in Ballot Measure 37 between pre-owners and post-owners surely meets the test of rationality. As the State advised the Circuit Court, "It is rational to assume that the cost of acquiring property will take account any limitations on using that property resulting from land use regulations that exist at the time of acquisition. Requiring payment of just compensation under those circumstances would thus be an unjustified windfall for the landowner." State Defendants' Memorandum In Support of Motion for Summary Judgment at 11. It is rational for an enactment to seek to avoid windfall payments by a state payment program.

The Circuit Court rejected this rationale by substituting its own policy judgment for that of the voters, stating that "[t]he assertion that some post-owners received a discount on their property is tenuous at best." Slip op. at 14. In the Circuit Court's estimation, for most post-owners, "the land use regulations would have had little effect on purchase price because . . . the properties were too far removed from urban areas to be desirable for residential subdivisions or other non-farm use." *Id*. These statements by the Circuit Court – unburdened by any

citations to record evidence – fail to consider that some purchasers of out-of-the-way properties may well do so on a speculative basis, anticipating that growth will ultimately reach their properties and bring a demand for development. More generally, these questions concerning the advisability of the distinction are quintessentially the types of questions reserved for the voters and the legislative branches under rationality review. *Mallatt*, *supra*; *Sherman*, *supra.*

The Circuit Court further argued that the State's rationale was inadequate because it "does not take into account those property buyers who were willing to pay more for land because it was subject to land use regulations," nor does it provide for compensation to landowners "whose property values may diminish dramatically as a result of waivers granted to adjoining landowners." *Id*. Again, this type of flyspecking of the enactment has no place in rational basis review. The fact that a state program provides compensation to *some* affected members of the public does not create a constitutional obligation to compensate all other members of the public who are situated differently.

The fact that Ballot Measure 37 distinguishes groups of property owners based on when they purchased their properties makes it no different from the entire body of regulations governing the use and taxation of real estate. State and local enactments in the area of real property routinely, and rationally, employ a "grandfather" clause in which "a particular year is chosen as the effective date of new legislation, in order to prevent inequitable results or to promote some other legitimate purpose." *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 236 (Cal. 1978).

What the voters of Oregon have done in approving Ballot Measure 37 is to recognize a reliance interest on the part of landowners in the set of regulations applicable to their properties at the time of purchase. The compensation mechanism of Ballot Measure 37 discourages intrusions on that reliance interest, and acts as a type of insurance policy against such intrusions. Reasonable people can differ on the soundness of this policy. Protection of reliance interests, however, has long been held a rational and legitimate basis for government action. *See, e.g.*, *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 465 (1988); *Heckler v. Mathews*, 465 U.S. 728, 746 (1984); *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 178 (1980); *New Orleans v. Dukes*, 427 U.S. 297, 305 (1976).

The U.S. Supreme Court has addressed an analogous ballot measure in the context of property taxation in *Nordlinger v. Hahn*, 505 U.S. 1 (1992). There, the Court considered the constitutionality under the federal Equal Protection Clause of a ballot measure that effectively locked in property tax assessments at the time of purchase, limiting increases in assessments to 2 percent annually. In a period of real estate inflation, the measure had the effect of creating more favorable taxation for newer owners than for longtime owners. The Court found a rational basis for the measure in the protection of the longtime owners' reliance interests:

> [T]he State legitimately can conclude that a new owner at the time of acquiring his property does not have the same reliance interest warranting protection against higher taxes as does an existing owner. The State may deny a new owner at the point of purchase the right to "lock in" to the same assessed value as is enjoyed by an existing owner of comparable property, because an existing owner rationally may be thought to have vested expectations in his property or home that are more deserving of

> protection than the anticipatory expectations of a new owner at the point of purchase. A new owner has full information about the scope of future tax liability before acquiring the property, and if he thinks the future tax burden is too demanding, he can decide not to complete the purchase at all. By contrast, the existing owner, already saddled with his purchase, does not have the option of deciding not to buy his home if taxes become prohibitively high.

Nordlinger, 505 U.S. at 12-13.

In the present case, it may be said that a new owner has "full information" about the existing regulatory limitations on a property before acquiring it, while the existing owner "does not have the option of deciding not to buy his home" if regulatory burdens take a turn for the worse in his or her eyes. In the present case, as in *Nordlinger*, there is room for debate about the wisdom of the policy in view of competing fiscal needs and competing public objectives – but that debate is properly carried out in the democratic arena.

CONCLUSION

For the foregoing reasons, *amicus* respectfully submits that the Circuit Court erred in determining that Ballot Measure 37 violates the Equal Privileges and Immunities Clause of the Oregon Constitution. *Amicus* urges this Court to reverse the decision below.

Respectfully submitted,

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December 5, 2005

CERTIFICATE OF SERVICE
MACPHERSON v. DEPT. OF ADMINISTRATIVE SERVICES
Supreme Court Case No. S52875

On this 5th day of December, 2005, I served the foregoing brief *amicus curiae* on all interested parties in this action:

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I further certify that all parties required to be served have been served.

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