

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.

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**INTERVENOR-DEFENDANTS-APPELLANTS, CROSS-RESPONDENTS  
DEFENSE OF MARRIAGE COALITION, et al.'s**

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**REPLY MEMORANDUM ON MOOTNESS AND MOTION TO DISMISS**

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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

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DECEMBER 7, 2004

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## I. INTRODUCTION

As Plaintiffs' case now stands, there is nothing for this Court properly to decide: the Plaintiffs have had their claims rendered moot by the passage of Measure 36. They did not plead at the trial court level, or assign error here, or even "plead" here in their suggested "amended complaint," (fn 4, pp15, Plaintiffs' Opening Brief on Mootness), anything like a justiciable attack on any "benefits" laws. They did not ask for a ruling that the benefits of marriage, whatever those might be, arising from apparently several hundred statutes, are unconstitutional. They have not even *now* told this Court what "benefits statutes" concern them, or what their theory is, or what analysis applies, as to those unnamed statutes. It would be a stretch unparalleled in Oregon history for this Court to create a new lawsuit for Plaintiffs now, or to order the Legislature to enact, or order the Governor to sign, a civil unions bill. This Court should simply decline to do any of this and dismiss this case as moot, with appropriate instructions to the trial court.<sup>1</sup>

Nor can the Plaintiffs who already hold marriage licenses or certificates obtain relief from this Court, since the marriage licenses were void *ab initio* and have no force and effect.

For both of the above reasons, the Court should dismiss Plaintiffs' case as moot.

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<sup>1</sup> This is not to say, of course, that Plaintiffs, or someone else, is not entitled to bring such a constitutional challenge, but only that they cannot do so now, in this case.

## **II. PLAINTIFFS' REQUEST FOR THIS COURT TO AMEND THE APPEAL AND GRANT THE BENEFITS OF MARRIAGE IS NOT JUSTICIABLE AT THIS TIME AND IN THIS CASE.**

The Court should decide only those issues necessary to resolve the parties' assignments of error, and nothing more. The voters of Oregon have foreclosed the possibility that ORS Chapter 106 is itself unconstitutional, so all assignments of error that seek relief based on that theory have been rendered moot. All the plaintiffs (up until election day) assigned error *only* to the trial court's failure to allow them to be married—nothing else.<sup>2</sup> They lampooned the constitutionality of civil unions repeatedly throughout their briefing, both below and here. Obviously, the election result changed the lay of the land. However, given that even Plaintiffs attempts to amend the Complaint in a footnote in their last brief did not say which specific benefits statutes they want to attack, given the lack of briefing on how any specific statute violates constitutional norms, given the lack of briefing on how the Legislature might redress such statute- specific harm if it exists, given the fact that Plaintiffs have not requested any relief the Court has any authority to grant—and, finally, given the fact that the case is before the Court on an ORCP 67B limited judgment in the first place, this appeal is simply not the right vehicle for this Court to take up the issue of civil unions. Plaintiffs have adequate opportunity to replead their case at the trial court, or in a new case, to allege facts showing an actual controversy concerning specific statutes exists.

It is fundamental that this Court is one of appellate jurisdiction, and that when deciding a case on appeal, it acts either to affirm, reverse, or modify a judgment below. ORS 19.420. ("Upon an appeal, the court to which the appeal is made may affirm, reverse or modify the judgment or part

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<sup>2</sup> DOMC Intervenor acknowledges, of course, that one of the reasons Plaintiffs sought that status was to gain the benefits attendant to marriage. That does not change the fact that plaintiffs' case, theory and briefings unremittingly focused on marriage itself, adamantly rejecting the statutory benefits as a remedy.



thereof appealed from . . .”). But when part of a final judgment is rendered moot, the appellate court has no further basis to act, insofar as that part of the judgment is concerned. It makes no difference what other arguments may support or refute the trial court’s reasoning. If the judgment is moot, all that is to be done is to remand with instructions to vacate that part of the judgment that has become moot. *First Commerce of America v. Nimbus Center Associates*, 329 Or 199, 986 P2d 556 (1999).

Insofar as the relief granted below, the trial court’s revised limited judgment consists of a temporary injunction preventing the County from issuing further marriage licenses to same sex couples, and the surprise mandamus to the State requiring it to record the certificates of couples to whom licenses were issued. The injunction against the County is accompanied by a declaratory judgment stating:

The Court hereby declares that, to the extent that **ORS Chapter 106** acts as a bar to the rights and privileges guaranteed by Article I, Section 20 of the Oregon constitution, that portion of Chapter 106 is unconstitutional.

ER-424. (Emphasis added) This is a declaration that the *definition of marriage* itself is an unconstitutional bar, nothing more, and that declaration has been rendered moot by Measure 36. Notably, the declaratory judgment does not say any of the statutes that constitute privileges or benefits of marriage are unconstitutional—indeed, that was never pled or considered at the trial court level. And thus, the trial court’s distinction between the status of marriage and its incidental privileges was no accident in light of plaintiffs’ insistence on marriage as their sole remedy. Since Measure 36 removes all question that the definition of marriage is now constitutional, the declaratory judgment has been rendered moot.

Nor does the Revised Limited Judgment presume to order the Legislature to do anything. Indeed, the trial court could not have enjoined the Legislature to act, since it had no such authority to

do so. Or Const. Art III, § 1. Thus, the injunction against the County simply created an incentive, an invitation, for the Legislature to act, by only temporarily enjoining the County from continuing to issue same sex marriage licenses. ER-425. In that sense, the trial court properly respected the fundamental separation of powers built into the Constitution. Because Measure 36 prevents the County from issuing additional marriage licenses to same sex couples, the temporary nature of the injunction has been rendered moot, even if the Legislature were to fail to enact a civil union bill. Again, to state the obvious, Judge Bearden's injunction was part of a *remedy* for the constitutional problem he identified. If there is no remaining constitutional issue—as there is not under Measure 36—then there is no *remedy* to hand out. Accordingly, the Court should remand to the trial court with instruction to vacate the declaratory judgment and the portion of the injunction against the County that permits it to expire.

With the County permanently prevented from resuming its course of marrying same sex couples, with this Court constitutionally without power to order the Legislature to enact a civil union statute—with no pleading alleging any specific facts tied to those statutes—what the Court is asked to do at this juncture is to issue an abstract, purely advisory opinion about the general question of the “benefits of marriage.” This Court might as well write an academic law review article on the subject: for both writings would be equally without any guidance from the pleadings in this case.<sup>3</sup>

Without precisely saying so, the State tacitly admits all this, even while ostensibly supporting plaintiffs' argument. It suggests this Court could give “practical effect” to the trial court's declaratory judgment by affirming it and giving the Legislature an opportunity to correct the constitutional defect.

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<sup>3</sup> In view of plaintiffs' adamant, explicit opposition to civil union benefits before Measure 36 passed, it is sophistic for them to pull a single phrase from their lengthy complaint out of context in support of their current pursuit of that which they formerly rejected. (Plaintiffs' Response Brief on Mootness at 2.) The Court should read the amended complaint in its context, and in the light of all their pre-election argument, to be an attack on the marriage statutes and nothing more.

State's Resp on Mootness at 5, fn.1. But, as explained earlier, Measure 36 moots the trial court's declaration that the definition of marriage is unconstitutional, so this Court cannot "affirm" it—it must be vacated. Regardless, to give the Legislature "opportunity" to take up a topic at its next session is to do nothing more than to make a suggestion. With respect, the Legislature can take up the topic of civil unions with or without this Court's assistance, as it could have before Measure 36 passed. Without any means to bring traction to any suggestion, this Court would not be giving "practical effect" to any of these plaintiffs' rights—it would simply be giving political or legal advice to the Legislature, under the auspices of an advisory opinion. This Court has consistently denied it has authority to do such things, or to decide matters that have been rendered advisory, as recently as earlier this Fall. *Yancy v. Shatzer*, 337 Or 345; 97 P3d 1161 (2004).

To do as plaintiffs now request, this Court would have to reverse the consistent course of its justiciability jurisprudence. Theoretically, this Court could decide the constitutionality of a presently-undetermined number of statutes, none of which have even been identified to the Court, and none of which have been analyzed through the honing whetstone of adverse party briefing. Then this Court would have to decide which, if any, suffer constitutional problems, and this Court would then have to attempt to determine, statute by statute, how the Legislature might have dealt with any constitutional defects, using its established methodology of inferring the Legislature's intent. Should the Court undertake that Herculean effort, the most it could then do would be to announce its opinion for the benefit of the future. It still could not order any practical relief in this case, because none of the plaintiffs have alleged they have suffered harm tied to any specific benefit statute. Plaintiffs' requested relief, that this Court order both the Legislature and the Governor to create a civil union statute is utterly beyond

constitutional authority. The manifest futility of such an effort illustrates why the Court should treat plaintiffs' novel new theories for appeal as nonjusticiable.

**III. THE STATUS OF THE PREEXISTING MARRIAGE LICENSES IS AN ACTIVE ISSUE. THE COURT SHOULD DECLARE THE PREEXISTING LICENSES VOID FROM THE OUTSET.**

All the parties agree the controversy concerning the marriage licenses issued by Multnomah County has not been mooted by Measure 36's passage. The State's first and DOMC's third assignments of error put the status of these licences squarely before this Court, appealing the trial court's surprise grant of mandamus against the State in the limited judgment.<sup>4</sup> The Court has at least the following options to choose among in resolving that issue: (a) -- it can rule the licenses were void *ab initio* because the County lacked authority under Article VI Section 10 of the Oregon Constitution to defy the terms of the marriage statute; (b) -- it can decide the issue on the basis the State urged in its opening brief by ruling that only the State can determine their validity, pursuant to its authority under ORS Chapter 432; (c) -- without deciding (a) or (b), it can rule that Measure 36 cuts off any prospective recognition of the couples as being married, as the State urges in its response brief on mootness, or (d) -- it can refuse to decide this issue and remand it for further proceedings in the trial court, since the trial court actually never decided the question. Either of the first two alternatives will resolve all the issues presented by the plaintiffs' amended complaint. The third alternative also

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<sup>4</sup> The County is simply wrong in arguing that the issue of its authority under Article VI, Section 10 to issue the licenses is not before the Court. County Resp. Br. on Mootness at 4. DOMC Intervenor's third assignment of error directly challenges the trial court's grant of mandamus ordering the State to register the marriages. DOMC argued consistently in each previous brief on the merits in this Court that the trial court erred in so ordering the State, because the marriages are void as a matter of law under Article VI, Section 10. As a party to the case, *DOMC Intervenor* **is entitled to raise its own assignments of error and to support them with the legal arguments that apply**. Attempts by other parties to limit the arguments to those they favor discussing are unavailing.

effectively resolves the issue, in that there is nothing in this case that challenges any specific denial of any specific marital benefits during the interim between the issuance of the licenses and the election on November 2nd. The final alternative available to the Court—remand—appears to be the only choice if the Court rejects the first three alternatives. DOMC’s additional defense to the licenses’ issuance—that the County failed to comply Oregon’s Public Meetings Act—was not adjudicated below and presents issues of fact that must be developed in the record before that court in the first instance.<sup>5</sup> Thus, the Court cannot in any event properly declare the licenses to have been validly issued.

The Court should decide this issue against the plaintiffs and County on the basis DOMC Intervenor has urged—lack of County authority—for two very good reasons. First, determining whether the County had constitutional authority to declare the definition of marriage unconstitutional is the logical precursor to all other issues. If the County lacked authority under the Oregon Constitution to issue the licenses in the first instance, the licenses are void and all other bases for arguing about their validity are superfluous. *State ex rel Huddleston v. Sawyer*, 324 Ore. 597, 615, 932 P.2d 1145 (1997) (quoting *State v. Leathers*, 271 Or 236, 240, 531 P2d 901 (1975)); *Spady v. Graves*, 307 Ore. 483, 489, 770 P.2d 53 (1989). *See also Pense v. McCall*, 243 Or. 383, 393 413 P. 2d 722 (1966). Thus, in view of Measure 36’s passage, there would be no reason for the Court to analyze plaintiffs’ argument that the licenses were “constitutionally required” before the election, because they were invalidly issued. It would be unnecessary to analyze the separate effect of Measure 36 on their pre-election or post-election validity. Deciding the County’s authority even logically precedes the

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<sup>5</sup> Contrary to the County’s assertion at page 4 of its latest response brief, DOMC Intervenor has not argued that this Court should resolve the public meetings law issue raised by the pleadings. Rather, DOMC correctly observed that this unresolved issue (which is a mixed issue of fact and law) would have to be decided on remand by the trial court if this Court does not decide the County authority issue. *See* DOMC’s Br on Mootness at 9.

State’s argument against registration made under ORS Chapter 432, because if the licenses were void *ab initio*, then so were the later marriage certificates. Their invalidity-in-fact would be the primary basis for the State to reject them for recording, rendering it unnecessary to resolve the County’s and State’s disagreement as to which of them is statutorily authorized to decide ORS 106.010’s constitutionality, or what acts are “purely ministerial,” if any.

The second reason the Court should decide this issue under Article VI, Section 10 is the need to reiterate and clarify the Cooper doctrine, to exclude future local officials from engaging in constitutional decision making about other state statutes. For the reasons stated in DOMC Intervenor’s earlier briefing, the Court should take this opportunity to eliminate any misunderstanding any local officials may have that Cooper or any of this Court’s other decisions give them authority to ignore statewide statutes as unconstitutional. To give local officials that power sets up inconsistent local administration of statewide statutes, which was clearly not the Court’s intent in Cooper. *See* DOMC Intervenor’s Resp. Br. on the Merits at 44-49.

DOMC Intervenor’s have fully briefed the County authority issue to this Court, giving the other parties full opportunity to meet it on the merits. In fact, given that this round of briefs marks the parties’ sixth submission to this Court, it is highly significant that no other party has made serious substantive arguments to refute DOMC’s briefing. Since that failure is not due to surprise or lack of opportunity, and the issue is crucial to disposition of the case, it can only be attributed to one reason—there is no substantive rebuttal. The County simply ignored this constitutional limitation on its authority before it acted,<sup>6</sup> and now it hopes this Court will, too.

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<sup>6</sup> It is perhaps possible that the County still does not fully appreciate the issue. Its most recent brief says “DOMC now argues that the court should not determine the validity of plaintiffs’ marriages . . . on *constitutional* grounds, but should either determine their validity based on County authority, and or

In summary, by deciding the County authority issue as DOMC Intervenors have urged, the Court resolves every claim the plaintiffs actually raised in their amended complaint and on appeal, and all the issues raised by any of the parties in the post-Measure 36 briefing except whether the case should now be treated as one seeking the benefits of marriage without the status.

#### IV. CONCLUSION

None of the plaintiffs hold valid licenses—the County lacked authority to issue them—so the passage of Measure 36 renders the entire subject of same sex marriage in Oregon moot. This request was the totality of plaintiffs’ complaint, and of their appeal. The Court should issue its judgment ordering the trial court to vacate its revised limited judgment, permanently enjoin Multnomah County from issuing marriage licenses to same sex couples, and issue judgment declaring the State must vacate any certificates that it previously registered.

Submitted this \_\_\_\_ day of December, 2004

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public meetings law, neither of which have been briefed to the court. . . .” County Resp. on Mootness at 3-4. Can it be that the State’s largest County really does not see that the County authority argument *is and always has been a constitutional argument* —concerning Article VI, Section 10? It certainly has been so briefed to the Court, repeatedly, since the opening brief on appeal. The County can refuse to address this issue if it chooses (until this Court decides otherwise), but it should not distort the record in doing so.

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