

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 KEIFER; 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,

vs.

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

CA No. A124877

SC S51612

INTERVENOR-PLAINTIFF-
RESPONDENT, CROSS-APPELLANT
MULTNOMAH COUNTY'S REPLY
BRIEF TO DEFENDANT STATE OF
OREGON'S ANSWERING BRIEF ON
MEASURE 36

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State ex rel Adams v. Powell, 171 Or App 81, 95-96, 15 P3d 54, 62 (2000)..... 2, 3

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Article I, section 21..... 1, 2, 3, 4

SUMMARY OF THE COUNTY'S ARGUMENTS

1. The County agrees with the State that Measure 36 does not render moot the question of whether excluding same-sex couples from the statutory privileges and benefits incident to civil marriage violates Article I, section 20, Oregon Constitution.

The trial court concluded that denying same-sex couples the statutory benefits of marriage violates Article I, section 20. The court expressly declined to rule on whether denying access to the institution of marriage similarly violates Article I, section 20. Measure 36 addresses only this second question, it does not address the question of whether denying same-sex couples the legal benefits incident to marriage violates Article I, section 20. This issue is not moot.

2. The County agrees that Measure 36 does not render moot the question of the appropriate remedy for the constitutional violation. As explained by the County in its Reply Brief on the Merits and its Opening Brief on Measure 36, it is the exclusive purview of the Court in the first instance to provide a remedy to the parties to the litigation.

3. The County agrees that Measure 36 does not render moot the question of whether the State Registrar has the discretion under ORS Chapter 432 to determine the lawfulness of a marriage license issued by a County.

4. The legal status of the plaintiffs who were married prior to the passage of Measure 36 is not moot. If plaintiffs' marriage contracts were legally executed, Measure 36 may not void these contracts without violating Article I, section 21, Oregon Constitution. The Court should interpret the measure so as to harmonize conflicting provisions. The Court can harmonize Measure 36 and Article I, section 21, by prohibiting the issuance of marriage licenses to same-sex couples after the date Measure 36 was certified and protecting the rights of those persons married prior to enactment.

5. The question of whether Oregon's Marriage laws, including Measure 36, violate the Fourteenth Amendment to the United States Constitution was raised by this Court on its own motion and is not moot.

DISCUSSION

I. The Court is Required to Give Effect to All Parts of the Constitution

In its Opening Brief on Measure 36, the County explained that the measure cannot be construed to impair the marriage contracts of the married plaintiffs without violating Article I, section 21, Oregon Constitution. The County reasserts that argument here.

The Court is required to apply the Oregon Constitution in a way that harmonizes all of its provisions:

Defendant[s] correctly assert that the court's function is to interpret constitutional language in a way that "harmonizes" potentially conflicting provisions. When possible, we 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." *State ex rel Adams v. Powell*, 171 Or App 81, 95-96, 15 P3d 54, 62 (2000)(internal citations omitted).

At trial, the County argued and the Court concluded that the exclusion of same-sex couples from the legal incidents of marriage under ORS Chapter 106 violates Article I, section 20. Accordingly, the exclusion could not be enforced and approximately 3,000 couples entered into marriage contracts that were otherwise lawful. Applying Measure 36 to void these contracts unquestionably impairs the parties' rights under these contracts.

The State responds that, even assuming *arguendo* the validity of the marriage contracts, the text of Measure 36 now precludes the State from recognizing these contracts. (State's Measure 36 Answering Brief at 9-11). The State's conclusion relies on a truncated version of the measure and ignores the obligation of this Court to enforce equally all parts of the constitution.

To support its argument that Measure 36 precludes the State from recognizing any same-sex marriages, the State cites a portion of Measure 36 -- “only a marriage between a man and a woman shall be valid or legally recognized as a marriage.” (State’s Measure 36 Answering Brief at 8). However, the full text of the measure provides:

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. (Emphasis added).

When interpreting legislation, it is the task of the Court to give effect to all of the text, neither omitting what has been inserted or inserting what has been omitted. ORS 174.010. The Court should give effect to “every word of a constitution.” *State ex rel Adams*, 171 Or App at 96.

The portion of the measure relied on by the State obviously ignores the introductory clause – “It is the policy of Oregon * * * .” As explained by the county, a statement of policy, whether in statute or the constitution, is generally not itself a firm rule of law. (County’s Measure 36 Opening Brief at 2). If, as the State apparently assumes, the purpose of the measure was to establish a firm rule of law as opposed to a more general policy, it would have been a simple matter to draft it that way. However, the drafters’ designation of the measure as a policy statement cannot be treated as mere surplusage.

Moreover, if viewed as a fixed rule of law from which there can be no exception, Measure 36 inevitably violates the prohibition against impairment of contracts in Article I, section 21. If the Court concludes that plaintiffs’ marriage contracts were lawful, because the exclusion of these couples from the benefits of marriage in ORS Chapter 106 violates Article I, section 20, then simply invalidating those contracts will impair the rights of the parties to these contracts. The Court should seek to avoid giving effect to one provision of the constitution in a manner that violates another provision.

Ultimately, this Court can harmonize Measure 36 with Article I, section 21, by recognizing the “policy” of Measure 36 while acknowledging a limited exception for those couples married prior to its adoption. The “policy” of Measure 36 may be given effect by prospectively prohibiting the issuance of a marriage license to same-sex couples on and after the date the measure was certified, but recognizing an exception limited to those persons married pursuant to a license issued and solemnized prior to that date.¹ In this way, the Court can give effect to all parts of the constitution, including both Measure 36 and Article I, section 21.

Finally, the State argues that Article I, section 21, is not before this Court because plaintiffs did not assert any claims under this provision at trial. Of course, this ignores the fact that Measure 36 passed more than six months after the trial court entered its judgment. Article I, section 21, expressly protects preexisting contracts against subsequently enacted legislation.² Until Measure 36 passed, there was no need for any party to discuss impairment under Article I, section 21. The State’s argument is simply an attempt to avoid this discussion.

II. The Fourteenth Amendment to the United States Constitution

In its letter dated August 10, 2004, this Court asked the parties to address the constitutionality of Oregon’s marriage laws under the Fourteenth Amendment to the United States Constitution. While this issue was not raised by the parties at trial, the court may seek guidance from the parties on any issue the court believes bears on the matter at bar. All

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¹ The measure was certified on December 2, 2004.

² “No * * * law impairing the obligation of contracts shall ever be passed * * *.” Article I, section 21, of the Oregon Constitution.

Oregon laws, including its marriage laws, must comply with the Fourteenth Amendment. Measure 36 cannot and does not purport to affect the Fourteenth Amendment. Accordingly, the issue of whether Oregon's marriage laws comply with the Fourteenth Amendment is not moot.

Respectfully submitted,

AGNES SOWLE, COUNTY ATTORNEY
FOR MULTNOMAH COUNTY, OREGON

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Of Attorneys for Plaintiff-Intervenor Multnomah
County

CERTIFICATE OF SERVICE

I certify that on December 7, 2004, I served two true copies of **INTERVENOR-PLAINTIFF-RESPONDENT, CROSS-APPELLANT MULTNOMAH COUNTY'S REPLY BRIEF TO DEFENDANT STATE OF OREGON'S ANSWERING BRIEF ON MEASURE 36** on:

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- ☒ United States Postal Service, ordinary first class mail
☐ United States Postal Service, certified or registered mail, return receipt requested
☐ Hand delivery
☒ Other : Email.

CERTIFICATE OF FILING

I certify that on December 7, 2004, I filed the original and 20 copies of this
**INTERVENOR-PLAINTIFF-RESPONDENT, CROSS-APPELLANT MULTNOMAH
 COUNTY'S REPLY BRIEF TO DEFENDANT STATE OF OREGON'S
 ANSWERING BRIEF ON MEASURE 36** with the State Court Administrator at this
 address:

State Court Administrator
Supreme Court Building
1163 State Street
Salem, OR 97301-2563

by:

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☐ United States Postal Service, certified or registered mail, return receipt requested
☐ Hand delivery
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