

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

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

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

NOVEMBER 2004

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

INTRODUCTION

The Oregon constitution will soon include the following amendment (hereinafter, “the amendment”): “It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage.” See www.sos.state.or.us (Secretary of State’s website). The amendment will not render any of plaintiffs’ claims moot.

This brief begins by setting forth the inquiry that the Court undertakes to determine whether a claim is moot: whether a decision in the case would have a practical effect on a party’s rights. This brief goes on to argue that, notwithstanding the amendment, a decision in this case would have a practical effect on plaintiffs’ rights in two ways. First, with respect to unmarried individual plaintiffs, the amendment does not preclude the Court from fashioning a remedy that extends to them the complete set of benefits, obligations, rights, responsibilities, and protections conferred on married couples and their children by state constitutional, statutory, regulatory, sub-regulatory, and common law, to which marriage is the only gateway under current law. Because the Court can fashion at least a partial remedy, plaintiffs’ claims are not moot. Second, with respect to married individual plaintiffs, the amendment does not void or impair their marriages, either retrospectively or prospectively. Because their marriages continue to be valid and the State continues to be required to recognize them, plaintiffs’ claims are not moot.

ARGUMENT

I. Plaintiffs' claims are not moot because a decision in this case would have a practical effect on plaintiffs' rights.

In Brumnett v. Psychiatric Sec. Review Bd., 315 Or 402, 848 P2d 1194 (1993), the Court held that “[c]ases that are otherwise justiciable, but in which a court’s decision no longer will have a practical effect on or concerning the rights of the parties, will be dismissed as moot.” Id. at 406; see also, e.g., State v. Snyder, 337 Or 410, 419-20, 97 P3d 1181 (2004) (declining to dismiss the case as moot because a decision would have a practical effect on the rights of a party); State ex rel. Juvenile Dep’t v. Garcia, 180 Or App 279, 284-86, 44 P3d 591 (2002) (same).

Notwithstanding the amendment, a decision in this case would have a practical effect on plaintiffs’ rights. Accordingly, plaintiffs’ claims are not moot.

Plaintiffs’ first claim for relief is predicated on plaintiffs’ argument that, by excluding same-sex couples from marriage, the State is denying same-sex couples and their children – including individual plaintiffs and their children – the advantages that come with marriage. As set forth in plaintiffs’ briefs on the merits, the advantages that come with marriage fall into two categories: (1) the complete set of benefits, obligations, rights, responsibilities, and protections conferred on married couples and their children by state constitutional, statutory, regulatory, sub-regulatory, and common law, to which marriage is the only gateway under current law (hereinafter, “the benefits of marriage”), and (2) the tangible and intangible advantages that come with marriage above and beyond the benefits of marriage. The amendment does not change the fact that, by excluding same-sex couples from marriage, the State is denying same-sex couples and their children – including individual plaintiffs and their

children – these advantages. The amendment only raises the question whether same-sex couples – including individual plaintiffs – may seek redress of the denial of these advantages. As set forth below, because the amendment does not preclude the Court from fashioning a remedy that extends the benefits of marriage to same-sex couples, a decision in this case would have a practical effect on plaintiffs’ rights. Accordingly, plaintiffs’ first claim for relief is not moot.

Plaintiffs’ second, third, and fourth claims for relief are predicated on plaintiffs’ argument that, by refusing to recognize the marriages of same-sex couples that followed from the issuance of licenses by the County (hereinafter, “the marriages”), the State denied married same-sex couples – including married individual plaintiffs – a particular advantage that comes with marriage: registration of records that confirm the existence of a relationship (see State Op Br at 25 (“[P]ersons will, at times, need to rely on copies of the state’s marriage, divorce and other vital records to determine or protect their legal rights.”)).¹ As set forth in plaintiffs’ briefs on the merits, the State Registrar was required to register the records because, under the law at the time, the marriages were valid and the State was required to recognize them. As set forth below, because the amendment may not be construed to affect, either retrospectively or prospectively, the validity of the marriages or the requirement

¹ As set forth in plaintiffs’ briefs on the merits, plaintiffs’ constitutional argument informs plaintiffs’ fourth claim for relief because the State Registrar would have registered the records but for her view that the law at the time permitted the State to deny same-sex couples the advantages that come with marriage (see ER 57 at ¶ 29; ER 106). Because her view of the law at the time was incorrect, a writ of mandamus may issue. State ex rel. Maizels v. Juba, 254 Or 323, 331, 460 P2d 850 (1969) (“[M]andamus may be used to decide disputed and difficult questions of law.”); see also Henkel v. Bradshaw, 257 Or 55, 57, 475 P2d 75 (1970) (same); Parks v. Board of County Comm’rs, 11 Or App 177, 198-99, 501 P2d 85 (1972) (same).

that the State recognize them, a decision in this case would affect plaintiffs' rights.

Accordingly, plaintiffs' second, third, and fourth claims for relief are not moot.

II. The amendment must be construed under an established analytical framework.

A. The amendment must be construed by reference to its text and context.

In Roseburg Sch. Dist. v. City of Roseburg, 316 Or 374, 851 P2d 595 (1993), the Court held that, "[i]n interpreting a constitutional provision adopted through the initiative process, our task is to discern the intent of the voters." Id. at 378. The Court further held that, in discerning the intent of the voters, it must first examine the text and context of the constitutional provision: "The best evidence of the voters' intent is the text of the provision itself. The context of the language of the ballot measure may also be considered * * * ." Id. (citations and footnote omitted).

In examining the text of the constitutional provision, "the court considers rules of construction of the [constitutional] text that bear directly on how to read the text." PGE Co. v. BOLI, 317 Or 606, 611, 859 P2d 1143 (1993); see also id. at 612 n4 (noting that the analytical framework "applies, not only to statutes enacted by the legislature, but also to the interpretation of laws and constitutional amendments adopted by initiative or referendum"). These rules of construction include the rule "not to insert what has been omitted, or to omit what has been inserted," id. at 611 (quotation omitted), and the rule that "words of common usage typically should be given their plain, natural, and ordinary meaning." Id.

The context of a constitutional provision is defined "very broadly" to include the overall scheme in which it exists: "Context may include related sections of the

[constitutional provision], related statutes, cases interpreting related statutes, and case law existing at the time of enactment.” Steven J. Johansen, What Does Ambiguous Mean? Making Sense of Statutory Analysis in Oregon, 34 Willamette L Rev 219, 235 (Spring 1998); see also id. at 235-44 (discussing the case law). In examining the context of the constitutional provision, “the court utilizes rules of construction that bear directly on the interpretation of the [constitutional] provision in context.” PGE, 317 Or at 611. These rules include the rule that “use of the same term throughout a[n] [overall scheme] indicates that the term has the same meaning throughout the [overall scheme].” Id. (citation omitted).

B. If its text and context are unclear, the amendment must be construed by reference to its history.

In Ecumenical Ministries v. Oregon State Lottery Comm’n, 318 Or 551, 871 P2d 106 (1994), the Court held that, “[i]f the intent of the voters is not clear from the text and context of the initiated constitutional provision, the court turns to the history of the provision.” Id. at 559 (footnote omitted). While it is true that, “if the intent is clear based on the text and context of the constitutional provision, the court does not look further,” Roseburg, 316 Or at 378, it is also true that “[t]he court * * * will not lightly conclude that the text is so clear that further inquiry is unnecessary. If any doubt remains, the court will consider the history of an initiated or referred constitutional provision in an effort to resolve the matter,” Shilo Inn v. Multnomah County, 333 Or 101, 117, 36 P3d 954 (2001); see also Martin v. City of Tigard, 335 Or 444, 453-54, 72 P3d 619 (2003) (same); Flavorland Foods v. Washington County Assessor, 334 Or 562, 567, 54 P3d 582 (2002) (same).

In examining the history of the constitutional provision, “this court examines, as legislative facts, other sources of information that were available to the voters at the time the measure was adopted and that disclose the public’s understanding of the measure.” Ecumenical Ministries, 318 Or at 559 n8. These sources of information include “the ballot title and arguments for and against the measure included in the voters’ pamphlet * * *.” Id. They also include “contemporaneous news reports and editorial comment on the measure.” Id.; see also City of LaGrande v. PERB, 284 Or 173, 182 n7, 184 n8, 586 P2d 765 (1978).

C. If its history is unclear, the amendment must be construed by reference to general maxims of constitutional construction.

In PGE, the Court held that, “if, after consideration of text, context, and * * * history, the intent of the [voters] remains unclear, then the court may resort to general maxims of [constitutional] construction to aid in resolving the remaining uncertainty.” PGE, 317 Or at 612; see also Ecumenical Ministries, 318 Or at 560 (holding that the “method of analysis” that “applies to the construction of an initiated constitutional provision” is the “same” as that which “applies to the construction of a statute”). These maxims include the maxim that a constitutional provision must not be construed in derogation of pre-existing constitutional rights unless it is clear that the voters intended for it to be so. See Vannatta v. Keisling, 324 Or 514, 527, 931 P2d 770 (1997) (“Any particular forms of expression that have been removed from that protection by a subsequent constitutional amendment must be construed carefully to give effect to the scope of the later exception, but no more, lest the salutary value of Article I, section 8, unintentionally be lost.”); State ex rel. Gladden v. Lonergan, 201 Or 163, 177, 269 P2d 492 (1954) (“It is a fundamental canon of construction that a

Constitution should receive a liberal interpretation in favor of a citizen, especially with respect to those provisions which were designed to safeguard the liberty and security of the citizen in regard to both person and property.”) (quotation omitted); State v. Dameron, 316 Or 448, 460, 853 P2d 1285 (1993) (same); Oregon State Shooting Ass’n v. Multnomah County, 122 Or App 540, 560, 858 P2d 1315 (1993) (same); see also State v. Gentry, 888 P2d 1105, 1138 (Wash 1995) (“[I]t is settled that implied repeal of one constitutional provision by another is not favored, and every reasonable effort will be made to give effect to both provisions * * * .”) (footnote omitted); State v. Cianci, 591 A2d 1193, 1202 (RI 1991) (“When more than one construction of a constitutional provision is possible, one of which would diminish or restrict a fundamental right of the people and the other of which would not do so, the latter must be adopted.”) (quotation omitted); Brimmer v. Thomson, 521 P2d 574, 580 (Wyo 1974) (recognizing “the basic and universally accepted rule that statutory and constitutional provisions which tend to limit the candidacy of any person for public office or exclude any citizen from participation in the elective process must be construed in favor of the right of the voters to exercise their choice and should be construed strictly and not extended to cases not clearly covered thereby”); Jackson v. City of Jacksonville, 225 So 2d 497, 500-01 (Fla 1969) (“Unless the later amendment expressly repeals or purports to modify an existing provision, the old and new should stand and operate together unless the clear intent of the later provision is thereby defeated.”) (citation omitted); Howton v. Morrow, 106 SW2d 81, 82 (Ky App 1937) (“[P]rovisions in statutes and Constitutions imposing restrictions upon the right of a person to hold office should receive a liberal construction in favor of his eligibility.”);

Norman J. Singer, Sutherland Statutory Construction § 22:13 (6th ed 2002)

(“Amendments by implication, like repeals by implication, are not favored and will not be upheld in doubtful cases * * * .”) (footnotes omitted); id. § 53:01 (“Harmony and consistency are positive values in a legal system because they serve the interests of impartiality and minimize arbitrariness. * * * In fact, courts have been said to be under a duty to construe statutes harmoniously where that can reasonably be done.”) (footnote omitted); id. at § 61:6 (“The rule that statutes in derogation of natural or common right are to be strictly interpreted * * * has been most commonly employed where the statute threatens to invade an existing property or contract right, or tends to interfere substantially with a cherished personal liberty.”) (footnotes omitted).

III. The amendment does not preclude the Court from fashioning a remedy that extends the benefits of marriage to same-sex couples.

A. The text and context of the amendment clearly demonstrate that the voters did not intend to preclude the Court from fashioning a remedy that extends the benefits of marriage to same-sex couples.

It is dispositive that the text of the amendment refers only to marriage. The amendment may not be interpreted “to insert what has been omitted * * *.” PGE, 317 Or at 611 (citation and quotation omitted). Because the text of the amendment omits any reference to the benefits of marriage, the amendment may not be interpreted to apply to them. Moreover, the word “marriage” “should be given [its] plain, natural, and ordinary meaning.” Id. In relevant part, Webster’s Third New International Dictionary, Unabridged (1993), defines the word “marriage” as follows:

“1 a : the state of being united to a person of the opposite sex as husband or wife b: the mutual relation of husband and wife: WEDLOCK c: the institution whereby men and women are joined in a special kind of social and legal dependence for the purpose of founding and maintaining a family * * *

2 : an act of marrying or the rite by which the married status is effected : WEDDING; [especially] : the wedding ceremony and attendant festivities or formalities * * *
 3 : an intimate or close union. * * *

Because the plain, natural, and ordinary meaning of the word “marriage” does not encompass the benefits of marriage, the amendment may not be interpreted to apply to them. Finally, to the extent that it is even necessary to examine the context of the amendment, it is significant that related statutory provisions that define and regulate marriage omit any reference to the benefits of marriage. See, e.g., ORS 106.010 (“Marriage is a civil contract entered into in person by males at least 17 years of age and females at least 17 years of age, who are otherwise capable, and solemnized in accordance with ORS 106.150.”). Similarly, it is significant that related case law distinguishes between marriage and the benefits of marriage. See, e.g., Tanner v. OHSU, 157 Or App 502, 516 n3, 971 P2d 435 (1998) (implicitly distinguishing marriage from the benefits of marriage).

For these reasons, it is clear that the voters did not intend for the amendment to apply to the benefits of marriage. Because the text and context of the amendment are clear, there is no need for further inquiry.²

² The amendment stands in marked contrast to those in other states. For example, the Georgia constitution was recently amended to include, in relevant part, the following language: “(a) This state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state. (b) No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage.” See http://www.sos.state.ga.us/elections/2004_constitutional_amendments.htm (Georgia Secretary of State’s website).

B. The history of the amendment clearly demonstrates that the voters did not intend to preclude the Court from fashioning a remedy that extends the benefits of marriage to same-sex couples.

Even if the text and context of the amendment are not clear, the history of the amendment underscores the common understanding that the amendment does not apply to the benefits of marriage. The ballot title and explanatory statement in the voters' pamphlet refer only to marriage. (See Voters' Pamphlet at 77 (App-2).) While the arguments against the amendment in the voters' pamphlet refer to the benefits of marriage, they do so in the course of making the point that, by excluding same-sex couples from marriage, the State is denying them and their children the benefits of marriage. (See id. at 89-102 (App-14 – App-27).) With respect to the arguments for the amendment in the voters' pamphlet, it is significant that Michael White, Executive Director of the Defense of Marriage Coalition, the lead proponent of the amendment, stated as follows: "Measure 36 does not prevent anyone from having a committed relationship and does not hinder benefits." (Id. at 89 (App-9) (emphasis added).)

A sampling of contemporaneous news reports and editorial comment from around the state confirms the common understanding that the amendment does not apply to the benefits of marriage:³

³ "[I]n determining the meaning of a term in the constitution, or in analyzing the constitutionality of a law, the court may take judicial notice of certain facts. When a court does so, * * * the court is taking judicial notice of legislative facts, which are facts utilized in determining what the law – statutory, decisional, or constitutional – is or should be." Ecumenical Ministries v. Oregon State Lottery Comm'n, 318 Or 551, 558, 871 P2d 106 (1994).

- “Once the definition of marriage has become explicit, [state senator Charles Starr] insisted, the debate over whether same-sex couples should be allowed to marry will end. The question will become whether to allow civil unions or some other opportunity for homosexuals to access benefits enjoyed by married folks today.” Schellene Clendenin, Pols Share Their Feelings on Measure 36, The Newberg Graphic (Sept 18, 2004) (App-38).
- “[Georgene Rice, spokesperson for the Defense of Marriage Coalition,] * * * said the Coalition’s amendment did not preclude the state of Oregon from creating civil unions, so that same-sex couples could have the same state rights as married heterosexual couples.” Tom Peterson, Backers Cite Definition as Issue, The Chronicle (The Dalles) (Sept 30, 2004) (App-39).
- “[Georgene Rice, communications director for the Defense of Marriage Coalition,] said gay and lesbian couples are free to pursue marriage-like rights via a different avenue, such as civil unions that have been approved in Vermont.” James Sinks, Gay-Marriage Fight Focuses on Oregon, The Bulletin (Bend) (Sept 30, 2004) (App-42); see also James Sinks, Gay Marriage Fight Focuses on Oregon, The Herald (Hermiston) (Oct 1, 2004) (same) (App-44).
- “Measure 36 * * * [does not] prohibit[] future efforts to acquire benefits and protections by other means.” Georgene Rice, Measure 36 – Same-sex marriage: Vote Yes, The Oregonian (Oct 3, 2004) (App-46).
- “[Measure 36] * * * would not bar Oregon from enacting a civil union law, such as Vermont’s, that could give [plaintiffs Williams and Belisle] the state benefits of marriage, and legal and social recognition of their relationship.”

Bill Graves, Questions of Rights, Social Status Stir Debate on Same-Sex Marriage, The Oregonian (Oct 8, 2004) (App-47).

- “[P]roponents of Measure 36 point out that if the measure passes, same-sex couples would have the option of seeking benefits and status through a civil union law.” (*Id.* at App-48.)
- “Kelly Clark, a Portland attorney advising the Defense of Marriage Coalition, disagreed, saying allegations that the measure would preclude civil unions for gay couples are ‘just wrong.’ Clark said the option to create civil unions for gay couples under the current law should still apply if the measure succeeds. ‘I personally support some notion * * * of a civil union or some sort of benefits for gay and lesbian couples to be decided by the couples and I wouldn’t be working for a ballot measure that I thought precluded that,’ he said.” Parker Howell, America Votes 2004: Amending Marriage a Constitution Controversy, Oregon Daily Emerald (Eugene) (Oct 28, 2004) (App-51).

For these additional reasons, it is clear that the voters did not intend for the amendment to apply to the benefits of marriage. Because the history of the amendment is clear, there is no need for further inquiry.

C. The amendment must be narrowly construed to preserve pre-existing constitutional rights wherever possible.

Even if the text, context, and history of the amendment are unclear, the amendment does not apply to the benefits of marriage under general maxims of constitutional construction. As discussed above, a constitutional provision must not be construed in derogation of pre-existing constitutional rights unless it is clear that the voters intended for it to be so. Thus, if it is unclear from the text, context, and

history of the amendment whether the voters intended to deny same-sex couples the benefits of marriage, the amendment must not be construed to do so. For this additional reason, the amendment does not apply to the benefits of marriage.

D. It is procedurally proper for the Court to fashion a remedy that extends the benefits of marriage to same-sex couples.

If the Court were to extend marriage – and, concomitantly, the benefits of marriage – to same-sex couples, it would grant plaintiffs’ requested relief in full. It follows that, if the Court were to extend only the benefits of marriage to same-sex couples, it would simply grant plaintiffs’ requested relief in part. As the United States Supreme Court has recognized, “the availability of a partial remedy is sufficient to prevent [a] case from being moot.” Calderone v. Moore, 518 US 149, 150 (1996) (quotation omitted).

Even if the extension of the benefits of marriage to same-sex couples is a form of relief that is distinct from the extension of marriage to same-sex couples, it does not matter whether plaintiffs requested the former separate and apart from the latter. As the Ninth Circuit has recognized, “in deciding a mootness issue, the question is not whether the precise relief sought at the time the application for [the relief] was filed is still available. The question is whether there can be any effective relief.” Northwest Env’tl. Def. Ctr. v. Gordon, 849 F2d 1241, 1244-45 (9th Cir 1988) (quotation omitted); see also, e.g., West v. Secretary of Dep’t of Transp., 206 F3d 920, 925 n4 (9th Cir 2000) (“The central question of all mootness problems is whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief. * * * [C]ourts must be careful to appraise the full range of remedial opportunities.”) (quotation omitted) (emphasis added); Southern

Pac. Transp. Co. v. Public Util. Comm’n, 9 F3d 807, 810 (9th Cir 1993) (“[W]here one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirements of a case or controversy regardless of whether the remaining claims are secondary.”) (quotations omitted).

Even if it matters whether plaintiffs requested the extension of the benefits of marriage to same-sex couples separate and apart from the extension of marriage to same-sex couples, plaintiffs, in their amended complaint, requested “such other relief as the Court may deem just and proper” (ER 43). Reflecting an understanding that such other relief includes the extension of the benefits of marriage to same-sex couples, the State, in its briefs in support of its motion for summary judgment, requested an opportunity for the legislature to decide between the extension of marriage to same-sex couples and the extension of the benefits of marriage to same-sex couples, and the trial court held that it “[was] not extending ORS Chapter 106 to same-sex couples’ right to marriage but to their right to benefits” (ER 437).

Even if plaintiffs’ requested relief is construed not to include the extension of the benefits of marriage to same-sex couples, and is instead construed to include only the extension of marriage to same-sex couples, “it is well-established in Oregon that the selection of a remedy that is not available does not bar later resort to an available remedy. * * * If * * * there is but one remedy, and not a choice between the two, a fruitless recourse to a remedy withheld does not bar recourse thereafter to the remedy allowed.” Johnson v. Dave’s Auto Ctr., Inc., 257 Or 34, 40, 476 P2d 190 (1970) (citations, quotations and footnote omitted); see also Osborne v. Hay, 284 Or 133, 144, 585 P2d 674 (1978); Andrysek v. Andrysek, 280 Or 61, 72, 569 P2d 615 (1978);

Anderson v. Allison, 256 Or 116, 119, 471 P2d 772 (1970); Payne v. Griffin, 239 Or 91, 95, 396 P2d 573 (1964); Ladd v. General Ins. Co., 236 Or 260, 265, 387 P2d 572 (1963); Sheppard v. Blitz, 177 Or 501, 508, 163 P2d 519 (1945); Dean v. Cole, 103 Or 570, 576, 204 P 952 (1922); First State Bank v. Hoehnke Nursery Co., 63 Or App 816, 822 n3, 667 P2d 1022 (1983). Thus, it is procedurally proper for the Court to fashion a remedy that extends the benefits of marriage to same-sex couples.⁴

IV. The amendment may not be construed to affect the validity of the marriages or the requirement that the State recognize them.

A. The amendment may not be construed to affect the marriages retrospectively.

As set forth in plaintiffs' brief on the merits, the State Registrar was required to register the records because, under the law at the time, the marriages were valid and the State was required to recognize them. As set forth below, the amendment does not void or impair the marriages retrospectively.⁵

It is a well-established maxim of constitutional construction that "a Constitution always operates prospectively, unless it is clearly shown from the language used or the objects to be accomplished that the provision was intended to

⁴ If the Court concludes that it would be procedurally improper for it to do so on the basis of the First Amended Complaint, notwithstanding the fact that no party would be prejudiced in the prosecution or defense of its case if the Court were to fashion a remedy that extends the benefits of marriage to same-sex couples, plaintiffs' complaint should be considered amended, see Whinston v. Kaiser Found. Hosp., 309 Or 350, 355, 788 P2d 428 (1990) (a party may amend a pleading to conform to the evidence or to include an issue tried by express or implied consent), overruled on other gds, Shoup v. Wal-Mart Stores, Inc., 335 Or 164, 61 P3d 928 (2003), or, alternatively, plaintiffs respectfully seek leave to amend their complaint in the interests of judicial economy.

⁵ Because the amendment does not void or impair the marriages retrospectively, the Court must reach the question whether same-sex couples are impermissibly denied the right to marry under the law as it exists prior to the date on which the amendment takes effect.

operate retrospectively, and such intent must be clearly established.” Darling v. Miles, 57 Or 593, 598, 112 P 1084 (1911); see also, e.g., Schramm v. Done, 135 Or 16, 21, 293 P 931 (1930) (“Where such provision is not afforded by constitutional authority, the courts, on principles of natural justice, will so construe all laws, including constitutional provisions, as intended to be prospective in their operations, unless a retroactive operation is clearly indicated.”); State v. Lanig, 154 Or App 665, 675, 963 P2d 58 (1998) (recognizing “the presumption that constitutional amendments apply prospectively”). The rule against retroactive application applies only to constitutional provisions “other than those which are procedural or remedial in nature * * *.” Joseph v. Lowery, 261 Or 545, 547, 495 P2d 273 (1972). In other words, it applies only to those which are “substantive” in nature. Id. A constitutional provision is substantive in nature “if [a retrospective] construction impairs existing rights, creates new obligations, or imposes more duties in respect to past transactions * * *.” Denny v. Bean, 51 Or 180, 184, 93 P 693 (1908); see also, e.g., Joseph, 261 Or at 551-52 (“[I]n the absence of an indication to the contrary, legislative acts should not be construed in a manner which changes legal rights and responsibilities arising out of transactions which occur[ed] prior to the passage of such acts.”); Kempf v. Carpenters & Joiners Local Union No. 1273, 229 Or 337, 343, 367 P2d 426 (1961) (“Unless retroactive construction is mandatory by the terms of the act it should not be applied if such construction will impair existing rights, create new obligations or impose additional duties with respect to past transactions.”); Lommasson v. School Dist. No. 1, 201 Or 71, 101, 267 P2d 1105 (1954) (“It is chiefly where the enactment would prejudicially affect vested rights, or the legal character of past transactions, that

the rule in question prevails.”) (quotation omitted); State ex rel. Juvenile Dep’t v. Nicholls, 192 Or App 604, 614, 87 P3d 680 (2004) (“[I]t is not the label that matters; it is the practical effect of the new enactment. When that effect is to change the legal consequences that attach to past actions, we presume that the legislature intended the change to be prospective only.”) To the extent that the amendment precludes an unmarried same-sex couple from seeking redress of the denial of the right to marry, it impairs existing rights and is therefore subject to the rule against retroactive application.

That said, because the text and context of the amendment are clear, the Court may conclude that the amendment does not void or impair the marriages without resort to the rule against retroactive application. See Joseph, 261 at 552 (“Legal rules relating to retroactive and prospective application of statutes are merely rules of construction by which the court attempts to ascertain the probable legislative intent.”). It is dispositive that the amendment does not refer to any retrospective effect. See PGE, 317 Or at 611 (setting forth the rule “not to insert what has been omitted”) (quotation omitted).

To the extent that it is even necessary to examine the history of the amendment, it is significant that it is virtually devoid of any discussion of the anticipated effect of the amendment on the marriages. (See Voters’ Pamphlet at 77-102 (App-2 – App-27); see also infra § III.B.2.) As the Court of Appeals recently observed, “[n]ot surprisingly, when a statute lacks an express retroactivity clause, the legislative record is typically silent * * *. The analysis therefore often moves past that step in short order and on to the maxims of construction.” Nicholls, 192 Or App

at 609 (citing Rhodes v. Eckelman, 302 Or 245, 248, 728 P2d 527 (1986)). In the face of such ambiguity, the rule against retroactive applications controls.

Accordingly, the amendment does not void or impair the marriages retrospectively.

B. The amendment may not be construed to affect the marriages prospectively.

1. The text and context of the amendment do not clearly demonstrate that the voters intended to void or impair the marriages.

The text and context of the amendment present two ambiguities that defeat a ready answer to the question of whether the amendment voids or impairs the marriages prospectively.

The first ambiguity stems from contextual considerations involving the word “valid.” Even if, under the amendment, the marriages are not “valid” prospectively, it is ambiguous whether they are “void” or “voidable” prospectively. Compare ORS 106.020 (void marriages) with ORS 106.030 (voidable marriages); see also Johnston v. Georgia-Pacific Corp., 35 Or App 231, 234 n2, 581 P2d 108 (1978) (“A voidable marriage is not subject to attack by third parties.”) Significantly, related statutory provisions that define and regulate marriage use the word “valid” in a way that fails to distinguish between “void” and “voidable.” These statutory provisions suggest that marriages that are not “valid” include both marriages that are “void” and marriages that are “voidable:” “All marriages, to which there are no legal impediments, solemnized before or in any religious organization or congregation according to the established ritual or form commonly practiced therein, are valid.” ORS 106.150(2) (emphases added). Thus, it is unclear from the text and context of the amendment

whether the word “valid” is intended to render the marriages “void” or “voidable” prospectively.

The second ambiguity stems from contextual considerations involving the words “policy” and “legally recognized.” Related case law makes clear that a statement of “policy” that precludes the “recognition” of a type of marriage is a creature of interstate comity law. As a matter of interstate comity law, a statement of policy that precludes recognition of a type of marriage precludes recognition of out-of-state marriages of that type. See Garrett v. Chapman, 252 Or 361, 364, 449 P2d 856 (1969) (“The general rule is that a marriage which is recognized as valid in the state where it was performed will be recognized in Oregon. There may be exceptions to the general rule where the policy of this state dictates a different result than would be reached by the state where the marriage was performed.”) (citations omitted) (emphases added); In re Ott’s Estate, 193 Or 262, 266, 238 P2d 269 (1951) (declining to recognize an out-of-state marriage in light of “a well established declaration of the state’s public policy” concerning re-marriage following divorce); see also Lilienthal v. Kaufman, 239 Or 1, 13, 395 P2d 543 (1964) (confirming that Ott’s Estate “did use the public policy rationale”). Because a statement of policy that precludes recognition of a type of marriage is concerned with out-of-state marriages, it is unclear from the text and context of the amendment whether the words “policy” and “legally recognized” are intended to apply to the in-state marriages prospectively.⁶ See PGE,

⁶ The fact that the initiative was filed on March 2, 2004 – i.e., before the issuance of licenses to same-sex couples by the County, when recognition of out-of-state marriages of same-sex couples was the primary concern – only compounds the ambiguity. See <http://egov.sos.state.or.us/elec/>

317 Or at 611 (“[U]se of the same term throughout a [scheme] indicates that the term has the same meaning throughout the [scheme].”) (citation omitted).

Accordingly, it is unclear from the text and context whether the voters intended to void or impair the pre-existing marriages prospectively.

2. The history of the amendment does not clearly demonstrate that the voters intended to void or impair the marriages.

The history of the amendment is virtually devoid of any discussion of the anticipated effect of the amendment on the marriages. This is true of the ballot title, explanatory statement, and arguments for and against the amendment in the voter’s pamphlet. (See Voters’ Pamphlet at 77-102 (App-2 – App-27).) At best, the history of the amendment is ambiguous about the anticipated effect of the amendment on the marriages. For example, the estimate of financial impact in the ballot title asserts that “[t]here is no financial effect on state or local government expenditures or revenues.” (Id. at 77 (App-2).) As set forth in plaintiffs’ briefs on the merits, under the law at the time, the marriages were valid and the State was required to recognize them. The assertion that the amendment has no financial effect on state or local government expenditures or revenue necessarily implies that the amendment does not void or impair the marriages, given that a marriage implicates both expenditures and revenue at both a state and a local level.

Contemporaneous news reports and editorial comment from around the state only compound the ambiguity. Some suggest that the amendment is intended solely to preclude the issuance of additional marriage licenses to same-sex couples:

web_irr_search.record_detail?p_reference=20040150..LSCYYY (Secretary of State’s website).

- “‘We have been very, very careful to ensure that it is only about defining marriage and clarifying the intent in the constitution,’ said Tim Nashif, political director for the Defense of Marriage Coalition. * * * ‘All we’re doing right now is trying to preserve the status quo,’ Nashif said.” James Sinks, Same-Sex Marriage Opponents Attack Gay Parenting, The Bulletin (Bend) (July 8, 2004) (emphasis added) (App-28).
- “Measure 36 is an attempt to stop the social engineering by certain county commissioners to issue marriage licenses to same-sex couples, and to curb the court rulings that Oregon’s statutes and long-standing policy that a marriage is between one man and one woman is ‘unconstitutional.’” Deborah Steele Hazen, Measure 36, The Clatskanie Chief (Oct 14, 2004) (emphases added) (App-54).

Others assert that the amendment is not intended to deprive lesbian and gay couples of pre-existing rights:

- “[Kelly Clark, the attorney for the coalition,] knows of no rights that gays and lesbians would lose if voters pass the initiative, he said.” James Sinks, Same-Sex Marriage Opponents Attack Gay Parenting, The Bulletin (Bend) (July 8, 2004) (App-29).
- “The measure does not deny rights to same-sex couples, [Georgene Rice from the Yes on 36 Committee] said, but it is necessary to reinforce support for traditional marriage * * * .” Tom Bennett, Drugs, Trees and Lawsuits Divide Coast Residents, The Daily Astorian (Sept 15, 2004) (App-36).

Yet others make both points:

- “[I]t’s possible, some legal experts argue, that the court could create two groups of gay couples in the state by declaring the existing 2,961 same-sex marriages legal while upholding a ban on future same-sex marriages.” Ashbel S. Green and Bill Graves, Status of Same-Sex Marriages Likely to Wait in Legal Limbo, The Oregonian (Aug 8, 2004) (emphasis added) (App-31).
- “If the measure passes, [Kelly Clark, a Portland attorney advising the Defense of Marriage Coalition,] said it would ‘effectively moot about three-fourths’ of the current case before the Supreme Court, although it would not change the status of the marriage licenses already issued to same-sex couples.” Parker Howell, America Votes 2004: Amending Marriage a Constitution Controversy, Oregon Daily Emerald (Eugene) (Oct 28, 2004) (emphasis added) (App-51).

Accordingly, it is unclear from the history of the amendment whether the voters intended to void or impair the pre-existing marriages prospectively.

3. The amendment must be narrowly construed to preserve pre-existing constitutional rights wherever possible.

Because it is unclear from the text, context, and history of the amendment whether the voters intended to void or impair the pre-existing marriages prospectively, the amendment must be construed by reference to general maxims of constitutional construction. As discussed above, a constitutional provision must not be construed in derogation of pre-existing constitutional rights unless it is clear that the voters intended for it to be so. Thus, the amendment must not be construed to void or impair the pre-existing marriages prospectively. Rather, the amendment should be construed solely to preclude the issuance of additional marriage licenses to same-sex couples.

Accordingly, the amendment does not void or impair the pre-existing marriages prospectively.

CONCLUSION

For the foregoing reasons, the amendment will not render any of plaintiffs' claims moot. In light of the amendment:

(A) with respect to unmarried same-sex couples – including unmarried individual plaintiffs – the Court should:

(1) hold that the State is impermissibly denying them and their children the complete set of benefits, obligations, rights, responsibilities, and protections conferred on married couples and their children by state constitutional, statutory, regulatory, sub-regulatory, and common law; and

(2) extend to them the complete set of benefits, obligations, rights, responsibilities, and protections conferred on married couples and their children by state constitutional, statutory, regulatory, sub-regulatory, and common law; and

(3) order the legislature to enact, and the governor to sign, legislation that:

(a) creates an alternative civil institution for them that:

(i) serves as a gateway to the complete set of benefits, obligations, rights, responsibilities, and protections conferred on married couples and their children by state

constitutional, statutory, regulatory, sub-regulatory, and
common law; and

(ii) is otherwise comparable to the civil institution of
marriage;⁷ and

(b) takes effect within ninety days of the order;⁸ and

(B) with respect to married same-sex couples – including married individual
plaintiffs – the Court should:

(1) if the Court concludes that the amendment may not be construed to
affect the marriages retrospectively or prospectively:

(a) hold that the marriages are valid and that the State is required
to recognize them; and

(b) order the State Registrar to register the records;

(2) if, in the alternative, the Court concludes that the amendment may
not be construed to affect the marriages retrospectively:

⁷ Although the Vermont legislature denominated Vermont’s alternative a “civil union,” the Oregon legislature need not do likewise because the term “civil union” is not a term-of-art. The Court need not prescribe how Oregon’s alternative is denominated. The Court need only prescribe that Oregon’s alternative serve as a gateway to the complete set of benefits, obligations, rights, responsibilities, and protections conferred on married couples and their children by state constitutional, statutory, regulatory, sub-regulatory, and common law; be otherwise comparable to the civil institution of marriage; and take effect within ninety days of the order.

⁸ To ensure compliance with the order, the Court should make clear to the legislature and the governor that there are only two ways in which to remedy the denial of the benefits of marriage to same-sex couples: extend the benefits of marriage to same-sex couples or nullify the benefits of marriage for all couples. Thus, if the legislature and the governor were to refuse to extend the benefits of marriage to same-sex couples, they would bring about the nullification of the benefits of marriage for all couples.

- (a) hold that the marriages are valid and that the State is required to recognize them, until the date on which the amendment takes effect;
 - (b) order the State Registrar to register the records, until the date on which the amendment takes effect; and
 - (c) fashion a remedy that requires the alternative civil status of married same-sex couples – including married individual plaintiffs – to be recognized retroactively to the date on which the amendment takes effect; or
- (3) if, in the alternative, the Court concludes that the marriages are not valid and that the State is not required to recognize them:
- (a) fashion a remedy that requires the alternative civil status of married same-sex couples – including married individual

plaintiffs – to be recognized retroactively to the date on which
they were married.

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