

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 OPENING
BRIEF IN RESPONSE TO COURT'S
QUESTIONS REGARDING MOOTNESS

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INTRODUCTION

The court has requested that the parties reply to the following questions:

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?

The passage of Measure 36 (2004) does not render moot any part of the case presently before the court. The core question in this case is whether Article I, section 20, of the Oregon Constitution requires that the privileges and immunities of marriage be extended to same-sex couples.

The individual plaintiffs are same-sex couples who have either entered into a civil marriage contract in Multnomah County, or who wish to have access to the right to enter into a civil marriage contract and receive the benefits that flow there from. Plaintiff-Intervenor Multnomah County issued marriage licenses to four of the individual plaintiffs and to 3000 or so other same-sex couples in Multnomah County pursuant to the authority granted to counties in ORS Chapter 106. The County presented those licenses to the State Registrar for registration as vital records. Defendants challenge the validity of those licenses, and defendant State asserts that the State Registrar, not the County, determines whether a marriage license is lawfully issued.

The trial court held that the failure to provide to same-sex couples the same statutory privileges and benefits that flow from the civil marriage contract is a violation of Article I, section 20 of the Oregon Constitution. However, rather than fashioning a remedy for that violation, the trial court deferred to the legislature to fashion a remedy. Additionally, the trial court determined that the State Registrar had no discretion to refuse

to register the marriage licenses submitted by the County and ordered the State Registrar to register all of the same-sex marriage licenses issued by Multnomah County that had been properly solemnized.

Even if Measure 36 prohibits Oregon from extending the institution of marriage to same-sex couples, the rights and liabilities of the plaintiffs in this litigation, and the validity of the marriages of the other 3000 couples are not resolved.

STANDARD OF REVIEW

A case is justiciable “where there is an actual and substantial controversy between the parties having adverse legal interests.” *Brown v. Oregon State Bar*, 293 Or 446, 449, 648 P2d 1289 (1982). A justiciable case is moot if “a decision no longer will have a practical effect on or concerning the rights of the parties.” *Yancey v. Schatzer*, 337 Or 345; 97 P3d 1161, quoting *Brumnett v. PSRB*, 315 Or 402, 406, 848 P2d 1194 (1993).

ARGUMENT

- A. Certification of Measure 36 does not render moot whether it is a violation of Article I, section 20, to deny same sex couples access to the privileges and immunities afforded by the civil marriage contract.**

Measure 36 amends the Oregon Constitution to include a policy statement that the institution of marriage in Oregon is limited to one man and one woman:

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.¹

¹ A statement of *policy*, whether in a statute or the constitution, is generally not itself a firm rule of law. A policy is a statement of the general principles by which the legislature or government is guided. “This term, as applied to a law, ordinance, or rule of law, denotes its general purpose or tendency considered as directed to the welfare or prosperity of the state or community.” *Black’s Law Dictionary*, Sixth Edition. What effect this policy statement may have on the prohibition against favoritism found in Article I, section 20 is not at issue here.

Regardless of its ultimate effect, the issues in this case are not rendered moot by the Measure. The trial court specifically did not extend the *institution* of marriage to same-sex couples, but instead held that to deny the statutory benefits that flow from the marriage contract to same-sex couples is a violation of Article I, section 20. Measure 36 does not purport to affect the principle of equality of privileges and immunities for all citizens in Article I, section 20. Nor does it purport to affect the obligations of public officials under Article XV, section 3, to support the constitution. A ruling on whether the trial court correctly interpreted Article I, section 20 as protecting the right of same-sex couples to the same privileges and immunities the statutes afford to heterosexual couples who enter into a civil marriage contract is necessary to determine the rights of the individual plaintiffs. In addition, whether the County had an obligation under the constitution to implement ORS Chapter 106 consistent with the equal privileges and immunities clause remains a viable issue.

B. Certification of Measure 36 does not render moot issues regarding the status of the married plaintiffs' marriage contracts.

***1. The Text of Measure 36 Does Not Contain Language That Clearly Indicates Intent to Make it Retroactive.*²**

Four of the individual plaintiffs were granted marriage licenses by Multnomah County and had their marriages solemnized prior to the passage and certification of Measure 36. This court must determine whether the marriages of those individual plaintiffs (as well as the approximately three thousand other same-sex couples who were issued marriage licenses and entered into marriage contracts) were lawful under the law in effect at the time they were licensed and solemnized.

² A constitutional amendment does not take effect until it has been certified. Article XVII of the Oregon Constitution provides that an amendment to the Constitution shall be in effect as a part of the Constitution from the date of proclamation.

In *Schramm v. Done*, 135 Or 16, 21, 293 P 931 (1930) this court held that principles of natural justice require the court to construe all laws, including constitutional amendments, as intended to be prospective in application, unless a retroactive operation is clearly indicated. The text of Measure 36 does not contain any language that clearly indicates retroactive application.

To the extent the court finds it useful to inquire into the legislative intent in support of the measure, the County notes that the individual plaintiffs provide an extensive discussion of this intent in their Opening Brief in response to the court's question. The County joins in and relies on plaintiffs' argument regarding questions of legislative intent.

2. *Claims Respecting Married Plaintiffs' Status are Not Moot Because Measure 36 Cannot be Applied Retroactively.*

Claims regarding the status of the same-sex couples that received marriage licenses prior to April 20, 2004³ and whose marriages were solemnized, are not moot because a retroactive application of Measure 36 would impair the marriage contracts of those plaintiffs in violation of Article I, section 21, Oregon Constitution.

a. **Article I, section 21, protects preexisting contracts from impairment by subsequently enacted laws.**

Article I, section 21 provides in part that "No * * * law impairing the obligation of contracts shall ever be passed * * *." Article I, section 21, applies to contracts between private parties as well as to contracts involving the state. *Hughes v. State*, 314 Or 1, 12, 838 P2d 1018 (1992). The court in *Hughes* established a two-step method for analyzing impairment of contract claims under Article I, section 21:

³ The trial court's Limited Judgment enjoined the County from further issuing marriage licenses to same-sex couples.

Whether the state is alleged to be a party to a contract in dispute or not, however, the proper analysis to determine whether a law of the state violates the Contract Clause of Article I, section 21, requires two steps: First, it must be determined whether a contract exists to which the person asserting an impairment is a party; and, second, it must be determined whether a law of this state has impaired an obligation of that contract. General principles of contract law normally will govern both inquiries[.]

Hughes, 314 Or at 13-14, citing *Eckles v. State*, 306 Or 380, 760 P2d 846 (1988), *appeal dismissed* 490 US 1032 (1989).

Using this analysis, the married plaintiffs in this case are parties to civil contracts that would be significantly impaired by the retroactive application of Measure 36.

b. A marriage contract is a “civil contract.”

Under Oregon law, marriage is a “civil contract” entered into between persons at least 17 years old who are otherwise capable of marrying. ORS 106.010. Marriage is thus expressly designated as a private civil contract between the persons who enter into it. In addition, under general contract principles, each party to the contract mutually offers commitment, fidelity, and support to the other, which offer may be accepted by performance and formalized by a marriage license issued and solemnized under ORS Chapter 106. Once the contract is established, the parties assume a broad range of statutory rights and obligations with respect to each other. (*See* ORS 112.025 and 112.035 (intestate inheritance), 136.655 (spousal privilege against compelled testimony), 107.590 (court-ordered counseling), 432.124 (access to death records), 657.255 (access to unemployment benefits)). A marriage contract may be dissolved only by court order. ORS 107.115.

The existence and terms of a contract are determined according to the laws that exist at the time the contract is executed. *Schramm*, 135 Or at 19. Plaintiffs entered into

their marriage contracts prior to the passage and certification of Measure 36. Plaintiffs did so with the good faith belief that the statutes limiting marriage to opposite-sex couples were unconstitutional. Multnomah County issued the marriage licenses on the same basis. Except for the statutory exclusion of same-sex couples from marriage, the plaintiff couples complied with all statutory and common law requirements for establishing a civil marriage contract.

For purposes of determining whether a contract exists sufficient to satisfy the first level of the *Hughes* analysis, the question before this court is whether the statutory exclusion of same-sex couples from marriage under ORS Chapter 106 violates Article I, section 20, Oregon Constitution. If it does, then the statute could not be lawfully enforced to prohibit plaintiffs from entering into a lawful marriage contract. If this court finds the statutes do not violate Article I, section 20, then plaintiffs could not have lawfully entered into a marriage contract and cannot now invoke the protections of Article I, section 21. Thus, to determine whether a contract exists sufficient to satisfy the first step in the *Hughes* analysis, the court is inevitably returned to the question of whether ORS Chapter 106 violates Article I, section 20. A decision regarding this issue will have a profound practical effect upon the rights of the individual plaintiffs.

c. If applied retroactively, Measure 36 would substantially impair plaintiffs' marriage contracts.

Once it is established that "a contract exists to which the person asserting an impairment is a party," it must be determined whether retroactive application of Measure 36 impairs an obligation of these contracts. *Hughes*, 314 Or at 13-14.

The text of the measure apparently speaks only to the marriage contract, limiting the marriage contract to opposite-sex couples. The history of the measure supports an

interpretation that the measure was only intended to limit the *institution* of marriage to heterosexual couples. Oregon Voters' Pamphlet, Vol. 1, Measure 36 Explanatory Statement.⁴ The effect of the measure, if applied retroactively, would render invalid the individual plaintiff's marriage contracts. Rendering these contracts invalid would deny these plaintiffs all of the benefits and privileges that are available to them only by virtue of the marriage contract. This result is more than a substantial impairment of these marriage contracts, it is a complete abrogation of them. Accordingly, applying Measure 36 retroactively would substantially impair plaintiffs' marriage contracts in violation of Article I, section 21.

3. *Prospective application of Measure 36 to the married plaintiffs would impermissibly breach these marriage contracts.*

However, even if the court determines that the voters intended to apply Measure 36 retroactively, to apply the stated *policy* of the measure to the four married plaintiffs (or to the approximately 3000 other same-sex couples who were issued marriage licenses in Multnomah County and entered into marriage contracts prior to April 2004) would impermissibly breach their marriage contract.

In *Hughes v. State of Oregon*, 314 Or 1, 838 P2d 1018 (1992), this court ruled that legislation cannot retroactively impair an existing contract, even if the legislative authority intended retroactive application. The Court in *Hughes* distinguished between

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⁴ "Under state statutes, a marriage is a civil contract entered into by a male and a female who solemnize the marriage by declaring 'that they take each other to be husband and wife.' There is ongoing litigation concerning whether the current marriage statutes are valid under the Oregon Constitution. Ballot Measure 36 adds to the Oregon Constitution a statement of policy that only a marriage between one man and one woman is valid or legally recognized as a marriage." Oregon Voters' Pamphlet, Vol. 1, Measure 36 Explanatory Statement.

“impairing” and “breaching” a contract. *Hughes*, 314 Or at 31. Legislation may not retroactively impair a contract but may prospectively breach the same contract, provided a remedy is available to the non-breaching party. *Hughes*, 314 Or at 32-33.

As to the married plaintiffs, prospective application of Measure 36 would impermissibly breach their marriage contracts. Assuming plaintiffs’ marriage contracts consist of tangible statutory benefits and intangible social benefits,⁵ Measure 36 cannot breach these contracts because, while the state could remedy the loss of the statutory benefits through legislation creating a civil union, there is no remedy that could compensate these plaintiffs for the loss of the intangible social benefits that marriage conveys. If Measure 36 is applied prospectively to breach plaintiff’s marriage contracts, the state can remedy no more than half of the injury suffered by these plaintiffs as a result of the breach.

Under the analysis employed in *Hughes*, legislation can prospectively breach an existing contract only where the state can provide an adequate remedy. *Hughes*, 314 Or at 32-33. In *Hughes*, state employees’ PERS benefits were prospectively taxed in violation of the existing PERS contract, but legislation adjusting the retirees’ benefits to compensate for the tax loss was adequate to remedy the injury. Here, there is no foreseeable legislation that can adequately compensate the married plaintiffs for the injury they will suffer from the loss of the intangible social benefits that accompany marriage. Civil union legislation can provide a remedy only for the injury to the plaintiff’s statutory benefits. It cannot provide a remedy for the loss of the intangible

⁵ Multnomah County assigned error to the trial court’s failure to extend Article I, section 20, protections to the intangible benefits of marriage. (Intervenor Plaintiff’s Opening Brief). The State notes that the tangible and intangible benefits of marriage are “inseparable.” (Defendant State’s Response Brief).

social benefits that arise solely from admission into the institution of marriage. For this reason, Measure 36 cannot be applied prospectively to breach these plaintiffs' marriage contracts.

- C. Measure 36 does not render moot the issue of whether the trial court erred in fashioning a remedy for a constitutional violation that neither extended the benefits of ORS Chapter 106, nor declared the statutory scheme invalid.**

The issue of remedy also remains justiciable in this case. If the court affirms the trial court's decision that ORS Chapter 106 violated Article I, section 20, by denying plaintiffs the privileges and immunities granted their heterosexual counterparts, the court must also determine an appropriate remedy for that violation, at least so far as the individual plaintiffs are concerned. As the County argued in its Reply Brief, it is the exclusive purview of the courts to provide a remedy to the parties in litigation. The trial court's decision to require the legislature to fashion a remedy is both insufficient as to the individual plaintiffs, and is unsupported in the law. A decision by this court regarding the appropriate remedy for the constitutional violation will have a practical effect upon the individual plaintiffs who were issued marriage licenses and whose marriages were solemnized prior to the passage of Measure 36. The State refused to recognize them as legally valid marriages, prompting this litigation and there can be no question that a declaration that the statute must be extended to include these plaintiffs will have a practical affect on the parties. If the court determines that these were valid marriages when entered into, Measure 36 cannot, by retroactive effect, invalidate them, and therefore cannot render the issue moot.

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- D. Measure 36 does not render moot the issue of whether the State Registrar has the discretion, under ORS Chapter 432, to determine the lawfulness of a marriage license issued by a County.**

The State assigns as error the trial court's determination that ORS 432.405 requires the State Registrar to register and maintain as vital records the marriage licenses forwarded to it by the county for registration. The State also assigns as error the trial court's grant of mandamus to plaintiffs requiring the State Registrar to register the licenses of the same-sex couples, including four of the individual plaintiffs. Neither of these issues is rendered moot by the passage of Measure 36.

A decision by the court on the State's first assignment of error will have a practical effect on both the State, and plaintiff-intervenor County. Resolution of the issue will determine whether it is the County or the State Registrar that is, by statute, charged with the duty to determine whether or not it is lawful to issue a marriage license in the first instance. If the court affirms the trial court on this issue, the State Registrar may not lawfully refuse to register marriage licenses presented for registration by a County. If the court overturns the trial court, then both the State Registrar and the County will necessarily be required to change their current practices regarding the issuance and registration of marriage licenses.

The mandamus issue remains justiciable, because the marriage licenses of four of the individual plaintiffs, as well as approximately 3000 other marriage licenses, have been registered in the State's records of vital statistics as a result of the trial court's order. The court's decision regarding whether mandamus was the appropriate relief for plaintiffs' will have a practical effect on those individual plaintiffs, as well as the State Registrar. Measure 36 will have no effect on the issue because, as discussed above, the measure cannot be applied retroactively.

E. Measure 36 does not render moot issues regarding the Fourteenth Amendment to the U.S. Constitution.

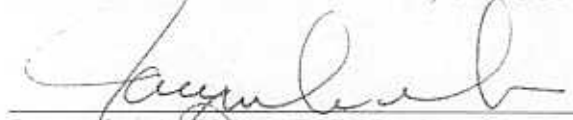
The court requested the parties to address, in their opening briefs, the question of whether Oregon's marriage laws deny equal protection of the law in violation of the Fourteenth Amendment to the U.S. Constitution. Measure 36 amends the Oregon Constitution, but does not amend the U.S. Constitution. Therefore, an analysis of Oregon's marriage laws under the Fourteenth Amendment is not rendered moot by the passage of Measure 36.

CONCLUSION

No part of the case before the court is rendered moot by Measure 36. A decision by the court on the issues before it will have a profound practical effect on both plaintiffs and defendant State.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 17, 2004, I served two true copies of **INTERVENOR-
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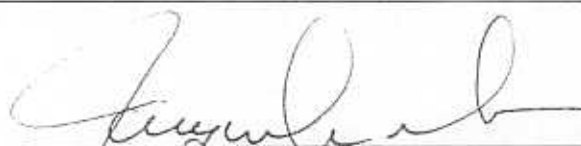
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