

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,

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,

Multnomah County Circuit Court
No. 0403-03057

Appellate Court No. A124877

Supreme Court No. S51612

Continued.....

and

DEFENSE OF MARRIAGE
COALITION, CECIL MICHAEL
THOMAS, NANCY JO THOMAS, DAN
MATES, and DICK JORDAN
OSBORNE,

Intervenors-Defendants-Appellants,
Cross-Respondents.

STATE DEFENDANTS'-APPELLANTS,' CROSS-RESPONDENTS'
OPENING BRIEF ON BALLOT MEASURE 36

Certified Appeal from the Judgment
of the Circuit Court for Multnomah County
Honorable FRANK L. BEARDEN, Judge

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**STATE DEFENDANTS'-APPELLANTS,' CROSS-RESPONDENTS'
OPENING BRIEF ON BALLOT MEASURE 36**

THE COURT'S QUESTIONS

This court has asked the parties to respond to the following questions about the effect, if any, that the passage of Ballot Measure 36 (2004) will have 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?

SUMMARY OF THE STATE'S RESPONSE

Measure 36 will add to the Oregon Constitution¹ the following provision:

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.

If this court construes Measure 36 to mean that the State of Oregon and its political subdivisions are prohibited from recognizing as legal or otherwise treating as valid any marriage that is not "between one man and one woman," and assuming that "marriage" means the status of civil marriage *per se* and not the statutory benefits that are incident to that status, then certification of the passage of Measure 36 will have the following effects on this case:

1. It *will* render moot the claim by plaintiffs and the County that the appropriate remedy for the constitutional violation found by the trial court in this case

¹ Although the Secretary of State has not yet completed canvassing the votes on Measure 36, the official county election results indicate that a majority of the voters approved the measure. The measure is scheduled to take effect as part of the Oregon Constitution on December 2, 2004, thirty days after the November 2 election. *See* Or Const Art IV, § 1(4)(d); Or Const Art XVII, § 1.

is to extend the statutory right of civil marriage to same-sex couples. Likewise, Measure 36 renders unenforceable the portion of the Revised Limited Judgment providing that, in the event the legislature does not cure the constitutional violation within the time permitted under the judgment, “the County will be required to issue marriage licenses to same-sex couples to avoid further violating Article I, section 20.”

2. It will *not* render moot any other “part or parts of this case” that are properly before this court for decision, including: (a) whether Oregon laws that deny same-sex couples the legal benefits incident to civil marriage violate Article I, section 20, and, if so, what remedy is appropriate; and (b) whether the trial court erred in requiring the State Registrar to register the marriage license-and-solemnization documents the County issued to same-sex couples before the entry of the trial court’s Opinion and Order on April 20, 2004.

3. Under current Oregon law, and without regard to the certification of the passage of Measure 36, whether marital status *per se* is a “privilege” under Article I, section 20, is an academic question and is not properly before this court for decision in this case.

DISCUSSION

I. Mootness, Ripeness, and Justiciability

The “judicial power” of Oregon courts is limited to deciding cases that are presently justiciable – *i.e.*, those cases that present “an existing controversy.” *Yancy v. Shatzer*, 337 Or 345, 362, 97 P3d 1161 (2004). A case is “ripe” if the controversy involves present facts and is *not* “based on future events of a hypothetical issue.” *McIntire v. Forbes*, 322 Or 426, 434, 909 P2d 846 (1996). A case is “moot” if a

judicial decision in the matter “would resolve merely an abstract question without practical effect.” *Warren v. Lane County*, 297 Or 290, 293, 686 P2d 316 (1984). *See also Brumnett v. PSRB*, 315 Or 402, 406, 848 P2d 1194 (1993).² In other words, a case becomes “moot” when it is no longer “ripe.” Logically, a case must be “ripe” before it can become “moot” as a result of subsequent events. And a case, or issue, that is not ripe, either because it is moot or for some other reason, presents an “abstract” question, and therefore is not “justiciable.”

II. The Issues Raised By the Parties in This Case

The parties have raised four separate challenges to the Revised Limited Judgment entered by the trial court in this case:

Marital status *per se*: The plaintiffs and the County contend that the status of civil marriage *per se* is a “privilege” within the meaning of Article I, section 20, of the Oregon Constitution and that the trial court erred in not treating it as such. (*See* Plaintiffs App Br 21-34 (First, Second, and Third Assignments of Error); County App Br 11-16 (First Assignment of Error)).

Application of Article I, section 20 to plaintiffs’ claims: DOMC contends that the trial court erred in holding that, under Article I, section 20, the statutory benefits of civil marriage must be extended to same-sex couples. (*See* DOMC App Br 14-46 (First Assignment of Error)).

² “Standing,” on the other hand, refers to the right of a particular person or entity to bring a case. *See Eckles v. State of Oregon*, 306 Or 380, 383, 760 P2d 846 (1988), *appeal dismissed*, 490 US 1032, 109 S Ct 1928, 104 L Ed 2d 400 (1989) (“To say that a plaintiff has ‘no standing’ is to say that the plaintiff has no right to have a tribunal decide a claim under the law defining the requested relief, regardless whether another plaintiff has any such right”).

The “remedy” question: Under the trial court’s judgment, the legislature has 90 days “after the commencement of the next regular session * * * to produce legislation that would balance the substantive rights of same-sex domestic partners with those of opposite-sex marri[ed] * * * couples or the County will be required to issue marriage licenses to same-sex couples to avoid further violating Article I, section 20.” (See ER-425). The plaintiffs and the County argue that, under *Hewitt v. SAIF*, 294 Or 33, 653 P2d 970 (1982), the trial court was required either to deny civil marriage and its attendant benefits to everyone, or to extend the statutory right of civil marriage to same-sex couples, and that the latter is the appropriate remedy here. (See Plaintiffs App Br 38-51 (Fourth, Fifth, and Sixth Assignments of Error); County App Br 16-18 (Second Assignment of Error)). On the other hand, DOMC argues that the trial court “erred in crafting a remedy that extends the benefits of marriage to same-sex couples.” (See DOMC App Br 60-65 (Second Assignment of Error)).

The “registration” requirement: The state and DOMC both challenge the portion of the trial court’s judgment granting plaintiffs’ request for a writ of mandamus requiring the State Registrar to register as vital records the marriage license-and-solemnization documents issued by the County to same-sex couples before April 20, 2004. (See State App Br 12-34 (Assignment of Error); DOMC App Br 66-76 (Third Assignment of Error)).

As the Attorney General stated in his opinion and as the state has stressed in its briefs filed previously in this case, only one constitutional question is properly before this court: Do Oregon laws that deny same-sex couples the legal benefits incident to

civil marriage violate Article I, section 20, and, if so, what remedy is authorized and appropriate?³ To decide whether Measure 36 renders moot that question, or any of the others raised by the parties' claims of error, this court must determine the intent and meaning of the measure.

III. What Ballot Measure 36 Means

When construing an initiated constitutional provision, this court's goal is to "discern the intent of the voters." *Shilo Inn v. Multnomah County*, 333 Or 101, 116, 36 P3d 954 (2001), *modified on recons*, 334 Or 11, 116, 45 P3d 107 (2002). *See also Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 57, 11 P3d 228 (2000) ("the people's understanding and intended meaning of the provision in question * * * are critical to [this court's] analysis"). The best evidence of that intent is the text of the provision. *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or 551, 559, 871 P2d 106 (1994). This court also considers the context of the provision, including other relevant constitutional provisions, case law from this court, and any relevant statutory framework in effect at the time when the people adopted the provision. *Flavorland Foods v. Washington County Assessor*, 334 Or 562, 569-75, 54 P3d 582 (2002). If the people's intent is clear after consideration of the text and context of the provision, then the court's inquiry is over. *Ecumenical Ministries*, 318 Or at 559. If "any doubt remains," however, this court "will consider the history of an initiated * * *

³ *See, e.g.*, Attorney General's Opinion, March 12, 2004, at 2 (describing the "issue" as denial of the "benefits and obligations" automatically available to opposite-sex couples who choose to marry); State App Br 36-37; State Resp Br 5-9; State Reply Br 1.

constitutional provision in an effort to resolve the matter.” *Shilo Inn*, 333 Or at 117 (citing *Ecumenical Ministries*, 318 Or at 559).

Measure 36, which was approved by the people on November 2, 2004, would add to the Oregon Constitution the following provision:

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.⁴

At the outset, the state observes that the measure’s opening words – “[i]t is the *policy* of Oregon, and its political subdivisions” – could be read as creating an ambiguity as to the operative effect of the measure. That is, it is at least arguable that the term “policy” raises the question whether Measure 36 constitutes an operative, enforceable statement of law, or instead, is only a statement of principle or general preference so that further action is required in order to establish an enforceable legal restriction on the definition of “marriage.” Of course, if Measure 36 has the latter effect, then it does not render moot *any* part of this case. However, even if so construed, the

⁴ The “Explanatory Statement” for Measure 36 contained in the Voters’ Pamphlet states:

Ballot Measure 36 amends the Oregon Constitution to declare that the policy of the State of Oregon and its political subdivisions is that “only a marriage between one man and one woman shall be valid or legally recognized as a marriage.”

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.

measure could have legal effect for another purpose. It would constitute a statement of state policy that could preclude Oregon from recognizing any out-of-state same-sex marriages under the general principles associated with the Full Faith and Credit Clause of the federal constitution.⁵

In the state's view, however, there is substantial reason to conclude that the text of Measure 36 constitutes an enforceable provision of law that does have bearing on the current litigation. The text certainly can be construed as an operative statement of law. The measure states that it is state policy that no marriages other than those between one man and one woman are valid or legally recognizable in Oregon. By its terms, the measure is not limited solely to out-of-state marriages, as it might have been were it intended to be only a statement of state policy for Full-Faith-and-Credit-Clause purposes. And, notwithstanding the use of the word "policy," it states directly, specifically and in mandatory terms that "*only* a marriage between one man and one woman *shall* be valid or legally recognized."⁶ (Emphasis added). A fair reading of

⁵ The Full Faith and Credit Clause, Article IV, section 1 of the U.S. Constitution provides:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

See generally, e.g., Schulz v. First Nat. Bank of Portland, 220 Or 350, 358, 348 P2d 22 (1959) (noting that rights valid in a sister state can be enforced in Oregon unless to do so would clearly be contrary to our stated public policy).

⁶ *Webster's Third New Int'l Dictionary* 1290, 1896, 2529-60 (unabridged ed 1993) defines "legal," "recognize," and "valid," in pertinent part, as follows:

legal * * * **2:** of or relating to law * * * **3a:** deriving authority from law: founded upon law: de jure * * * **b:** having a formal status derived from

the text of Measure 36 thus supports the conclusion that it was intended to and does have effect on marriages that occur in Oregon as well as those that occur out-of-state. Thus, it appears that the people of Oregon have declared that “marriage,” as a state-regulated institution in Oregon, shall be reserved for relationships between “one man and one woman.” And Measure 36 at least makes it clear that the State of Oregon and its political subdivisions are not required to—and, indeed, should not—grant civil marriage licenses to same-sex couples.

The context of Measure 36 supports that construction. The people are presumed to have known at least two things about the state of the law prior to the vote

or as if from law often without a basis in actual fact: **TITULAR** * * * **4:** conforming to or permitted by law or established rules (as of a game): according to the principles of law: conforming to the procedures and methods prescribed by law * * * **5:** recognized or made effective by a court of law as distinguished from a court of equity: existing or valid in law as distinguished from equity * * * **7a:** created by the constructions of the law * * * **b:** recognized as such by law * * * **8:** arising by operation of law as distinguished from that which arises by agreement or act of the parties[.]

* * * * *

recognize * * * **1 obs a:** to admit the fact, truth, or validity of **b:** REVERSE, CORRECT **2a:** to recall knowledge of : make out as or perceive to be something previously known * * * **b:** to perceive clearly : be fully aware of : **REALIZE** * * * **3:** to acknowledge formally: as **a:** to admit as being of a particular status * * * **d(1):** to acknowledge the de facto existence of (as a government in a state) **(2):** to acknowledge the independence of (as a community or body that has thrown off the sovereignty of a state to which it was subject) and treat as independent or otherwise effective **4:** to acknowledge in some definite way: take notice of * * * [.]

* * * * *

valid * * * **1a:** having legal strength or force : incapable of being rightfully overthrown or set aside : sanctioned or authorized by sovereign temporal or spiritual power * * * **b:** conforming to conditions essential to sacramental efficacy * * * **2a:** well grounded or justifiable: applicable to the matter at hand: **PERTINENT, SOUND** * * * [.]

on Measure 36: (1) Oregon statutes have limited access to civil marriage to one man and one woman since 1854; and (2) ORS chapter 106 still imposes that limitation. *See Martin v. City of Tigard*, 335 Or 444, 453, 72 P3d 619 (2003) (examining the context of an initiated provision and presuming that the people were aware of existing law). Given that context, there can be no doubt that the people intended to add to the Oregon Constitution the one-man-one-woman definition of “marriage” that has been recognized by Oregon statutes for the past 150 years. That context further suggests that the people intended to protect that historical limitation from legislative or judicially mandated changes.

The text and context of Measure 36 make equally clear what the people did *not* intend. The text shows that they did not decide whether the State of Oregon may or must withhold from same-sex couples the numerous statutory benefits associated with the status of civil marriage. Significantly, the measure does not *expressly* authorize or require the state to deny those benefits to same-sex couples. That silence indicates that the people meant to leave open the question whether the legislature may or should extend the benefits associated with marriage to same-sex couples.

This court “will not lightly conclude that the text [and context are] so clear that further inquiry is unnecessary” and it will consider the history of initiated constitutional provisions as long as “*any* doubt” about the meaning of the provision remains. *Shilo Inn*, 333 Or at 117 (emphasis added). Accordingly, the state does not end its inquiry without examining the history of Measure 36, which includes other sources of information that were available to the people, including the ballot title, the

explanatory statement, and arguments for and against the measure contained in the voters' pamphlet. *Ecumenical Ministries*, 318 Or at 559 n 8; *Shilo Inn*, 333 Or at 129-30. Like the text and context of the measure, its history demonstrates that the people did not intend to address whether same-sex couples are entitled to the benefits associated with marriage. Neither the ballot title summary nor the explanatory statement mentions whether Measure 36 addresses entitlement to the benefits associated with marriage. Rather, they both focus on access to and the validity of "marriage" itself. *See* Voters' Pamphlet at 77. Arguments in favor of Measure 36 likewise focus on preserving the traditional and historical definition of marriage.⁷

Thus, the text, context, and history of Measure 36 all indicate that the people intended to ensure that the State of Oregon will not grant "marriage" licenses to same-sex couples. But Measure 36 does not address whether the State of Oregon may or should deny same-sex couples access to the legal benefits automatically granted to opposite-sex couples who marry.

IV. The Effect of Measure 36 on This Case

In light of the foregoing, Measure 36 will affect this case as follows:

⁷ For example, the Voters' Pamphlet statement submitted by Michael White, Executive Director of the Defense of Marriage Coalition, includes the following argument in favor of Measure 36:

Vote YES on 36, Because Preserving Marriage Is Not Discrimination. Measure 36 does not prevent anyone from having a committed relationship and *does not hinder benefits*. It just preserves marriage as a unique relationship between a man and a woman, that's not discrimination.

Voters' Pamphlet at 84 (emphasis in italics added).

1. Measure 36 *will* moot plaintiffs' contention (also asserted by the County) that the only appropriate remedy for the constitutional violation found by the trial court is to extend the statutory right of civil marriage to same-sex couples. Likewise, Measure 36 renders unenforceable the portion of the trial court's Revised Limited Judgment providing that, in the event the legislature does not cure the constitutional violation found by the trial court within the time permitted under the judgment, "the County will be required to issue marriage licenses to same-sex couples to avoid further violating Article I, section 20."

2. DOMC's contention that the trial court erred when it declared that withholding the legal benefits incident to civil marriage violates Article I, section 20, will *not* be rendered moot. Measure 36 addresses only the status of civil marriage; it does not address the legal benefits that are tied currently to that status.

3. The state's contention (also asserted by DOMC) that the trial court erred in issuing a writ of mandamus compelling the State Registrar to register the marriage license-and-solemnization documents issued by the County before entry of the trial court's April 20, 2004, Opinion and Order will *not* be rendered moot. This court can and should reverse the trial court's decision on the registration issue on unconstitutional grounds, as fully explained in the state's opening brief on appeal. Measure 36 will provide a constitutional basis for reversing the trial court's ruling on the mandamus claim, but "this court ordinarily will not decide constitutional questions when an adequate unconstitutional basis for decision exists." *Crocker and Crocker*, 332 Or 42, 46, 22 P3d 759 (2001).

4. The claim by plaintiffs and the County that marital status *per se* is a “privilege” protected by Article I, section 20 (like DOMC’s contention that it is not) remains an academic question that is not properly before the court for decision in this case.

CONCLUSION

For the reasons discussed above, and in the state’s opening and answering briefs on the merits, this court should: (1) *affirm* the portion of the Revised Limited Judgment adjudicating plaintiffs’ First Claim for Relief and give the legislature a reasonable opportunity to craft any necessary remedial legislation during the 2005 regular session; and (2) *reverse* the portion of the Revised Limited Judgment granting plaintiffs’ request for a writ of mandamus requiring the State Registrar to register the marriage license-and-solemnization documents issued by the County to same-sex couples before April 20, 2004.

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original State Defendants'-Appellants,' Cross-Respondents' Opening Brief on Ballot Measure 36 to be filed with the State Court Administrator, Records Section, at 1163 State Street, Salem, Oregon 97301-2563, on November 17, 2004.

I further certify that I directed the State Defendants'-Appellants,' Cross-Respondents' Opening Brief on Ballot Measure 36 to be served upon: Lynn R. Nakamoto, attorney for cross-appellants, Kenneth J. Choe, attorney for cross-appellants, Agnes Sowle attorney for intervenor-plaintiff-respondent, cross-appellants, Multnomah County, Vance M. Croney, attorney for prospective intervenor-plaintiff-respondent Benton County, Kelly Clark, attorney for intervenors-defendants-appellants, cross-appellants, Defense of Marriage Coalition *et al* (DOMC), Herbert G. Grey, attorney for intervenors-defendants-appellants, cross-appellants DOMC, Benjamin W. Bull, attorney for intervenors-defendants-appellants, cross-appellants DOMC, Kelly E. Ford, attorney for intervenors-defendants-appellants, cross-appellants DOMC, Kevin Clarkson, attorney for intervenors-defendants-appellants, cross-appellants DOMC, Raymond M. Cihak, attorney for intervenors-defendants-appellants, cross-appellants DOMC, on November 17, 2004, by mailing two copies, with postage prepaid, in an envelope addressed to:

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