

IN THE SUPREME COURT OF THE STATE OF OREGON

MARY LI and REBECCA KENNEDY;  
STEPHEN KNOX, M.D. and ERIC WARSHAW,  
M.D.; KELLY BURKE and DOLORES DOYLE;  
DONNA POTTER and PAMELA MOEN;  
DOMINICK VETRI and DOUGLAS DEWITT;  
SALLY SHEKLOW and ENID LEFTON; IRENE  
FARRERA and NINA KORICAN; WALTER  
FRANKEL and CURTIS KIEFER; JULIE  
WILLIAMS and COLEEN BELISLE; BASIC  
RIGHTS OREGON; and AMERICAN CIVIL  
LIBERTIES UNION OF OREGON,

Plaintiffs-Respondents, Cross-Appellants,  
and

MULTNOMAH COUNTY,

Intervenor-Plaintiff-Respondent, Cross-Appellant,

v.

STATE OF OREGON; THEODORE  
KULONGOSKI, in his official capacity as  
Governor of the State of Oregon; HARDY  
MYERS, in his official capacity as Attorney  
General of the State of Oregon; GARY WEEKS, in  
his official capacity as Director of the Department  
of Human Services of the State of Oregon; and  
JENNIFER WOODWARD, in her official capacity  
as State Registrar of the State of Oregon,

Defendants-Appellants, Cross-Respondents,  
and

DEFENSE OF MARRIAGE COALITION, CECIL  
MICHAEL THOMAS, NANCY JO THOMAS,  
DAN MATES, and DICK JORDAN OSBORNE,

Intervenors-Defendants-Appellants,  
Cross-Respondents.

Multnomah County Circuit  
Court Case No. 0403-03057

SC S51612

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**PLAINTIFFS-RESPONDENTS AND CROSS-APPELLANTS'  
REPLY BRIEF  
ON EFFECTS OF MEASURE 36 ON THIS APPEAL**

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Appeal from a Judgment of the Circuit Court of Multnomah County  
Honorable Frank L. Bearden, Judge

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DECEMBER 2004

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**PLAINTIFFS-RESPONDENTS AND CROSS-APPELLANTS’  
REPLY BRIEF ON EFFECTS OF MEASURE 36 ON THIS APPEAL**

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**INTRODUCTION**

Neither plaintiffs’ claims for relief nor plaintiffs’ assignments of error on cross-appeal are moot. Unmarried individual plaintiffs remain entitled to the benefits of marriage on terms comparable to married individuals. Married individual plaintiffs remain entitled to recognition of their pre-amendment marriages.

**ARGUMENT**

- I. Unmarried individual plaintiffs are entitled to the benefits of marriage on terms comparable to married individuals.**
  - A. Unmarried individual plaintiffs may continue to ask the Court to order the extension of the benefits of marriage to them on terms comparable to married individuals.**

DOMC now adds to its argument that plaintiffs failed to ask for the extension of the benefits of marriage to same-sex couples by contending that plaintiffs lack standing to seek the extension of the benefits of marriage on their first claim for relief (DOMC Answering Supp Br at 8-12). DOMC contends that because individual plaintiffs “have not established on the record below any interest in the benefits of marriage independent of the institution itself” (DOMC Answering Supp Br at 10), they “have no actual case or controversy before this court on the benefits of marriage” (*id.* at 11). The right to the benefits of marriage was before the trial court, and plaintiffs have standing to seek such benefits.

- 1. The trial court considered whether plaintiffs have a right to the benefits of marriage.**

As noted in their earlier briefs regarding the effect of Measure 36 on this appeal, plaintiffs sufficiently alleged a right to the benefits of marriage as they

challenged the constitutionality of the marriage statutes. There is no need for a “radically amended complaint” (DOMC Answering Supp Br at 1). DOMC’s contention that plaintiffs had a different theory in the trial court, and its reliance on Millers Mut. Fire Ins. Co. v. Wildish Const. Co., 306 Or 102, 758 P2d 836 (1988), and Court of Appeals cases that cite to it (DOMC Answering Supp Br at 8-9), is misplaced.

DOMC ignores that plaintiffs raised their constitutional entitlement to the benefits of marriage in the trial court, and the trial court’s ruling extended the benefits of marriage (but not marriage itself) to plaintiffs. Thus, the essential premise for DOMC’s procedural argument – that the trial court lacked an opportunity to consider whether it is unconstitutional to deny plaintiffs the benefits of marriage in the first instance – is simply missing. See State v. Hitz, 307 Or 183, 188, 766 P2d 373 (1988). Plaintiffs’ right to the benefits of marriage was before the trial court and remains before this Court.<sup>1</sup>

**2. The unmarried plaintiffs have standing to seek a ruling on the unconstitutionality of the marriage statutes, which exclude them from the benefits of marriage.**

DOMC argues that plaintiffs lack standing by failing to plead and prove that they are each denied specifically and individually enumerated rights, responsibilities,

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<sup>1</sup> Without saying so, DOMC also suggests that plaintiffs are judicially estopped from contending that they are entitled to the benefits of marriage (DOMC Answering Supp Br at 8 n8). Estoppel does not apply in this case. Day v. Advanced M & D Sales, Inc., 336 Or 511, 522, 524, 86 P3d 678 (2004). Plaintiffs properly have argued that under the Oregon Constitution as it existed prior to December 2, 2004, their exclusion from both marriage and the benefits of marriage was unconstitutional and that a remedy limited to the benefits of marriage would be to shunt them into a separate and unequal institution. Plaintiffs’ views regarding the inherent inequality of a “civil union” remedy has not changed; the Oregon Constitution has changed their ability to continue to assert that a “civil union” remedy is unconstitutional under the Oregon Constitution.

benefits, or obligations that come with marriage that they need to have or utilize right now (DOMC Answering Supp Br at 9-11). DOMC also claims that plaintiffs must plead and prove that they sought individual benefits or rights specifically, as opposed to seeking them all through their challenge to the marriage statutes (DOMC Answering Supp Br at 11). The trial court correctly ruled that all individual plaintiffs have standing (ER 430-ER 432). The unmarried plaintiffs need not challenge the constitutionality of the marriage statutes on a benefit-by-benefit basis, and a favorable decision will have an immediate practical effect on them.<sup>2</sup>

Plaintiffs' first claim for relief was brought under the Uniform Declaratory Judgments Act. That act defines who may obtain declarations regarding laws in ORS 28.020, as follows:

“Any person interested under a deed, will, written contract or other writing constituting a contract, or whose rights, status or other legal relations are affected by a constitution, statute, municipal charter, ordinance, contract or franchise may have determined any question of construction or validity arising under any such instrument, constitution, statute, municipal charter, ordinance, contract or franchise and obtain a declaration of rights, status or legal relations thereunder.”

Under ORS 28.020, the plaintiff must plead and show how the plaintiff's rights are affected by the challenged instrument and “some injury or other impact on a legally recognized interest beyond an abstract interest in the correct application of the law.” Budget Rent-a-Car of Washington-Oregon, Inc. v. Multnomah County, 287 Or 93, 95, 597 P2d 1232 (1979). The unmarried plaintiffs are affected by the marriage statutes' exclusion of them from marrying a desired same-sex spouse, and therefore exclusion of them from the benefits of marriage.

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<sup>2</sup> Married plaintiffs have standing as well, for the reasons below and for the reasons stated in part II below.

Plaintiffs no longer seek marriage as a remedy given Measure 36. But that circumstance does not alter the fact that a declaration that the marriage statutes violate Article I, section 20 by excluding them from the benefits of marriage will have a practical effect on them. Practical effects of a decision for all plaintiffs include their immediate access to the benefits of marriage, plus some level of recognition as a family unit (albeit one that is not equal to that of a family unit headed by a married couple) given that plaintiffs' families will have access to tangible state-conferred benefits of marriage. On this basis alone, all plaintiffs have standing. See Cope v. City of Cannon Beach, 317 Or 339, 342, 855 P2d 1083 (1993) (facial challenge to a statute, i.e., the assertion that it is unconstitutional no matter how it is applied, is ripe for review under federal law); Advocates for Effective Regulation v. City of Eugene, 160 Or App 292, 981 P2d 368 (1999) (facial challenge to initiative is ripe under state law); Gaffey v. Babb, 50 Or App 617, 623-24, 624 P2d 616, rev den, 291 Or 117, 631 P2d 341 (1981) (standing and justiciable controversy in declaratory judgment action challenging the facial validity of a criminal ordinance); State v. Linde, 179 Or App 553, 555-56, 41 P3d 440 (2002) (because of stigma associated with length of the appellant's civil commitment, appeal concerning the extension of his commitment, even though his confinement had ended, was not moot).

DOMC relies heavily on Brause v. State of Alaska, 21 P3d 357 (Alaska 2001), for its argument that plaintiffs lack standing. In that case, the Alaska Supreme Court, applying an "abuse of discretion" standard of review, 21 P3d at 358, held that a court can exercise its discretion under the Alaska declaratory judgments statute to deny a declaration on the "prudential" ground of ripeness by balancing the plaintiffs' "need for decision against the risks of decision." Brause, 21 P3d at 360. That is not the law in Oregon, nor is it the issue presented here. The Oregon declaratory judgments



statute contains expansive language regarding standing, ORS 28.020, and the test in Oregon for constitutional standing does not include a balancing test incorporating political considerations. Cf. Brause, 21 P3d at 360 (noting, among other things, that the trial court would have to declare a statute unconstitutional, and that exercising such a power can undermine public trust and confidence in courts and indicate a lack of respect for the legislative and executive branches of government). Accordingly, Brause is of no persuasive value.

Like the married plaintiffs, the unmarried plaintiffs have standing to challenge the marriage statutes and also may seek the extension of the benefits of marriage to them.

**B. The Court must order the extension of the benefits of marriage to unmarried individual plaintiffs on terms comparable to married individuals.**

The trial court recognized that relationships and families are strengthened by the benefits of marriage and that, in this regard, same-sex couples and their children are no different than opposite-sex couples and their children. Accordingly, it correctly ruled that there is no constitutionally sufficient justification for refusing to extend the benefits of marriage to same-sex couples.

DOMC mistakenly asserts that there may be a constitutionally sufficient justification for refusing to extend some, if not all, benefits of marriage to same-sex couples. There is no such justification. First, DOMC erroneously assumes that discrimination between same-sex couples and their families and opposite couples and their families is subject to rational basis review. To the contrary, as previously briefed, such discrimination is subject to heightened scrutiny, both because it is a form of gender discrimination and because it is a form of sexual orientation discrimination. Second, even if such discrimination is subject to rational basis

review, DOMC erroneously assumes that there is a state interest that is rationally furthered by the refusal to extend some, if not all, benefits of marriage to same-sex couples. Plaintiffs have argued that “[t]he exclusion of same-sex couples from both marriage and its benefits fails even rational basis review” (Pls Answering Br at 49 (emphases added)). In response, DOMC has invoked only considerations involving “traditional” procreation, child welfare, and tradition. As previously briefed, neither a state interest in “traditional” procreation nor the state interest in child welfare is rationally furthered by the refusal to extend the benefits of marriage to same-sex couples. Moreover, tradition for its own sake is not a legitimate state interest. Thus, as the State itself concedes, there is no state interest that is rationally furthered by the refusal to extend some, if not all, benefits of marriage to same-sex couples. DOMC’s example of the presumption of parenthood serves only to bolster plaintiffs’ position. The purpose of the presumption is to foster stability in the life of a child by creating certainty in the legal relationship between the child and his or her parents. If a same-sex couple enters into a civil status comparable to marriage and one member of the couple becomes a parent to a child, the child will benefit from a presumption of a legal relationship between the child and the other member of the couple – and the child will do so to the same extent as a child in a household in which an opposite-sex couple enters into a marriage. Neither considerations involving “traditional” procreation nor considerations involving child welfare alter the analysis. Thus, notwithstanding DOMC’s assertion to the contrary, the Court must order the extension of the benefits of marriage to unmarried individual plaintiffs on terms comparable to married individuals.

One of the benefits of marriage is a civil status that serves as a single gateway to all of the other benefits of marriage. Thus, the Court must order the State to create

a comparable civil status for unmarried individual plaintiffs, now that they no longer seek to enter into the same civil status as married individuals.<sup>3</sup> Alternatively stated, in order to extend of the benefits of marriage to unmarried individual plaintiffs on terms comparable to married individuals, the Court must order the State to create an alternative civil status comparable to marriage. Because the alternative civil status must be comparable to marriage, DOMC's questions about its contours are merely rhetorical – the eligibility criteria for same-sex couples who wish to enter into the alternative civil status (e.g., age, capacity, consanguinity, numerosity, etc.) must be comparable to those of marriage.

Notwithstanding DOMC's misguided invocation of separation-of-powers principles, it is the duty of the judicial branch to order the legislative and executive branches to come into compliance with the law where their policy choices stray outside of what is permissible under the constitution. This is especially true here, where there is only one appropriate remedial option – the extension of all of the benefits of marriage to unmarried individual plaintiffs on terms comparable to married individuals.<sup>4</sup> This is not to say that the legislative and executive branches may not modify the benefits of marriage for all couples, both same-sex and opposite-

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<sup>3</sup> As previously briefed, the only other remedial option – the nullification of any civil status that serves as a single gateway to all of the other benefits of marriage – is not an appropriate one.

<sup>4</sup> To the extent that the State cites Hughes v. State, 314 Or 1, 33 n36, 838 P2d 1018 (1992), for the proposition that the legislative and executive branches are free to fashion whatever remedy they want, it misconstrues the case law. As previously briefed, where the Court finds an Article I, section 20 violation, there are only two remedial options – extending the privilege or nullifying it. In relevant part, Hughes concerned a breach of contract, not an Article I, section 20 violation. There, unlike in a case concerning an Article I, section 20 violation in which there are only two ways in which equality may be ensured, it was appropriate for the Court to defer to the legislative branch to fashion a remedy because there were numerous ways in which the breach of contract could have been remedied, and it was unclear which the legislature would have elected had it known that its actions would result in a breach of contract.

sex, after the fact. As previously briefed, they are free to do so. At this time, however, the legislative and executive branches must extend whatever benefits of marriage are currently enjoyed by opposite-sex couples and their children to same-sex couples and their children on comparable terms. Indeed, consistent with its remedies jurisprudence, the Court must order that they do so.

**II. Married individual plaintiffs are entitled to recognition of their pre-amendment marriages.**

**A. Plaintiffs' assignments of error on cross-appeal are not entirely moot.**

Plaintiffs do not contest that their assignments of error on cross-appeal no longer apply to unmarried individual plaintiffs. In light of the amendment, unmarried individual plaintiffs no longer seek post-amendment marriages. Plaintiffs' assignments of error on cross-appeal, however, continue to apply to married individual plaintiffs. Married individual plaintiffs continue to seek recognition of their pre-amendment marriages. Thus, the Court must still reach the questions presented by plaintiffs' assignments of error on cross-appeal: (1) whether marriage, separate and apart from the benefits of marriage, constitutes a privilege or immunity, and (2) whether, as a remedial matter, married individual plaintiffs are entitled to recognition of their pre-amendment marriages, in addition to the benefits of marriage.

Plaintiffs' first claim for relief was brought by "all plaintiff couples," both married and unmarried (ER 37). Under their first claim for relief, plaintiffs complained that, because "[t]he Oregon statutory code does not permit marriages of same-sex couples," the State not only "refuse[s] to issue marriage licenses to same-sex couples," including unmarried individual plaintiffs, but also "refuse[s] to recognize marriages of same-sex couples," including married individual plaintiffs (*id.*). Plaintiffs have consistently maintained that the refusal to recognize marriages of

same-sex couples “has the practical effect of directly and substantially harming [married individual plaintiffs] in that it excludes them from marriage, the social validation that it confers, and the hundreds of rights, responsibilities, benefits, and obligations that it affords,” including, but not limited to, “the benefit of ensuring that their marriage records are publicly available for official confirmation of the existence of their marriages”<sup>5</sup> (ER 35-ER 37; see also ER 156-ER 167; ER 171-ER 177; ER 478-ER 483 (declarations of married individual plaintiffs)). Thus, plaintiffs’ assignments of error on cross-appeal are not entirely moot, as married individual plaintiffs continue to maintain that, under pre-amendment law, the constitution required the State to recognize the marriages of same-sex couples to the same extent as the marriages of opposite-sex couples.

DOMC contends that plaintiff’s assignments of error on cross-appeal no longer apply to married individual plaintiffs because, DOMC argues (and plaintiffs’ dispute), married individual plaintiffs are in fact unmarried because their pre-amendment marriages were never valid because the licenses were improperly issued. DOMC’s contention misses the point. DOMC is free to make its argument in rebuttal to plaintiffs’ argument that the pre-amendment marriages were valid. But this disagreement between plaintiffs and DOMC over the validity of the pre-amendment

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<sup>5</sup> This benefit – registration of records that confirm the existence of a relationship – is also the subject of plaintiffs’ second, third, and fourth claims for relief. As consistently noted throughout the briefing, plaintiffs’ fourth claim for relief was adjudicated in the alternative to plaintiffs second and third claims for relief (ER 424-ER 425).

marriages does not render plaintiffs' assignments of error on cross-appeal moot. Rather, it goes to whether plaintiffs prevail on their assignments of error on cross-appeal.<sup>6</sup>

**B. The amendment does not affect the fact that married individual plaintiffs are entitled to recognition of their pre-amendment marriages.**

The State's textual analysis of the amendment is flawed. It fails to recognize the use of the disjunctive "or" in the text. In light of the disjunctive, the amendment may be fairly read as two statements of law: (1) "It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid as a marriage," and (2) "It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be legally recognized as a marriage." While each statement of law may be clear in certain respects, each is ambiguous with respect to the way in which the law will treat the pre-amendment marriages prospectively.

While the statement concerning the validity of marriages may be clear as to the manner in which unmarried same-sex couples who seek to obtain Oregon marriage licenses will be treated, it is ambiguous as to the manner in which married same-sex couples who have already obtained Oregon marriage licenses will be treated. If their pre-amendment marriages are void on a prospective basis, then the couples have no control over whether the State will recognize their marriages on a prospective basis.

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<sup>6</sup> Plaintiffs have consistently argued that, in light of the State's and DOMC's argument that the marriages were never valid because the licenses were improperly issued, the Court must address whether, under pre-amendment law, the constitution required the State to recognize the marriages of same-sex couples to the same extent as the marriages of opposite-sex couples. This is so because the answer to the question informs (1) whether married individual plaintiffs married in good faith, regardless of whether the licenses were properly issued, and (2) whether the County executive had a constitutional duty to issue the licenses to married individual plaintiffs.

But, if their pre-amendment marriages are merely voidable on a prospective basis, then the couples, and the couples alone, have complete control over whether the State will recognize their marriages on a prospective basis – the State has no say. This is the first ambiguity on which plaintiffs predicate their argument.<sup>7</sup>

The statement concerning the recognition of marriages is also ambiguous as to the manner in which married same-sex couples who have already obtained Oregon marriage licenses will be treated. In light of the use of the term “policy” in conjunction with the use of phrase “legally recognized” – a construct found in interstate comity jurisprudence – it is unclear whether this portion of the amendment is directed solely at recognition of out-of-state marriages. Notwithstanding the State’s assertion to the contrary, in advancing this argument, plaintiffs do not suggest that the term “marriage” has two different meanings, one referring to Oregon marriages and the other referring to out-of-state marriages. Rather, they contend that it is ambiguous whether the use of the term “valid” was intended to address the manner in which the law will treat Oregon marriages and the use of the term “legally recognized” was intended to address the manner in which the law will treat out-of-state marriages. This is the second ambiguity on which plaintiffs predicate their argument.<sup>8</sup>

The State implicitly concedes that the amendment does not affect the pre-amendment marriages retrospectively. It suggests, however, that it is of no consequence whether the pre-amendment marriages were valid from the date of the marriages to the date of the amendment. The State is incorrect. Even if the Court

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<sup>7</sup> The State sidesteps plaintiffs’ argument by relying on its erroneous assumption (discussed below) that the statement concerning the recognition of the marriages is unambiguous as to the manner in which married same-sex couples who have already obtained Oregon marriage licenses will be treated.

<sup>8</sup> Notwithstanding the State’s assertion to the contrary, plaintiffs do not predicate their argument on the impairment of contracts clause of Article I, section 21.

were to rule that the pre-amendment marriages were valid only from the date of the marriages to the date of the amendment, it would be of significant consequence to married individual plaintiffs. Under their first claim for relief, married individual plaintiffs sought recognition of their pre-amendment marriages for all purposes. In addition, under their second, third, and fourth claims for relief, married individual plaintiffs sought – and in fact won – recognition of their pre-amendment marriages for purposes of registration of their marriage records. If the Court were to rule that the pre-amendment marriages were valid from the date of the marriages to the date of the amendment, such a ruling would retroactively entitle married individual plaintiffs to enjoy the benefits that they should have enjoyed by virtue of their marriages during this window of time.

DOMC's assertion that "the question whether Measure 36 voids or renders same sex marriage licenses 'unrecognizable' is not before this Court" (DOMC Answering Supp Br at 7 n6) appears to assume that married individual plaintiffs are in fact unmarried. As discussed above, DOMC's assertion is at best premature. In the alternative, it appears to ignore the fact that married individual plaintiffs, under their first claim for relief, sought recognition of their pre-amendment marriages for all purposes and, under their second, third, and fourth claims for relief, sought – and in fact won – recognition of their pre-amendment marriages for purposes of registration of their marriage records.



## CONCLUSION

The amendment will not render any of plaintiffs' claims for relief or plaintiffs' assignments of error on cross-appeal moot.

Dated this 7th day of December, 2004.

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