

No. 11-____.

In the

Supreme Court of the United States.

A. L. Bruner and Marilyn Bruner,

Petitioners,

-v-

Richard Whitman; State of Oregon Department
of Land Conservation and Development,

Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit .**

PETITION FOR WRIT OF CERTIORARI.

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Questions Presented.

1. By approving of Oregon's retroactive change in its land use laws, has the court of appeals nullified this Court's bedrock law establishing when petitioners' contract right to develop their land vested for purposes of the Takings Clause of the federal constitution?

2. Does State legislation retroactively destroying petitioners' vested contract right to develop their land violate their substantive due process rights or their right to be free from disparate treatment under the fourteenth amendment?

Parties To The Proceeding

Other Plaintiffs-Appellants in U.S.C.A. No. 10-35966:

John Bowers; Lynna Bowers; Robert Ferns; Milton Gordon; Kathleen Gordon;
Morton Gossett; Charles N. Hilkey, Jr.; Linda Jones; James Lavia; Marcia Lavia;
Donald Litchfield; Melissa Litchfield; Jerry McCauley; Kathleen McCauley; Irma
Payne; Harold Payne; Walter Phillips; and Lyle Woodcock.

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Citation of Opinions and Orders.

The published Opinion of the United States Court of Appeals for the Ninth Circuit in *John Bowers et al. v. Richard Whitman et al.*, Docket No. 10-35966, decided January 12, 2012, and reported at 664 F.3d 1321 (9th Cir. 2012), affirming the district court's order granting respondents' cross motion for summary judgment, is set forth in the Appendix hereto (App. 1-22).

The unpublished Order and Amended Opinion of the United States Court of Appeals for the Ninth Circuit in *John Bowers et al. v. Richard Whitman et al.*, Docket No. 10-35966, decided January 12, 2012, and then amended on February 28, 2012, affirming the district court's order granting respondents' cross motion for summary judgment, is set forth in the Appendix hereto (App. 23-47).

The unpublished Order of the United States District Court for the District of Oregon in *John Bowers et al. v. Richard Whitman et al.*, Docket No. 09-3082-PA, dated and filed September 28, 2010, granting respondents' cross motion for summary judgment, is set forth in the Appendix hereto (App. 51-53).

The unpublished Memorandum of the United States Court of Appeals for the Ninth Circuit in *Citizens for Constitutional Fairness et al. v. Jackson County et al. and Rogue Advocates et al. v. State of Oregon*, Docket No. 09-35653, filed July 20, 2010, reversing the findings and rulings of the United States District Court for the District of Oregon, is set forth in the Appendix hereto (App. 48-50).

The unpublished judgment and findings of fact and conclusions of law in *Citizens for Constitutional Fairness et al. v. Jackson County et al.*, Docket No. 08-3015-PA, dated and filed November 19, 2008, November 12, 2008, respectively, and reported at 2008 WL4890585, concluding that plaintiffs' Measure 37 waivers are valid and enforceable, is set forth in the Appendix hereto (App. 54-63).

The unpublished Order of the Josephine County Board of Commissioners for the State of Oregon in *In the Matter of Resolving A Claim Under Measure 37, Oregon 2004 Election: A. L. & Marilyn Bruner*, Order No. 2006-028, dated February 15, 2006, is set forth in the Appendix hereto (App. 64-68).

The unpublished Order and Amended Opinion of the United States Court of Appeals for the Ninth Circuit in *John Bowers et al. v. Richard Whitman et al.*, Docket No. 10-35966, decided January 12, 2012, and then amended February 28, 2012, which also denied petitioners' petition for rehearing or for rehearing *en banc*, is set forth in the Appendix hereto (App. 23-47).

Basis for Jurisdiction in this Court.

The unpublished Opinion of the United States Court of Appeals for the Ninth Circuit in *John Bowers et al. v. Richard Whitman et al.*, Docket No. 10-35966, was initially decided January 12,

2012, and reported at 664 F3d 1321 (9th Cir. 2012) (App. 1-22). The Opinion was then amended on February 28, 2012 (App. 23-47). Incident to amending its Opinion on February 28, 2012, the court of appeals at the same time denied petitioners' petition for rehearing or for rehearing *en banc* (App. 26).

This petition for writ of certiorari is filed within ninety (90) days of February 28, 2012. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

Constitutional, Statutory and Rule Provisions Implicated by This Petition.

United States Constitution, Article I, § 10, Clause 1:

No State shall...pass any...ex post facto Law,
or Law impairing the Obligation of Contracts....

United States Constitution, Amendment V:

No person...shall be deprived of life, liberty, or property,
without due process of law; nor shall private property be
taken for public use, without just compensation.

United States Constitution, Amendment XIV, § 1:

...No State shall make or enforce any law which shall abridge the
privileges or immunities of citizens of the United States; nor shall
any State deprive any person of life, liberty, or property, without
due process of law; nor deny to any person within its jurisdiction
the equal protection of the laws.

Oregon Rev. Stat. § 197.352 (2005) [Measure 37]:

Compensation for loss of value due to land use regulation. The
following provisions are added to and made a part of ORS chapter 197:

(1) If a public entity enacts or enforces a new land use regulation or
enforces a land use regulation enacted prior to December 2, 2004, that
restricts the use of private real property or any interest therein and has
the effect of reducing the fair market value of the property, or any
interest therein, then the owner of the property shall be paid just
compensation.

(2) Just compensation shall be equal to the reduction in the fair
market value of the affected property interest resulting from

enactment or enforcement of the land use regulation as of the date the owner makes written demand for compensation under this section.

....

(4) Just compensation under subsection (1) of this section shall be due the owner of the property if the land use regulation continues to be enforced against the property 180 days after the owner of the property makes written demand for compensation under this section to the public entity enacting or enforcing the land use regulation.

(5) For claims arising from land use regulations enacted prior to December 2, 2004, written demand for compensation under subsection (4) shall be made within two years of December 2, 2004, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner of the property, whichever is later....

(6) If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under this section, the present owner of the property, or any interest therein, shall have a cause of action for compensation under this section in the circuit court in which the real property is located, and the present owner of the real property shall be entitled to reasonable attorney fees, expenses, costs, and other disbursements reasonably incurred to collect the compensation.

....

(8) Notwithstanding any other state statute or the availability of funds under subsection (10) of this section, in lieu of payment of just compensation under this section, the governing body responsible for enacting the land use regulation may modify, remove, or not to apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.

....

(10) Claims made under this section shall be paid from funds, if any, specifically allocated by the legislature, city, county, or metropolitan service district for payment of claims under this section. Notwithstanding the availability of funds under this subsection, a metropolitan service district, city, county, or state agency shall have discretion to use available funds to pay claims or to modify, remove, or not apply a land use regulation or land use regulations pursuant to subsection (6)

of this section. If a claim has not been paid within two years from the date on which it accrues, the owner shall be allowed to use the property as permitted at the time the owner acquired the property.

(11) Definitions - for purposes of this section:

....

(D) "Public entity" shall include the state, a metropolitan service district, a city, or a county.

(12) The remedy created by this section is in addition to any other remedy under the Oregon or United States Constitutions, and is not intended to modify or replace any other remedy.

....

Oregon Rev. Stat. §§ 195.300-336 (2007) [Measure 49]:

195.301 Legislative findings. (1) The Legislative Assembly finds that:

(a) In some situations, land use regulations unfairly burden particular property owners.

(b) To address these situations, it is necessary to amend Oregon's land use statutes to provide just compensation for unfair burdens caused by land use regulations.

(2) The purpose of ORS 195.305 to 195.336 and sections 5 to 11, chapter 424, Oregon Laws 2007, sections 2 to 9 and 17, chapter 855, Oregon Laws 2009, and sections 2 to 7, chapter 8, Oregon Laws 2010, and the amendments to Ballot Measure 37 (2004) is to modify Ballot Measure 37 (2004) to ensure that Oregon law provides just compensation for unfair burdens while retaining Oregon's protections for farm and forest uses and the state's water resources. [2007 c.424 §3]

....

195.305 Compensation for restriction of use of real property

due to land use regulation. (1) If a public entity enacts one or more land use regulations that restrict the residential use of private real property or a farming or forest practice and that reduce the fair market value of the property, then the owner of the property shall be entitled to just compensation from the public entity that enacted the land use regulation or regulations as provided in ORS 195.310 to 195.314.

(2) Just compensation under ORS 195.310 to 195.314 shall be based on the reduction in the fair market value of the property resulting from the land use regulation.

- (3) Subsection (1) of this section shall not apply to land use regulations that were enacted prior to the claimant's acquisition date or to land use regulations:
- (a) Restricting or prohibiting activities commonly and historically recognized as public nuisances under common law;
 - (b) Restricting or prohibiting activities for the protection of public health and safety;
 - (c) To the extent the land use regulation is required to comply with federal law; or
 - (d) Restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing.
- (4)(a) Subsection (3)(a) of this section shall be construed narrowly in favor of granting just compensation under this section. Nothing in subsection (3) of this section is intended to affect or alter rights provided by the Oregon or United States Constitution.
- (b) Subsection (3)(b) of this section does not apply to any farming or forest practice regulation that is enacted after January 1, 2007, unless the primary purpose of the regulation is the protection of human health and safety.
- (c) Subsection (3)(c) of this section does not apply to any farming or forest practice regulation that is enacted after January 1, 2007, unless the public entity enacting the regulation has no discretion under federal law to decline to enact the regulation.
- (5) A public entity may adopt or apply procedures for the processing of claims under ORS 195.310 to 195.336.
- (6) The public entity that enacted the land use regulation that gives rise to a claim under subsection (1) of this section shall provide just compensation as required under ORS 195.310 to 195.336.
- (7) A decision by a public entity that an owner qualifies for just compensation under ORS 195.305 to 195.336 and sections 5 to 11, chapter 424, Oregon Laws 2007, sections 2 to 9 and 17, chapter 855, Oregon Laws 2009, and sections 2 to 7, chapter 8, Oregon Laws 2010, and a decision by a public entity on the nature and extent of that compensation are not land use decisions.
- (8) The remedies created by ORS 195.305 to 195.336 and sections 5 to 11, chapter 424, Oregon Laws 2007, sections 2 to 9 and 17, chapter 855, Oregon Laws 2009, and sections 2 to 7, chapter 8, Oregon Laws 2010, are in addition to any other remedy

under the Oregon or United States Constitution, and are not intended to modify or replace any constitutional remedy.

....

Note:

Sec. 5. A claimant that filed a claim under ORS 197.352 [renumbered 195.305] on or before the date of adjournment sine die of the 2007 regular session of the Seventy-fourth Legislative Assembly [June 28, 2007] is entitled to just compensation as provided in:

- (1) Section 6 or 7 of this 2007 Act, at the claimant's election, if the property described in the claim is located entirely outside any urban growth boundary and entirely outside the boundaries of any city;
- (2) Section 9 of this 2007 Act if the property described in the claim is located, in whole or in part, within an urban growth boundary;
- (3) A waiver issued before the effective date of this 2007 Act [December 6, 2007] to the extent that the claimant's use of the property complies with the waiver and the claimant has a common law vested right on the effective date of this 2007 Act to complete and continue the use described in the waiver.

195.310 Claim for compensation; calculation of reduction in fair market value; highest and best use of restricted property; status of use authorized. (1) A person may file a claim for just compensation under ORS 195.305 and 195.310 to 195.314 after June 28, 2007, if:

- (a) The person is an owner of the property and all owners of the property have consented in writing to the filing of the claim;
- (b) The person's desired use of the property is a residential use or a farming or forest practice;
- (c) The person's desired use of the property is restricted by one or more land use regulations enacted after January 1, 2007; and
- (d) The enactment of one or more land use regulations after January 1, 2007, other than land use regulations described in ORS 195.305 (3), has reduced the fair market value of the property.

....

Oregon Rev. Stat. § 558.200:

Definition of county court

DEFINITION OF COUNTY COMMISSIONERS

THIS SECTION GIVES COUNTY COMMISSIONERS
AUTHORITY TO ACT AS A COUNTY COURT AND TO
PERFORM JUDICIAL FUNCTIONS

As used in ORS 558.200 (Definition of county court) to 558.440
(Special elections) county court includes board of county
commissioners. [1969 c. 698 § 1]

[Last modified: August 7, 2008
(Board of Commissioners)]

558.400 Board of commissioners; powers; qualifications and
terms of commissioners. (1) The power and authority given to
districts organized under ORS 558.200....(no longer after this
modification are the County Commissioners empowered to act
as a County Court under ORS 558.200.

Statement of the Case.

Beginning in 1973, the State of Oregon under the authority of Chapter 197 of the Oregon Revised Statutes regulated the use of land on a statewide basis by promulgating rules, plans and ordinances which counties and cities were obligated to implement. The effect of this statewide regulation of land in some cases was to prevent a landowner's highest and best use of his property, i.e., it constituted a partial regulatory taking of property which under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), was not compensable as a "taking" within the meaning of the fifth amendment to the federal constitution.

In 2004, Oregon voters through the initiative process passed a so-called Ballot Measure 37, originally codified at Or. Rev. Stat. § 197.352 (2005) ("Measure 37"). Measure 37 required "state and local governments to compensate private property owners for the reduction in the fair market value of their real property that results from any land use regulations of those governmental entities that restrict the use of the subject properties." *McPherson v. Dep't of Admin. Servs.*, 130 P.3d 308, 312 (Or. 2006). Section 1 of Measure 37 authorized a regulating public entity such as a county to pay eligible landowners "just compensation" if that entity enforced land use regulations so that it reduced the fair market value of their property even if the regulation did not amount to a "taking" for constitutional purposes.

Section 4 of Measure 37 gave landowners the right to seek "just compensation" from the regulating entity if the land use regulation continued to be enforced against their property 180 days after the landowner made written demand for such compensation; and if despite such claim, the land regulation continued to be enforced, the present owner of the property "shall have a cause of action for compensation...in the circuit court in which the real property is located, and [he] shall be entitled

to reasonable attorney's fees, expenses, costs, and other disbursements reasonably incurred to collect the compensation."

However, instead of paying an eligible landowner "just compensation" upon his claim that it do so, Sections 8 and 10 of Measure 37 gave the governing body responsible for enacting the land use regulation the power to modify, remove, or not apply the land use regulation(s) in order to avoid paying compensation and allow the landowner "to use the property for a use permitted at the time the owner acquired the property." This option available to the regulating authority to exempt property from otherwise applicable land use regulations instead of paying the landowner just compensation became known as a "Measure 37 waiver." See *Damman v. Bd. of Comm'rs of Yamhill Cnty.*, 250 P.3d 933, 935 (Or. App. 2011).

Measure 37 generated about 7,000 claims statewide. Most property owners who pursued a remedy under Measure 37 received Measure 37 waivers from their local governments, not monetary compensation. As Measure 37 claims began to mount, respondent Oregon Department of Land Conservation and Development ("respondent" or "DLCD") in early 2007 imposed a moratorium upon the implementation of any final order on a Measure 37 claim other than the payment of monetary compensation. It promulgated a new rule requiring that before a landowner could use his property for a use under a Measure 37 waiver, he must obtain a DLCD waiver in cases where the use of the land implicated one of its regulations.

Later in 2007, the Oregon legislature referred to the voters so-called Ballot Measure 49 ("Measure 49"). It passed and is currently codified at Or. Rev. Stat. §§ 195.300 to 195.336 (2007). By now restricting claimants for "just compensation" in the future to only those affected by land use restrictions "enacted after January 1, 2007," Measure 49 dramatically reduced the pool of claimants who could pursue these kind of remedies; it also changed those remedies, the process for realizing them and the approval standards therefor.

As the Oregon Supreme Court observed in *Corey v. Dep't of Land Conservation & Dev.*, 184 P.3d 1109, 1113 (Or. 2008), Measure 49

conveys a clear intent to extinguish and replace the benefits and procedures that Measure 37 granted to landowners...[in that it] extensively amends [Measure 37] in a way that wholly supercedes the provisions of Measure 37 pertaining to monetary compensation for and waivers from the burden of certain land use regulations under the earlier measure.

Id. As for those landowners who had *already* begun pursuing relief under Measure 37, Measure 49 also retroactively replaced the process, the approval standards and the extent of relief available, if any, by removing some of the benefits previously available under Measure 37, including monetary relief and waivers allowing commercial and industrial development. See Or. Rev. Stat. §§ 195.305 & 195.310.

However, in a compiled note after § 195.305, Measure 49 exempted from its new regime those landowners who had sought compensation under Measure 37 and who possess "a common law vested right on the effective date of this 2007 Act [December 6, 2007] to complete and continue the

use described in this waiver.” Or. Rev. Stat. § 195.305, *compiled note, post*. Measure 49 does not mandate any particular process for a landowner to establish his vested rights in this regard; and claimants seeking vested rights for purposes of § 195.305 generally applied for a local determination or sought a declaratory judgment to this effect.

Against this statutory backdrop, petitioners A. L. Bruner and Marilyn Bruner (“petitioners”) purchased a 40-acre tract of land located in Josephine County, Oregon, in 1984. At that time, the property was zoned for residential uses, allowing 40 one-acre homesites. After petitioners acquired the property, Josephine County (“the County”), the governing entity responsible for implementing land use regulations, in 1993 down-zoned the land to agricultural uses which required an 80-acre minimum lot size for a residence. Upon the passage of Measure 37 in 2004, petitioners made a timely claim in August of 2005 for compensation against the County in the amount of \$4.5 million on account of its partial regulatory taking of their property which prevented them from dividing their parcel into one-acre buildable lots consistent with the 1984 zoning law (App. 64-65).

The County investigated petitioners’ Measure 37 claim, finding it valid and compensable (App. 65). On February 15, 2006, the County, acting through its Board of County Commissioners which was also acting as a County Court in the conduct of County business under Or. Rev. Stat. § 558.200, issued a Final Judgment or Order (No. 2006-028) on petitioners’ claim for a Measure 37 waiver after a public hearing (App. 64-68). Pursuant to this Final Judgment or Order, the County---again acting through its Board of Commissioners and acting as a County Court in the conduct of County business---elected not to pay petitioners the compensation due them for its partial regulatory taking of their land and instead agreed with petitioners not to apply its land use regulations to petitioners’ property, thereby granting them a Measure 37 waiver which allowed petitioners the right to develop their 40-acre tract in order to accommodate 38 one-acre lots at a value of about \$4.5 million (App. 65-68).

At the time petitioners presented their claim, the Board of County Commissioners acted as a County Court because home-rule counties such as respondent Josephine County, where petitioners reside, conducted such business as a County Court when it conducted County business like resolving land uses issues, settling contract claims against it and changing its zoning laws, all matters involved in this transaction with petitioners. Neither petitioners nor respondent pursued any appeal from this Final Judgment or Order No. 2006-028 of February 15, 2006.

Petitioners began work to develop their land consistent with 1984 zoning requirements, preparing proposals for submission to the County under the terms of their waiver agreement. Petitioners timely submitted their application for River Run Estates Planned Development on the subject property as authorized under Final Judgment or Order No. 2006-028. However, after Measure 49 was passed in December of 2007, the County delayed and then refused to process or approve petitioners’ planned development. Petitioners and other electors of the County petitioned the County for a public proclamation ratifying Measure 37 waivers as contracts and promising to comply with its provisions. The County refused to do so and also refused to issue development permits to petitioners based upon their Measure 37 waiver. Under Measure 49, petitioners would have been allowed to develop *just one lot* on their property.

On March 31, 2008, petitioners brought a civil action against the County in the State’s Circuit

Court for Josephine County (*A.L. Bruner and Marilyn Bruner v. Josephine County*, C.A. No. 08-CV-0404). Their four-count complaint sought damages from the County of \$4.5 million alleging that the Final Judgment or Order of February 15, 2006, was a consummated agreement contained within a valid, enforceable and unappealed judgment which the County could not repudiate; that they had a vested right in developing their land consistent with the zoning law in 1984; and that the County's reliance on the passage of Measure 49 was a violation of separation of powers principles since the County's commitment to grant petitioners a Measure 37 waiver was one accomplished through its Board of Commissioners acting as a County Court in the conduct of County business, a purely judicial function with which the Legislature (by passing Measure 49) could not interfere. Petitioners also claimed that the County's repudiation of the Judgment or Order No. 2006-028 was an unconstitutional taking of their property, i.e., their accrued cause of action for compensation which had gone to final judgment, in violation of the fifth and fourteenth amendments.

On June 13, 2008, a judge of the Circuit Court for Josephine County dismissed petitioners' complaint. Petitioners appealed to the Oregon Court of Appeals. While their appeal was pending, other citizens of Oregon who had claims under Measure 37 began a civil action in 2008 in the federal district court for the District of Oregon against Jackson County asserting *inter alia* the continuing vitality of their Measure 37 waivers as valid, enforceable contracts. (*Citizens for Constitutional Fairness et al. v. Jackson County et al.*, C.A. No. 08-3015-PA) ("*Citizens I*") (App. 6-7;55-63).

On November 12, 2008, the federal district court in *Citizens I* issued a ruling after trial on some, but not all, of the plaintiffs' claims (App. 55-63). It ruled that Measure 37 waivers are binding, constitutionally protected contracts between plaintiffs and Jackson County which could not be impaired under the Contract Clause of the federal constitution and therefore must be honored by Jackson County (App. 58-61). The trial judge also ruled that Measure 37 waivers were final "quasi-judicial" orders which the legislature by enacting Measure 49 could not rescind without violating separation of powers principles (App. 62-63). After judgment issued (App. 54), Jackson County pursued an interlocutory appeal on these two issues in *Citizens I* to the court of appeals for the Ninth Circuit (App. 7).

While Jackson County's appeal to the Ninth Circuit in *Citizens I* was pending, different claimants-citizens under Measure 37 brought this civil action in federal district for the District of Oregon against respondent DLCD ("respondent") (*Jon & Lynna Bowers et al. v. DLCD*, C.A. No. 09-3082-PA) ("*Bowers*") (App. 7-8). The *Bowers* plaintiffs alleged that Measure 49 had caused a "taking" of their property, i.e., their vested, accrued claims for compensation under Measure 37, in violation of the fifth amendment; and that Measure 49 violates their right to substantive due process and to the equal protection of the laws under the fourteenth amendment (App. 8).

Petitioners A. L. Bruner and Marilyn Bruner joined this *Bowers* suit as parties-plaintiffs adding respondent Richard Whitman, Director of the DLCD ("respondent") as a party-defendant to the extent that their claims in their State court case—still pending appeal to the Oregon Court of Appeals—did not overlap. Respondents in *Bowers* soon moved for summary judgment on all claims (App. 8;51-52). Petitioners and the other plaintiffs opposed the motion and filed a cross motion for summary judgment on their "taking" claim (App. 52-53). The district judge heard arguments on May 10, 2010, and reserved judgment.

About two months later, on July 20, 2010, the court of appeals reversed the district court in *Citizens I* in an unpublished memorandum (App. 48-50) (*Citizens for Constitutional Fairness v. Jackson Cnty.*, 388 F. App'x 710, 711 (9th Cir. 2010)). It ruled without elaboration that the Measure 37 waivers were not contracts within the meaning of the Contract Clause and were administrative decisions, not court judgments (App. 7-8;49). In the wake of this opinion, the district court in *Citizens* then concluded that the court of appeals' decision disposed of the remainder of the claims of the *Citizens* plaintiffs and dismissed their entire case (App. 7). The *Citizens* plaintiffs appealed this final judgment to the court of appeals for the Ninth Circuit (*Id.*).

This decision by the court of appeals in *Citizens I* also caused the federal district court in *Bowers* on September 28, 2010, to grant respondents' motion for summary judgment and to deny the cross motion for summary judgment made by petitioners and the other *Bowers* plaintiffs (App. 51-53). All the *Bowers* plaintiffs, including petitioners, appealed this ruling to the court of appeals for the Ninth Circuit (App. 8).

Because the "taking" claims under the fifth amendment were substantially the same for both the *Citizens* and *Bowers* plaintiffs and since the plaintiffs in both cases were owners of real property in Oregon who received Measure 37 waivers instead of compensation but could not develop their land because of Measure 49, these two appeals were consolidated for briefing and argument before the court of appeals (App. 2-3;6).

On January 12, 2012, the court of appeals in a unanimous opinion affirmed the district court's decision in *Bowers* granting summary judgment in respondents' favor (App. 1-22). First addressing the "taking" claim under the fifth amendment, the court determined that petitioners' property rights in the form of accrued claims for compensation under Measure 37---even though contained within a valid, enforceable and final judgment---had not vested for purposes of the fifth amendment and were therefore subject to repeal by Measure 49 (App. 9-11).

Specifically, the court found that the *Bowers* plaintiffs were unable to articulate the precise nature of this right under Measure 37 or the certainty of their expectations about it (App. 11). It rejected the notion that this "accrued cause of action" was definite enough to constitute a property interest which could be "taken" because all Measure 37 waivers amounted to was an administrative decision giving claimants the right to sue, *not* a court judgment establishing with certainty their right to use their property in any particular way (App. 11-13).

Nor could it conclude that this "statutory entitlement" to compensation or to the equivalent of compensation has sufficiently crystallized to a degree of certainty sufficient for purposes of the fifth amendment (App. 13-15). There was no unequivocal promise by the State to pay compensation; there was no guarantee to claimants that they could use their property in a particular way; and there was no "unequivocal grant of an unfettered right" (App. 14-15). According to the court, rather than contracts, Measure 37 waivers were more akin to benefits benevolently given by the government, like Social Security benefits or a zoning permit (App. 15-16). In any event, the court did not think that the *Bowers* plaintiffs' claims were ripe or that they had exhausted their administrative remedies under Measure 49 (App. 15-17).

The court of appeals then ruled that Measure 49's enactment did not violate substantive due

process (App. 17-18). Applying a rational basis of review (because it saw no fundamental rights implicated), the court concluded that this retroactive legislation was supported by a legitimate legislative purpose, i.e., to ameliorate the costs of Measure 37 either to the taxpayers or to the State's natural resources (App.18). Nor did it offend the equal protection clause since any disparate treatment was caused merely by the timing of the new legislation which was applied to all Measure 37 claims that existed at the time of its enactment and was rationally related to legitimate state purposes (App. 18-20).

The court of appeals amended its opinion on February 28, 2012, by adding a footnote (App. 23-47). Incident to amending its opinion, the court of appeals on the same day denied petitioners' petition for rehearing or for rehearing *en banc* (App. 25-26).

In the meantime, on December 29, 2010, the Oregon Court of Appeals affirmed the dismissal of petitioners' complaint in *A. L. Bruner and Marilyn Bruner v. Josephine County*, 246 P3d 46 (Or. App. 2010), ruling that Measure 37 waivers were not contracts, that there was no violation of separation-of-powers principles and that there was no taking of their accrued vested contract right in violation of the fifth amendment. On January 12, 2012, the Oregon Supreme Court denied petitioners' petition for review. Petitioners have filed a petition for certiorari asking this Court to review this decision of the Oregon Court of Appeals (*A.L. Bruner and Marilyn Bruner v. Josephine County*, U.S. Supreme Court No. 11-___).

Argument Supporting Allowance of the Writ.

1. The Court Of Appeals Nullified This Court's Bedrock Law About When Petitioners' Contract Right To Develop Their Property Vested For Purposes Of The Takings Clause When It Approved Oregon's Retroactive Change In Its Land Use Regulations.

With the passage of Measure 37 on November 2, 2004, petitioners possessed a cognizable property right to make a timely claim for "just compensation" against the County in the amount of \$4.5 million on account of its partial regulatory taking of their property which prevented them from dividing their 40-acre parcel into 38 one-acre buildable lots consistent with the zoning law when they purchased the land in 1984 (App. 64-65). Exercising this right which Measure 37 gave them, petitioners on August 29, 2005, made their claim on the County for compensation for the loss of the fair market value of their property (App. 64-65). The County investigated their claim and after a hearing, found that it was "complete and satisfies the requirements of Measure 37, as documented in the [C]ounty's claim file....(App. 65).

Once the County validated petitioners' claim for compensation, petitioners' property interest ripened from a mere claim for compensation into an offer to settle a valid debt due petitioners from the County which offer the County could accept in one of two ways: (1) it could pay petitioners just compensation under Section 10 of Measure 37; or (2) it could decide to waive, modify or not apply its land use regulations under Section 8 of Measure 37 so that petitioners could use their land as allowed in 1984 with the proviso under Sections 4 & 6 of Measure 37 that if these regulations nonetheless continued in force more than 180 days after petitioners' claim for compensation was made, petitioners would have a cause of action against the County for such compensation together

with attorney's fees and other costs "reasonably incurred to collect the compensation."

The County chose to accept petitioners' offer by agreeing to waive, modify or not apply its land use regulations to petitioners' property so that they could develop their property as they would have been allowed to do in 1984 when they purchased it. Petitioners' property rights, i.e., their right to develop their land consistent with the land use regulations in 1984 or, if they were not allowed to do so beyond 180 days, their right to bring suit seeking just compensation together with attorney's fees, costs and other disbursements, became vested as soon as the contract was formed when the County accepted their offer and granted the waiver rather than pay petitioners compensation.

This agreement----this completed, executed contract between petitioners and the County acting through its Board of Commissioners and acting as a County Court in the conduct of County business----is reflected in the ensuing Final Judgment or Order No. 2006-028 of February 15, 2006 (App. 64-68). Its terms reflect the parties' completed bargain: in return for petitioners agreeing not to prosecute their claim for just compensation caused by the County's regulatory taking of their land, the County agreed to waive, modify or not apply its land uses regulations so that petitioners could develop their property (App.16). Neither petitioners nor the County appealed via a writ of review to the Oregon appellate courts from this Final Judgment or Order No. 2006-028.

This Court is the final arbiter of whether and when contracts are made, whether they are protected property rights under the Takings Clause, when these property interests vest and whether the regulatory authority has committed an unconstitutional taking of property. By ratifying respondents' reliance on Measure 49 when the County repudiated petitioners' vested contract right to develop their property consistent with land use regulations in effect in 1984 when they acquired it, the court of appeals nullified this Court's bedrock decisional law establishing petitioners' vested contract right to develop their land or to receive compensation for being prevented from doing so, instead relegating petitioners to a remedy of proving a "common law vesting" under Measure 49 which provides them no remedy at all for this taking.

In fact, by the time Measure 49 was enacted on December 6, 2007, petitioners' contract rights were *already* vested property rights deserving of protection under the fifth amendment. The County's reliance on Measure 49 to repudiate these vested contract rights, condoned by the court of appeals, constitutes a taking of these property rights to develop their land or to receive compensation if prevented from doing so. By nullifying all of this Court's bedrock principles of contract formation and the vesting of property rights for the purposes of takings under the fifth amendment, the court of appeals has abrogated the rights of Oregon citizens to seek redress when government regulation—retroactively imposed by legislative fiat----goes so far in its destruction of property rights as to constitute a taking which requires compensation.

Petitioners' Constitutionally Protected Contract Right to Develop Their Land.

While this Court will "accord respectful consideration and great weight to the views of the [court of appeals]" about whether petitioners possess a valid contract right to develop their land, *General Motors Corp. v. Romein*, 503 U.S. 181, 187 (1992), quoting *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938); *Combes v. Getz*, 285 U.S. 434, 441 (1932) and cases cited, it will determine independently thereof whether a contract was consummated between the parties. *Id.* In this

process, the Court employs traditional common law concepts of offer and acceptance, mutual assent, meeting of the minds and the need for consideration supporting each party's promise to perform. See, e.g., *Lynch v. United States*, 292 U.S. 571, 577-579 & n. 6 (1934); *Combes*, 285 U.S. at 449. *United States v. National Exchange Bank*, 270 U.S. 527, 534 (1926); *Reading Steel Casting Co. v. United States*, 268 U.S. 186, 188 (1925). *Hollerbach v. United States*, 233 U.S. 165, 171-172 (1914).

These traditional, bedrock principles of contract formation lead inevitably to the conclusion that petitioners and the County reached a completed contract once the County validated petitioners' Measure 37 claim for compensation and then accepted petitioners' offer to settle their claim in return for the County's promise not to enforce its land use regulations. *Romein*, 503 U.S. at 187-188. *Lynch*, 292 U.S. at 577-579. *Combes*, *supra*.

Even if Oregon's own law of contract formation were employed, the result is the same. Once validated by the County, petitioners' claim under Measure 37 to recover the loss in fair market value of their land constituted an offer to settle their compensation claim in return for the County's promise not to enforce its land regulations so that petitioners could develop their land as allowed in 1984 (*Klimek v. Perisich*, 371 P. 2d 956, 960 (Or. 1962); *Real Estate Loan Fund Oregon Ltd. v. Hevner*, 709 P.2d 727, 731 (Or. App. 1985)); the County accepted petitioners' offer by deciding not to enforce its land use restrictions (*Id.*); there was a meeting of the minds and mutual assent to the terms of this contract (*Klimek*; *Ken Hood Construction Co. v. Pacific Coast Construction, Inc.*, 120 P.3d 6, 11-12 (Or. App. 2005); and each party's promise to the other was supported by valid consideration. *Shelley v. Portland Tug & Barge Co.*, 76 P.2d 477, 483-484 (Or. 1938). *McPhail v. Milwaukee Lumber Co.*, 999 P.2d 1144, 1148 (Or. App. 2000). Finally, the ensuing Final Judgment or Order No. 2006-028 of February 15, 2006, is a written manifestation of the parties' completed contract. *Ken Hood Construction Co.*, 120 P.3d at 12.

In forming this contract with petitioners, the County at all times acted through its Board of Commissioners acting as a County Court in the conduct of County business under Or. Rev. Stat. § 558.200. This statute retains judicial authority in the County's Board of County Commissioners in certain home-rule counties like Josephine County whenever it conducts County business like resolving land use issues, settling contract claims against it or changing its zoning, all issues involved in this transaction with petitioners. *Strawberry Hill 4 Wheelers v. Board of Com'rs for Benton County*, 601 P.2d 769, 772 (1979). *Fasano v. Washington Co. Comm.*, 507 P.2d 23, 26-27 (Or. 1973). *Columbia Hills Development Corp. v. LCDC*, 624 P.2d 157, 161 (Or. App. 1981).

Under *Strawberry Hill 4 Wheelers*, the County's decision to contract with petitioners was judicial in nature because it resulted from applying preexisting criteria to a closely circumscribed concrete set of facts which applied to a relatively small number of persons. 601 P.2d at 775-776. The County's decision to contract with petitioners as reflected in its Final Judgment or Order No. 2006-028 qualifies in every respect. *Butchart v. Baker County*, 166 P.3d 537, 541 (Or. App. 2007). *Citizens for Responsibility v. Lane County*, 142 P.3d 486, 488 (Or. App. 2006). Since the County's decision to contract with petitioners is indisputably *judicial* in nature, the Final Judgment or Order No. 2006-028 reflecting its contract with petitioners was subject to review by the Oregon appellate courts via a writ of review. *Strawberry Hill 4 Wheelers*, 601 P. 2d at 775. Yet *neither* petitioners nor the County sought a timely writ of review to the Oregon appellate courts.

Oregon law recognizes that this completed contract of the parties contained within this final, unappealed Final Judgment or Order No. 2006-028 of February 15, 2006, is “personal property giving rise to vested rights which the legislature cannot, by retroactive law, either destroy or diminish in value.” *State ex rel. Weingart v. Kiessenback*, 114 P.2d 147, 149-150 (Or. 1941) citing *Hodges v. Snyder*, 261 U.S. 600, 603 (1923). More to the point, this final judgment adjudicated petitioners’ Measure 37 claim for just compensation long before the effective date of Measure 49 (December 6, 2007) and was not subject to judicial revision. In these circumstances, petitioners’ claim for just compensation merged into that judgment and was extinguished; but by consequent “merger” or “substitution,” petitioners were left with a final judgment and the right to enforce it. *Bleeg v. Metro*, 211 P.3d 302, 305 (2009). *English v. Multnomah Cty.*, 206 P.3d 224, 229-230 (2009). This is precisely the right---reduced to a final, unreviewable judgment---that petitioners sought to enforce in joining this civil action and in the collateral suit they pursued in the State courts of Oregon.

The court of appeals’ refusal to acknowledge petitioners’ vested, constitutionally protected contract right to develop their land---and to then conclude that no taking had been committed---nullifies all of this Court’s bedrock law establishing that petitioners’ protected property rights were created by contract and became vested once the County validated petitioners’ Measure 37 claim for compensation and then accepted their offer on or before February 15, 2006, to settle their claim in return for its promise not to enforce its land use regulations. See *Lynch*, 292 U.S. at 577; *Combes*, 285 U.S. at 441-442.

The court of appeals’ analysis does not apprehend *any* possibility that petitioners and the County entered into a valid, enforceable contract establishing their Measure 37 rights or that this contract provides the foundation for petitioners’ present claim that a taking has been committed. (App. 11). It conflates petitioners’ vested contract rights with an “accrued cause of action” and then concludes that this “cause of action” does not suffice as a vested property interest because it was not reduced to a “final unreviewable judgment” and is therefore inchoate and too uncertain to be considered vested for purposes of the Takings Clause (App. 11-12). As a basis for this conclusion, the court of appeals adverts to its abrupt one-page ruling in *Citizens I* that no formal contract existed there because the waivers between the other *Bowers* plaintiffs and Jackson County did not show “that there was any offer by Jackson County, acceptance by the property owners or consideration” sufficient to show a contract and that Jackson County did not promise the claimants there that they could put their property to any particular use (App. 49-50).

However, petitioners’ Measure 37 waiver with Josephine County---unlike those with Jackson County---indisputably shows that the County validated petitioners’ Measure 37 claim for compensation and then accepted their offer on or before February 15, 2006, to settle their claim in return for its promise not to enforce its land use regulations; that petitioners and the County thereby entered in to an enforceable contract which allowed petitioners the right to develop their 40-acre tract to accommodate 38 one-acre lots at a value of about \$4.5 million; and this contract was contained within a final, unreviewable judgment from which neither party appealed (App. 65-68). These facts more than meet the court of appeals’ own requirements which it cites for vesting this contract right (App. 11-12). See, e.g., *Ileto v. Glock*, 565 F.3d 1126, 1149 (9th Cir. 2009) (Berzon, J., concurring in part and dissenting in part); *Fields v. Legacy Health Sys.*, 413 F.3d 943, 956 (9th Cir. 2005); *Lyon v. Augusta S.P.A.*, 252 F.3d 1078, 1086 (9th Cir. 2001); *Austin v. City of Bisbee*, 855 F.2d 1429, 1435-1436 (9th Cir. 1988).

Moreover, unlike the waivers in Jackson County, the contract reflected in the Final Judgment or Order No. 2006-028 was self-enforcing. It specifies through incorporation by reference to the County's claim file for petitioners' property the "substantial" compensation to be paid petitioners if the County continued to apply the waived land use regulation; and it made petitioners' contract right----now reduced to a final, unappealed judgment----fully transferable to subsequent owners of the property (App. 13;65;67). Petitioners' "certainty of expectations" was solidified by the County's express, unequivocal promise not to apply its land use regulations instead of paying petitioners compensation as it would have been otherwise obligated to do; and the contract allowed petitioners the right to put their land to a particular use.

The court of appeals is wrong on another point: petitioners' Measure 37 waiver was *not* an "administrative decision" (App. 12;49). For the reasons already identified, the County's decision to contract with petitioners through its Board of County Commissioners acting as a County Court in the conduct of County business pursuant to Or. Rev. Stat. § 558.200, was entirely judicial in nature. The Final Judgment or Order No. 2006-028 reflecting its contract with petitioners was therefore subject to review by the Oregon appellate courts via a writ of review. *Strawberry Hill 4 Wheelers*, 601 P. 2d at 775. Yet *neither* petitioners nor the County sought a timely writ of review to the Oregon appellate courts, making this an unreviewable judgment upon which petitioners sued.

The Unconstitutional Retroactive Sweep of Measure 49.

Because the court of appeals failed to acknowledge that petitioners' constitutionally protected property rights had vested on or before February 15, 2006, they failed to address the unconstitutional retroactive sweep of Measure 49, one which by repealing Measure 37 extinguishes entirely petitioners' vested contract right to develop their land and thereby violates the Takings Clause of the federal constitution.

A final, unappealed judgment like Final Judgment or Order No. 2006-028 is personal property giving rise to completed, unconditional and vested rights which a legislature cannot by retroactive law either destroy or diminish in value. *Bradley v. School Board*, 416 U.S. 696, 720 (1974). *Hodges v. Snyder, supra*. Especially with new legislation affecting contractual or property rights, matters where predictability and stability are of prime importance, *United States v. Security Industrial Bank*, 459 U.S. 70, 79-82 (1982); *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 164 (1944), a party's settled, fixed and completed rights no longer subject to revision by a court cannot be undone without violating the Takings Clause. *Combes*, 285 U.S. at 441-442. *Union Pacific RR Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 198-200 (1913). *Ettor v. City of Tacoma*, 228 U.S. 148, 155-156 (1913). See *Romein*, 503 U.S. at 191.

Measure 49 does just that. It completely extinguishes petitioners' vested contract rights under Measure 37 to either develop 38 one-acre lots on their land or be paid compensation if prevented from doing so and it now relegates petitioners to developing just one lot on their land with no right to any compensation. By any yardstick, this retroactive regulatory scheme has caused a *complete* destruction of petitioners' vested contract rights under Measure 37 and constitutes a taking of petitioners' private property in violation of the fifth amendment. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980). *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979). *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130-131 (1978). *Goldblatt v. Hempstead*, 369 U.S. 590, 594

(1962) (“government action in the form of regulation cannot be so onerous as to constitute a taking which...requires compensation.”). *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

The Substantive Due Process Violation.

The right to substantive due process is an individual’s right to be free from the arbitrary action of government, regardless of the superficial fairness of the procedures employed to implement that action. *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). *Daniels v. Williams*, 474 U.S. 327, 331 (1986). It thus serves to prevent governmental power from being “used for purposes of oppression.” *Daniels*, 474 U.S. at 331-332 (1986). *Poe v. Ullman*, 367 U.S. 497, 542-543 (1961) (Harlan, J., dissenting) (It “includes a freedom from all substantial arbitrary impositions and purposeless restraints [by the state]...”). See *Moore v. East Cleveland*, 431 U. S. 494, 501 (1977). Even in zoning dispute cases, the principle of substantive due process guarantees property owners like petitioners the right to be free from arbitrary or irrational zoning actions. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267(1977).

In the wake of the court of appeals’ conclusion that petitioners have no vested contract rights subject to the Takings Clause, petitioners have been left to enforce their rights by resorting to Measure 49’s “common law vesting” remedy which provides them no remedy at all. Under *Clackamas Co. v. Holmes*, 508 P.2d 190, 191-192 (1973), to achieve common law vesting, the landowner must in good faith have begun substantial construction or have incurred substantial expenditures in reliance on the building permit *before* Measure 49 was enacted. *Friends of Yamhill Cnty., Inc. v. Bd. of Commrs. of Yamhill Cnty.*, 238 P.3d 1016, 1022-1023 (Or. App. 2010).

Petitioners, however, had no appreciable opportunity to meet this threshold of completion of their development in the very short time allotted to them, given the State’s escalating requirements of various approvals for their project as it proceeded, and, in fact, its interference with petitioners’ performance. In any event, the decisions of this Court have consistently held that “[a] person has no property, no *vested* interest, in any rule of the common law.” *Duke Power Company v. Carolina Env’tl. Study Group, Inc.*, 438 U.S. 59, 88 n. 32 (1978) quoting *Second Employers’ Liability Cases*, 223 U.S. 1, 50 (1912) and *Munn v. Illinois*, 94 U.S. 113, 134 (1877) (emphasis supplied).

Oregon’s Measure 49 has therefore by *ipse dixit* transformed petitioners’ constitutionally protected vested property right to develop their land or to seek just compensation if prevented from doing so into a non-vested common law remedy which they cannot exercise. Enabled by the court of appeals, Measure 49 permanently appropriates for the benefit of the State petitioners’ property and this it cannot do consistent with the constitution. “[A] State, by *ipse dixit*, may not transform private property into public property without [paying] compensation...” *Webb Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017-1019(1992).

Equal Protection of the Laws.

Once Oregon provides a right and a remedy for property owners to receive just compensation because of regulatory takings, those rights and remedies must comport with the Equal Protection Clause of the federal constitution. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985). *Griffin v. Illinois*, 351

U.S. at 13-14. See *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973). Measure 49 is justified by neither a compelling state interest nor a rational relationship to the asserted State goal. That a Measure 37 plaintiff who has not substantially begun his development before December 6, 2007, receives far harsher treatment than one who has amounts to the kind of disparate, unfair and unequal treatment which bespeaks a denial of the equal protection of the laws. *Allegheny Pittsburgh Coal v. Webster County*, 488 U.S. 336, 343-344 (1989). *Kahn v. Shevin*, 416 U.S.351, 355 (1974). *Johnson v. Robison*, 415 U.S. 361, 374-375 (1974). See *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 547 (1983).

Measure 37 implicates the right of access to the courts and if such access is a fundamental right, which it is, see *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002), this disparate treatment can only be sustained if Measure 49 serves a compelling state interest and it is narrowly drawn to promote that interest. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). *Reno v. Flores*, 507 U.S. 292, 302 (1993). Measure 49 does neither. Its purpose is to “provide compensation for unfair burdens while retaining Oregon’s protections for farm and forest uses and the state’s water resources.” Or. Rev. Stat. § 195.301. But there are no legislative facts which connect this statute to its purpose; and there is no finding to justify the separate and unequal treatment which it imposes on Measure 37 plaintiffs like petitioners who in good faith pursued their validated claims timely.

Even if a less rigorous but still heightened standard of justification is imposed on Measure 49, it still comes up short. There is no established correlation between providing compensation for “unfair burdens” to landowners or “protecting the State’s farm, forest and water uses” and depriving petitioners of a remedy for damages in the judicial system for the loss of their Measure 37 rights. Nor does Measure 49’s arbitrary, capricious classification founded only upon the accomplishment of an undefined “common law vesting” process pass muster under a rational relationship test. Preventing petitioners from exercising their vested, constitutionally protected contract right to use their land in the manner permitted when they purchased the parcel in 1984----and then denying them any remedy for preventing them from doing so----lacks a rational nexus to compensating landowners for “unfair burdens” or protecting the State’s farm, forest and water uses. In fact, it subverts that asserted goal.

Conclusion.

For the reasons identified herein, a writ of certiorari should issue to the court of appeals for the Ninth Circuit in order to review and reverse its decision affirming the grant of summary judgment in respondents’ favor; to declare that petitioners’ property interests under Measure 37 to develop their land or receive compensation if prevented from doing so are vested property rights deserving of protection under the fifth amendment; to declare that the retroactive effect of Measure 49, as interpreted by the court of appeals for the Ninth Circuit, deprives petitioners of substantive due process and the equal protection of the laws under the fourteenth amendment; or to provide petitioners such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

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