

IN THE SUPREME COURT OF THE
STATE OF OREGON

MARY LI and REBECCA KENNEDY; STEPHEN KNOX, M.D., and)	Multnomah County
ERIC WARSHAW, M.D.; KELLY BURKE and DOLORES DOYLE;)	Circuit Court
DONNA POTTER and PAMELA MOEN; DOMINICK VETRI and)	No. 0108 07915
DOUGLAS DEWITT; SALLY SHEKLOW and ENID LEFTON;)	
IRENE FARRERA and NINA KORICAN; WALTER FRANKEL and)	
CURTIS KIEFER; JULIE WILLIAMS and COLEEN BELISLE; BASIC)	Supreme Court
RIGHTS OREGON, an Oregon not-for-profit corporation; and)	No. S51612
AMERICAN CIVIL LIBERTIES UNION OF OREGON, an Oregon not-)	
for-profit corporation,)	
)	
Plaintiffs-Respondents, Cross-Appellants,)	
and)	
)	
MULTNOMAH COUNTY, a political subdivision of the state of Oregon,)	
)	
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, an assumed business name of)	
OREGON FAMILY COUNCIL, an Oregon not-for-profit corporation;)	
CECIL MICHAEL THOMAS; NANCY JO THOMAS; DAN MATES;)	
and DICK JORDAN OSBORNE,)	
)	
Intervenor-Defendants-Appellants, Cross-Respondents.)	

INTERVENOR-DEFENDANTS-APPELLANTS, CROSS-RESPONDENTS

DEFENSE OF MARRIAGE COALITION, et al.'s

~~MEMORANDUM ON MOOTNESS AND MOTION TO DISMISS~~

Appeal from the Judgment of the Circuit Court of the State of Oregon for the County of Multnomah
entered June 24, 2002.

Honorable Frank L. Bearden, Circuit Court Judge

NOVEMBER 17, 2004

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NOVEMBER 17, 2004

I. INTRODUCTION

On November 2, 2004, the People of Oregon approved Ballot Measure 36 (2004) (hereinafter “Measure 36”) by a significant—and statistically unchallengeable—margin. Measure 36 amends the Oregon Constitution by adding a section that provides:

It is the policy of the State of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as marriage.

Provided that the Secretary of State certifies the results of this election, Measure 36 will become part of the Oregon Constitution.

This Court has asked the following question in regard to the effect of certification of Measure 36 on this case:

Will the Secretary of State’s certification of the passage of Ballot Measure 36 (2004) render any part or parts of this case moot? If so, which part or parts of the case are rendered moot, and why?

BRO Plaintiffs raised two assignments of error in their appeal. First they argued that marriage is a privilege or immunity within the meaning of Article I, Section 20. Second, BRO Plaintiffs argued that the right to marry should be extended to same sex couples. Plaintiff-Intervenor Multnomah County simply echoed these assignments of error. These two assignments of error are both mooted by the passage of Measure 36. Upon certification of Measure 36, BRO Plaintiffs’ and Multnomah County’s entire appeal must be dismissed, because their assignments of error become unredressable.

The only live question remaining in this case revolves around the status of the approximately 3,000 Multnomah County same sex marriage licenses already issued, the duty of the State Registrar to record these licenses, and the “suspect class” status of homosexuals under this Court’s

precedent—*i.e.*, the State’s and DOMC Intervenor’s assignments of error in the underlying appeal.

Accordingly, DOMC Intervenor’s hereby move to dismiss the appeals of BRO Plaintiffs and Multnomah County, and move this Court to stay immediately the trial court’s judgment—specifically the order that Multnomah County begin issuing same sex marriage licenses if the Legislature fails to act within 90 days after it commences the next session— pending the certification of Measure 36. *See* ER-424-425. DOMC Intervenor’s also move this Court to vacate this particular order of the trial court, and permanently enjoin Multnomah County from issuing any marriage licenses to same sex couples.

II. ARGUMENT

BRO Plaintiffs assigned error to the trial court’s alleged failure to extend the definition of marriage to same sex couples, and the trial court’s decision to defer any remedy pending action by the Oregon Legislative Assembly. *See BRO Plaintiffs’ Opening Brief* at 7, 21–26, 38–51. *See, e.g.*, E-R 425. Multnomah County assigned error on the same grounds. *See Multnomah County’s Opening Brief* at 11-12, 16. At trial below, BRO Plaintiffs’ first claim for relief sought a declaration that Article I, Section 20 requires marriages between homosexual couples, notwithstanding the statutory limitation to opposite sex couples. E-R 13, 37–41. Multnomah County’s complaint in intervention merely incorporated BRO Plaintiffs’ amended complaint “in its entirety” by reference. E-R 45.

In summary, these appeals are moot and should be dismissed because: (1) Measure 36 conclusively establishes that the policy of the State of Oregon is that marriage is defined as a union

of a man and a woman, an enactment which may not be contradicted by any future legislative change to the marriage statutes, and therefore it is a legal impossibility for BRO Plaintiffs to obtain the relief sought; and (2) BRO Plaintiffs have only prayed for the right to marry, not an alternative relief of the right to certain government benefits—the so-called “civil unions” remedy envisioned by Judge Bearden’s order. This case cannot be saved from non-justiciability by altering the requested relief at this point in the proceedings.

The only legal issues remaining in this case after certification of Measure 36 are the legal status and efficacy of the approximately 3,000 same sex marriage licenses issued contrary to the plain language of ORS Chapter 106, the trial court’s mandate requiring the State Registrar to register marriage certificates of those same sex couples, and the question of whether homosexual couples represent a suspect class for the purposes of Article I, Section 20. *See* E-R 424–425.

A. BRO PLAINTIFFS’ AND THE COUNTY’S APPEALS MUST BE DISMISSED BECAUSE THEIR ASSIGNMENTS OF ERROR HAVE BEEN RENDERED MOOT BY PASSAGE OF MEASURE 36.

BRO Plaintiffs’ assignments of error both hinge on their Article I, Section 20 argument. Because Article I, Section 20 cannot now be read to require same sex marriage in light of Measure 36, the duty on this Court to harmonize all parts of the Oregon Constitution, and the prohibition on making any part of the Oregon Constitution surplusage, BRO Plaintiffs assignments of error fail for lack of justiciability.

This Court has recently affirmed that mootness deprives Oregon courts of constitutional jurisdiction over the case.

The constitutional grant of judicial power did not include the power to decide cases that had become moot at some stage of the proceedings.

* * * * *

[T]his court did not, in 1857, have the authority to create a rule that exceeded that circumscribed grant of power. Neither did the court acquire such authority in 1910.

Yancy v. Shatzer, 337 Or. 345, ___, 97 P.3d 1161, 1171 (2004) (judicial power under the Oregon Constitution does not extend to moot cases that are “capable of repetition, yet evading review”). Thus, mootness of a case deprives the court of any ability to adjudicate the merits. BRO Plaintiffs’ assignments of error are moot.

Under Oregon law, a case is moot when the relief requested by the parties becomes a legal impossibility:

“Under Oregon law, a justiciable controversy exists when “the interests of the parties to the action are adverse” and “the court’s decision in the matter will have some practical effect on the rights of the parties to the controversy.” *Brumnett v. PSRB*, 315 Or. 402, 405-06, 848 P.2d 1194 (1993). ‘*Cases 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, are moot.*’ *Id.* at 406.”

Barcik v. Kubiacyk, 321 Or 174, 182, 895 P.2d 765 (1995) (emphasis added). In this case, even if BRO Plaintiffs might have had some claim of right under Article I, Section 20 to marriage, that right can not be redressed after the certification of Measure 36, because neither the Oregon Courts nor the Legislature can ignore the constitutional policy articulated in Measure 36.

Measure 36 has settled the issue that the Oregon Constitution does not require marriage between homosexual couples. This Court must “harmonize” all parts of the Oregon Constitution. *See In re Fadeley*, 310 Or 548, 560, 802 P.2d 31 (1990). Article I, Section 20’s demand for equality cannot make surplusage out of Measure 36. *See State ex rel. Gladden v. Lonergan*, 201 Or 163, 177, 269 P.2d 491 (1954) (courts must give effect “to every part and every word of a Constitution and that unless there is some clear reason to the contrary, no portion of the

fundamental law shall be treated as superfluous.”). Therefore, both of BRO Plaintiffs’—and similarly, Multnomah County’s—assignments of error fail as a matter of law because even if marriage is declared a privilege or immunity, marriage itself cannot be extended legislatively or judicially to same sex couples.

The Oregon Legislature likewise could not implement a statutory scheme contrary to the Oregon Constitution. While the Legislature may act to implement constitutional provisions, it may not override or conflict with the Constitution. *Bernstein Bros. v. Department of Rev.*, 294 Or 614, 619, 661 P2d 537 (1983). Measure 36 confirms that it is the public policy of the State of Oregon that same sex marriages are not permitted Oregon.

Therefore, because the Courts and the Legislature are unable to ignore or supersede the language of the Oregon Constitution, nothing this Court can say in relation to BRO Plaintiffs’ assignments of error will have any practical effect on BRO Plaintiffs. Once certified, Measure 36 quite simply prevents any action that would have any “practical effect” on the BRO Plaintiffs’ interests as pleaded. *See Barcik v. Kubiacyk*, 321 Or at 182. Without the ability for this Court or the Legislature to effect BRO Plaintiffs tangible interests, this case is moot. *Id.*

BRO Plaintiffs and Multnomah County may argue that a newly enacted constitutional provision does not render an ongoing case moot, citing *Coalition for Equitable School Funding (CESF) v. State*, 311 Or. 300, 811 P.2d 116 (1991), and *Cox ex rel. Cox v. State*, 191 Or App. 1, 3-4, 80 P.3d 514 (2003). However, these cases do not stand for such a proposition. Rather *CESF* and *Cox* hinge on the application of constitutional amendments that alter specific statutory schemes themselves.

In *CESF*, students filed suit under Article I, Section 20, claiming that discrepancies in

school funding presented an unconstitutional privilege to districts receiving higher amounts of funding. Oregon Ballot Measure 5 (1990) altered the way taxes were to be collected and distributed to schools, equalizing funding around the State. *See* Or Const Article XI, Section 11; Ballot Measure 5 (1990). However, Measure 5 did not immediately correct funding disparities and had not been legislatively implemented by the time this Court reviewed the *CESF* case. In holding that Measure 5 did not moot the case, this Court stated:

“Defendants make two arguments. First, they argue that ‘the full dimensions of the changes [wrought by Measure 5] cannot be known until the legislature responds with implementing legislation.’ In essence, they are saying that the 1991 Legislative Assembly may correct the disparities of which plaintiffs complain. But that possibility begs the question, which is whether plaintiffs are entitled to prevail now. Defendants rely on *Mid-County Future Alt. v. Metro. Area LGBC*, 304 Or. 89, 742 P.2d 47 (1987). Their reliance is misplaced. In *Mid-County*, during the pendency of a contested annexation, the legislature expressly approved the Boundary Commission’s order, so an opinion would have been only advisory. ***Here, in contrast, there is only the potential for legislation to alter the factual predicate of the questions presented. That is not enough to make this case moot.***

“Second, defendants argue that ‘the school financing scheme [after the passage of Measure 5] is very different from the scheme plaintiffs ask the court to declare unconstitutional.’ Perhaps. But difference, if there is difference, does not equal mootness. The issue before us, assuming the well-pleaded facts to be true, is: Could plaintiffs prevail now? Measure 5 does not moot that issue. It is, rather, a part of the law whose effect on the pleaded facts we must consider in our analysis.”

CESF, 311 Or at 306 (emphasis added). *Cf. Cox ex rel. Cox v. State*, 191 Or App at 3–4 (discussing mootness holding of *CESF*).

In this case—like the *Mid-County* case cited in *CESF*—Measure 36 expressly precludes a legislative “fix” along the lines sought by BRO Plaintiffs. *See Bernstein Bros. v. Department of Rev.*, 294 Or at 619. Indeed, Measure 36 is self-executing; it needs no implementing legislation, nor could legislation ever meet BRO Plaintiffs’ prayer.

In sum, Measure 36 now makes explicit what had been implicit in the Oregon Constitution:

marriage is limited to a union between two individuals of the opposite sex. The constitutionality of marriage statutes has in this way been finally determined by the voters and is not subject to contrary interpretation under any other constitutional provision.

B. THIS CASE SHOULD NOT BE TURNED INTO A DETERMINATION WHETHER ARTICLE I, SECTION 20 REQUIRES THE STATE TO EXTEND THE TANGIBLE BENEFITS OF MARRIAGE TO UNMARRIED COUPLES, BECAUSE NO SUCH CLAIM HAS BEEN ALLEGED.

The relief granted by the trial court must be vacated because marriage cannot be required by Article I, Section 20 in light of the passage of Measure 36. That is particularly true where, as here, the trial court impermissibly decided an issue not pled and not before it: whether the benefits of marriage, without the legal status of marriage itself, are required under Article I, Section 20. *See* E-R 424–425. This action may not be *sua sponte* transformed into a consideration of other rights and remedies (*e.g.*, civil unions) that might confer the benefits of marriage on homosexual couples, simply in light of the passage of Measure 36. BRO Plaintiffs have up until now adamantly refused to plead or advance a “marriage benefits only” option as a vehicle for relief at the trial court below or before this Court.

At the trial court and before this Court, BRO Plaintiffs averred that they are entitled under Article I, Section 20 to get married—***and nothing less***. *BRO Plaintiffs’ Opening Brief* at 22, 39, 51. Their assignments of error are based solely on the trial court’s failure to grant them the right explicitly to marry. *Id* at 39. BRO Plaintiffs have never alleged or argued they are entitled to any lesser relief in the alternative. Now that the voters of Oregon have prospectively foreclosed that objective, BRO Plaintiffs have nothing left to which they can assign error under this record, on this appeal.

If BRO Plaintiffs wish to test the reach of Article I, Section 20 solely in relation to the legal benefits of marriage—in light of the passage of Measure 36—they will need to do so in a separate action. This court should reject any invitation to “morph” this case into something completely different than what it has been from the start: a campaign for the unprecedented re-definition of marriage itself.

C. THE APPEALS BY THE STATE AND DOMC INTERVENORS REMAIN VIABLE BECAUSE THE STATUS OF THE 3000 SAME SEX MARRIAGE LICENSES AND THEIR REGISTRATION MUST BE RESOLVED.

Even if Measure 36 does not definitively resolve BRO Plaintiffs’ second, third and fourth claims, this Court may proceed to determine that the same sex marriage licenses are invalid pursuant to DOMC Intervenor’s and the State’s appeals, because the county chair lacked authority to issue the marriage licenses in the first place.

Although that issue, by agreement among the parties and the trial court, was held in abeyance and was not fully briefed to the trial court before this appeal, it has been briefed on appeal, and its determination is purely a matter of law that can and should be determined by this Court at its earliest opportunity.

The case before this court is based on the trial court’s determination that a legislative remedy was required to address the effect of the Article I, Section 20 violation, and the injunction was entered solely to afford the Legislature an opportunity to address that declared violation. E-R 424-425. In light of the voters’ determination that Oregon’s marriage statutes remain constitutionally valid in limiting marriage to one man and one woman, there is no reason for a legislative remedy, and the trial court’s temporary injunction no longer serves its original purpose.

While BRO Plaintiffs have argued the homosexual marriages antedating the injunction are nevertheless valid under another theory (BRO Plaintiffs' Responding Brief, pp. 59-64), their arguments cannot overcome DOMC Intervenor's argument the marriage licenses issued to homosexual couples are void *ab initio* because the county chair lacked authority to order their issuance. DOMC Intervenor's Opening Brief, pp. 66-72. That determination is one of law and does not depend on the constitutionality of the marriage statutes under any theory, or indeed even on the passage of Measure 36. Accordingly, this court should direct the trial court to modify the injunction to permanently bar Multnomah County from issuing marriage licenses to same sex couples.

The California Supreme Court addressed the identical issue in *Lockyer v. City and County of San Francisco*, 33 Cal 4th 1055 (2004), and properly determined marriage licenses issued in violation of existing law are void when the county lacked authority to issue them. The same result should obtain here.

Additionally, DOMC Intervenor alleged the county violated the Oregon Public Meetings Law, *see* E-R 193-195, which was not adjudicated below and is not before the court on this appeal. Even if this Court is not persuaded that it can decide the county authority issue as a matter of law, this Court alternatively should remand the matter to the trial court for determination of the county authority and public meetings issues. The effect of those defenses on the validity of the existing marriage licenses (and, therefore, on whether the state is required to register the licenses) may be addressed on remand if necessary. If this Court decides either defense in DOMC Intervenor's favor, it would render the unlawfully issued same sex marriage licenses void *ab initio*.

Finally, Judge Bearden's ruling that the benefits of marriage must be conveyed to gay and

lesbian couples hinges on the Oregon Court of Appeals' ruling in *Tanner v. OHSU*, 157 Or App 502, 524, 971 P2d 435 (1998), that homosexuals present a suspect class under this Court's Article I, Section 20 jurisprudence. DOMC Intervenor argued in the underlying appeal that this Court has never so held, and this issue remains live.

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III. CONCLUSION

For the foregoing reasons, the appeals of BRO Plaintiffs and Multnomah County should be dismissed.

Submitted this ____ day of November, 2004

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