

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 RESPONSE
BRIEF TO DEFENDANTS' STATE OF
OREGON AND DEFENSE OF
MARRIAGE COALITIONS OPENING
BRIEFS REGARDING MOOTNESS

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INTRODUCTION

Intervenor-Plaintiff Multnomah County ("County") submits this combined Response to the Defendant State of Oregon's ("State") Opening Brief on Ballot Measure 36, and Intervenor-Defendant Defense of Marriage Coalition's ("DOMC") Memorandum on Mootness and Motion to Dismiss.

With one exception, the County agrees with the State's assertions regarding the effect of Measure 36 on the issues before the court. In addition to the issues identified by the State, the County believes there are additional issues that remain viable before this court, as described in the County's Opening Brief in Response to the Court's Questions Regarding Mootness.

The County agrees in part with the assertions made by DOMC regarding the effect of Measure 36 on issues before the court, and disagrees in part.

RESPONSE TO STATE OF OREGON

I. The Statutory Right of Civil Marriage

The State asserts: "Measure 36 will moot plaintiffs' contention (also asserted by the County) that the only appropriate remedy for the constitutional violation [of Article I, section 20] found by the trial court is to extend the statutory right of civil marriage to same-sex couples." (State's Brief at 11).

To the extent the State is asserting that Measure 36 *prospectively* renders moot the question of whether unmarried same-sex couples may enjoy the benefits of what the County refers to as the *institution* of marriage granted by ORS Chapter 106, the County agrees that Measure 36 has this effect.

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Measure 36 does not, however, render moot the issue of remedy for the four plaintiff couples who were issued marriage licenses and whose marriages were solemnized prior to November 2, 2004. The State does not directly discuss the status of these plaintiffs. For the reasons set forth in the County's Opening Brief on Mootness, the court must determine whether those marriages were valid at the time they were entered into, which necessarily requires a determination of whether ORS Chapter 106 impermissibly excluded same-sex couples from the institution of marriage under Article I, section 20, and if so the proper remedy for the constitutional violation. Therefore, the issue of the appropriate remedy for a constitutional violation is not moot as to these plaintiffs.¹

II. The Legal Benefits Incident to Civil Marriage

The County agrees with the State's assertion that the question of whether "withholding the legal benefits incident to civil marriage from same-sex couples violates Article I, section 20" and, if so, what remedy is appropriate, is not moot. (State's Brief at 11). To the extent this argument regarding the statutory benefits incident to marriage is the counterpart to the argument made above regarding access to the institution of marriage, the County agrees with the State.

III. Requiring the State to Register the Marriage License and Solemnization Documents

The County agrees that issues relating to the obligations of the State Register under ORS Chapter 432 are not moot.

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¹ In addition to the four plaintiff couples, there are approximately 3000 other same-sex couples who were issued marriage licenses and whose marriage licenses were solemnized. A ruling in the case will also have a practical effect on their legal status.

RESPONSE TO DOMC

I. The Status of the Approximately 3,000 Multnomah County Same-Sex Marriages

The County agrees with DOMC that the question of the status of the married plaintiffs and, by extension, the approximately 3,000 marriages performed in Multnomah County is not moot. (DOMC Brief at 3).

II. The Duty of the State Registrar to Record the Marriage Licenses

The County agrees that the issues regarding the obligation of the State Registrar to record the marriage licenses issued by Multnomah County are not moot. (DOMC Brief at 3). For the reasons stated in the County's Answering Brief on the Merits and Opening Brief on Mootness, the State Registrar does not have authority to determine the lawfulness of marriage licenses submitted to it.

However, in asserting that the mandamus issue is not moot, DOMC attempts to resurrect two issues that were not decided by the trial court and are not properly before this court: whether the County had the authority to issue marriage licenses to same-sex couples in contravention of ORS Chapter 106; and whether, in doing so, the County violated Oregon Public Meetings law. Both defendants raised the issue of County authority in opposition to the plaintiffs' motions for summary judgment. However, the trial court sent a letter to all parties on April 13, 2004 addressing the issue by stating, "new issues have been raised by defendants and intervenors which are beyond the agreed upon scope" of the issues for summary judgment, and limited the case to the "constitutionality issue only and all other issues will be separated and dealt with later if need be."

DOMC now argues that the court should not determine the validity of plaintiffs' marriages and those of the approximately 3000 other same-sex couples on constitutional grounds, but should either determine their validity based on County authority and/or public

meetings law, neither of which have been briefed to the court, or remand to the trial court for such a ruling. DOMC confuses the issue of whether the State Registrar has a non-discretionary duty to register marriage licenses presented for registration, with the issue of whether a County has the authority to issue a marriage license in contravention of ORS Chapter 106. As both the State and the County have asserted, the former issue is squarely before the court as a result of the trial court's grant of mandamus. The latter issue of County authority is not before the court.

The question posed by the Court subsequent to the parties is whether "the passage of Ballot Measure 36 (2004) render[s] any part or parts of this case moot." As noted by the trial court, issues of County authority and public meetings laws are not a part of this case.

III. The "Suspect Class" of Homosexuals Under This Court's Precedent

The County disagrees that this issue is a separate issue before the court. The question of suspect classification is subsumed within the analysis of the Article I, section 20, violation found by the trial court. As described above, the County and the State agree that the question of whether Oregon laws that deny same-sex couples the legal benefits incident to civil marriage violates Article I, section 20, is not moot.

IV. Plaintiffs' Claims Remain Justiciable Because a Decision by the Court's have a Practical Effect on Plaintiffs

DOMC argues that plaintiffs' claims are not justiciable because, following the passage of Measure 36, the court cannot grant the precise remedy requested by plaintiffs in their pleadings. DOMC confuses justiciability with pleading.

In order for a claim to be justiciable, the court's decision must have a practical effect on the party invoking the court's jurisdiction. *Milne v. City of Canby*, 195 Or App 1, 96 P3d 1267 (2004); *Utsey v. Coos County*, 176 Or App 524, 32 P3d 933 (2004). DOMC argues that

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plaintiffs' pleadings requested full access to marriage and, because such access is no longer available after the passage of Measure 36, the court cannot grant the relief requested and, therefore, the claims are no longer justiciable.

This argument ignores the equitable authority of the courts to fashion a remedy. It is precisely this authority invoked by the trial court when it ordered the statutory benefits incident to marriage be extended to same-sex couples, while reserving judgment on the question of whether the same couples should be allowed to enter the institution of marriage. No party to this action, including DOMC, appealed on the basis that the trial court lacked authority to fashion such a remedy. The claims before this court are equitable claims and the court retains equitable authority to fashion a remedy. *Wiley v. Berg*, 282 Or 9, 19, 578 P2d 384 (1978); *Brooke v. Amuchastegui*, 226 Or 335, 341, 360 P2d 275 (1961).

Notwithstanding the passage of Measure 36, this court may conclude that denying same-sex couples the statutory benefits incident to marriage violates Article I, section 20. If the court finds such a violation, any remedy it orders will have a practical effect on plaintiffs' rights. Similarly, a decision that Oregon's marriage laws do not violate Article I, section 20, will also have a practical effect on plaintiffs' rights. Accordingly, plaintiffs' claims are justiciable.

V. DOMC'S Motions Should be Denied

1. DOMC moves this court to dismiss plaintiffs' claim because it argues these claims are not justiciable following the passage of Measure 36. (DOMC Brief at 2). For the reasons described in section IV above, this motion should be denied.

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2. DOMC moves this Court to stay, vacate or enjoin the portion of the trial court order directing Multnomah County to begin issuing marriage licenses if the Legislature fails to remedy the constitutional violation within 90 days of convening. (DOMC Brief at 2). These motions are premature.

The Oregon Legislature is scheduled to convene on January 10, 2005. Accordingly, this part of the trial court order will not take effect until approximately April 10, 2005, if at all. More importantly, it cannot now be predicted what effect this court's decision on the remaining issues will have on the plaintiffs, County, State or Legislature. At a minimum, the County's obligations under the marriage statutes, the State Registrar's obligations under ORS Chapter 432, and the Legislature's obligations in response to any violations of Article I, section 20, will be shaped by this court's decision. Accordingly, any procedural motions regarding these obligations are premature.

CONCLUSION

Measure 36 renders moot only one issue in this case -- whether same-sex couples are prospectively entitled to enter into a civil marriage under ORS Chapter 106. The issues that remain justiciable because their resolution will have a practical effect on the parties to this case are as follows:

1. The legal status of the same-sex marriage entered into prior to the passage of Measure 36. This necessitates that the court decide whether ORS Chapter 106 impermissibly excluded same-sex couples from the civil marriage contract at the time those marriage were entered into in violation of Article I, section 20 of the Oregon Constitution; and, if so, the appropriate remedy for the constitutional violation.

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2. Whether same-sex couples are impermissibly excluded from the legal benefits incident to civil marriage in violation of Article I, section 20.
3. Whether the trial court was correct in determining that the State Registrar does not have the discretion to determine the lawfulness of the marriage licenses presented to it for filing under ORS Chapter 432.

Respectfully submitted,

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