

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'
ANSWERING 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'
ANSWERING BRIEF ON BALLOT MEASURE 36**

SUMMARY OF THE STATE'S ARGUMENTS

The state responds, as follows, to the arguments raised by plaintiffs, the County, and DOMC in their opening briefs on Ballot Measure 36 (2004):

1. The trial court did *not* conclude that, under Article I, section 20, of the Oregon Constitution, marital status *per se* is a privilege that ORS chapter 106 impermissibly denies to same-sex couples. Instead, the trial court declared that granting to opposite-sex couples the legal benefits incident to civil marriage and, at the same time, denying access to all of those benefits to same-sex couples violates Article I, section 20. DOMC has appealed from the trial court's judgment and claims that "[t]he trial court erred in holding that the benefits of marriage must be extended to same-sex couples under Article I, section 20" and that "[t]he trial court erred in crafting a remedy that extends the benefits of marriage to same sex couples." Measure 36 does not address and therefore does not render moot the question 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.

2. Assuming for the sake of argument that the question whether marital status *per se* is a privilege under Article I, section 20 is justiciable in this case, the approval of Measure 36 moots that question as applied to plaintiff couples who were not married before April 20, 2004. As to plaintiff couples who were married before the trial court ordered the County to stop issuing same-sex marriage licenses, the issue is not presently justiciable in this case. After the effective date of Measure 36, their

marriages cannot be legally recognized by the State of Oregon or its political subdivisions. Whether those marriages were legally valid between April 20, 2004, and December 2, 2004, is not at issue in this case.

3. The parties appear to be in agreement that Measure 36 does not render moot the question whether the trial court erred in requiring 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.

4. The trial court properly concluded that the legislature should be given a reasonable opportunity to cure the Article I, section 20, violation the trial court found. The legislature is the appropriate branch of government to choose among the remedies available in light of Measure 36.

5. Without regard to the approval of Measure 36, the question whether Oregon's marriage laws violate the Fourteenth Amendment to the United States Constitution is not, and never has been, properly before this court for decision.

DISCUSSION

I. What Measure 36 Means

In its opening brief in response to this court's questions about Measure 36, the state explained its view of the proper construction of the measure, in relevant part, as follows:

- “[T]here 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.”
- “[N]otwithstanding the use of the word ‘policy,’ [the measure] states directly, specifically and in mandatory terms that ‘*only* a marriage

between one man and one woman *shall* be valid or legally recognized.”

- “A fair reading of the text of Measure 36 * * * 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.”
- “[Measure 36] declare[s] that ‘marriage,’ as a state-regulated institution in Oregon, shall be reserved for relationships between ‘one man and one woman’ [and] * * * 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 text and context of Measure 36 make equally clear what the people did *not* intend [— *i.e.*, —] 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.”

(State Measure 36 Opening Br 7-9).

Both DOMC and plaintiffs expressly agree that Measure 36 is an enforceable provision of law that affects this appeal, and the County appears at least to assume as much, if only for the sake of argument. (*See* DOMC Measure 36 Opening Br 1-2; Plaintiffs Measure 36 Opening Br 1, 22; County Measure 36 Opening Br 1-3). There is some disagreement among the parties, however, about the effect Measure 36 has on the issues presented in this case.

II. Measure 36 Does Not Moot the Question Whether Statutes Denying Same-Sex Couples the Legal Benefits of Civil Marriage Violate Article I, Section 20

All parties in this case have appealed from the trial court’s Revised Limited Judgment. In that judgment, the trial court did not conclude that marital status *per se* is a privilege under Article I, section 20, or that ORS chapter 106 impermissibly

denied that privilege to same-sex couples. Instead, the trial court declared that granting opposite-sex couples the legal benefits incident to civil marriage and, at the same time, denying all those benefits to same-sex couples violates Article I, section 20. (*See* ER-424, ER-425. *See also* State Resp Br 5-7).

In their opening briefs on the merits, plaintiffs and the County contend that the trial court erred in not treating the status of civil marriage *per se* as a “privilege” within the meaning of Article I, section 20, and they also challenge the remedy ordered by the trial court, arguing that the trial court was required either to deny civil marriage to everyone or to extend the right of civil marriage and its attendant benefits to everyone. (*See* State Measure 36 Opening Br 3-4). In its opening brief on Measure 36, DOMC asserts that,

[u]pon certification of Measure 36, BRO Plaintiffs’ and Multnomah County’s entire appeal must be dismissed, because their assignments of error are unredressable.

(DOMC Measure 36 Opening Br 1). The state disagrees. Although Measure 36 renders moot the argument of plaintiffs and the County that the only appropriate remedy for the constitutional violation found by the trial court is to extend the right of civil marriage to same-sex couples, it does *not* foreclose or render moot review of the trial court’s declaratory judgment or consideration of other remedies for the violation found by the trial court.

In their complaint, in addition to asserting that they must be afforded the right to marry, plaintiffs alleged that Article I, section 20 requires that same-sex couples be granted the statutory benefits that are afforded to opposite-sex married couples. (*See*,

e.g., ER-35, ER-36 (“The fact that the Oregon statutory code does not permit marriages of same-sex couples has the practical effect of directly and substantially harming all plaintiff couples in that it excludes them from marriage, the social validation that it confers, *and the hundreds of rights, responsibilities, benefits, and obligations that it affords.*”) (emphasis added)). In their prayer for relief on their first claim, plaintiffs sought a declaration “that the failure of the Oregon statutory code to permit marriages of same-sex couples violates Article I, section 20” and also requested “such other relief as the Court may deem just and proper.” (ER-41, ER-43). And, as discussed above, the trial court granted “such other relief.”¹ On appeal, plaintiffs continue to assert that the trial court erred in not ordering that all of the legal incidents of marriage be granted immediately to them.

In any event, DOMC also has appealed from the trial court’s judgment. In its brief on the merits, DOMC claims that “[t]he trial court erred in holding that the benefits of marriage must be extended to same sex couples under Article I, section 20” and that “[t]he trial court erred in crafting a remedy that extends the benefits of

¹ DOMC argues that

nothing this Court can say in relation to BRO Plaintiffs’ assignments of error will have any practical effect on BRO Plaintiffs. Once certified, Measure 36 quite simply prevents any action that would have any “practical effect” on the BRO Plaintiffs’ interests as pleaded. [Citation omitted.] Without the ability for this Court or the Legislature to [a]ffect BRO Plaintiffs’ tangible interests, *this case is moot.*

(DOMC Measure 36 Opening Br 5) (emphasis added). To the contrary, among the things this court still could do that “will have [a] ‘practical effect’ on the BRO Plaintiffs’ interests” is to affirm the portion of the trial court’s judgment that gives the legislature an opportunity to correct the constitutional violation the trial court found.

marriage to same sex couples.”² (*See* DOMC App Br 14, 60). Thus, even if DOMC were correct in asserting that plaintiffs’ and the County’s entire appeal must be dismissed because of the approval of Measure 36, the measure does *not* render moot the question raised in DOMC’s appeal as to 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.

III. After the Effective Date of Measure 36, the State of Oregon and Its Political Subdivisions Are Prohibited From Legally Recognizing or Treating as Valid the 3000 Same-Sex Marriages Licensed By the County

Assuming the question whether marital status *per se* is a privilege under Article I, section 20 is justiciable in this case,³ the approval of Measure 36 moots that question as applied to plaintiff couples who are not among those already married pursuant to marriage licenses issued to same-sex couples by the County before April 20, 2004. Plaintiffs agree with that assessment. (*See* Plaintiffs Measure 36

² Although DOMC argues that Measure 36 renders “this case * * * moot,” because it “prevents any action that would have any ‘practical effect’ on the BRO Plaintiffs’ interests as pleaded,” DOMC also contends, in effect, that “this case” is *not* moot:

The only live question remaining in this case revolves around the status of the approximately 3000 Multnomah County same sex marriage licenses already issued, the duty of the State Registrar to record these licenses, and the “suspect class” status of homosexuals under this Court’s precedent – *i.e.*, the State’s and DOMC Intervenor’s assignments of error in the underlying appeal.

(DOMC Measure 36 Opening Br 1-2, 5).

³ The state has argued consistently that it is *not*. (*See* State Resp Br 7-9; State Reply Br 1; State Measure 36 Opening Br 12.)

Opening Br 22 (Measure 36 “should be construed solely to preclude the issuance of additional marriage licenses to same-sex couples”)).

With respect to plaintiff couples who were married before April 20, 2004, plaintiffs argue that Measure 36 “does not void or impair their marriages, either retrospectively or prospectively.” (Plaintiff’s Measure 36 Opening Br 1). The County makes a similar argument. (County Measure 36 Opening Br 4-9). As the state understands plaintiffs’ position, Measure 36 would impair the existing same-sex marriages “retrospectively” if it were construed to reach back in time and render them void *ab initio*, and the measure would impair these marriages “prospectively” if it were construed to bar legal recognition of them after its effective date.

Plaintiffs’ assertion that Measure 36 does not affect the “prospective” validity of the 3000 existing same-sex marriages is based on a flawed analysis of the text of Measure 36. 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), and 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). Measure 36 will 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.

The “prospective” effect of the measure on the validity of the 3000 existing same-sex marriages turns on whether the term “marriage” includes a marriage licensed and

solemnized in Oregon before the measure's effective date. According to plaintiffs, two textual ambiguities prevent a "yes" answer to that question:

[I]t is unclear from the text and context of the amendment *whether the word "valid" is intended to render marriages "void" or "voidable" prospectively.* * * * The second ambiguity stems from the contextual considerations involving the words "policy" and "legally recognized." * * * Because a statement of policy that precludes recognition of a type of marriage is concerned with out-of-state marriages, it is unclear from the text and context of [Measure 36] *whether the words "policy" and "legally recognized" are intended to apply to the in-state marriages prospectively.*

(Plaintiffs Measure 36 Opening Br 18-19) (emphasis in italics added).

Plaintiffs' reasoning is flawed. First, the distinction that they draw between "void" and "voidable" marriages is immaterial to the question whether Measure 36 "prospectively" invalidates existing same-sex marriages. Second, "marriage," as the term is used in Measure 36, *cannot* have two meanings – one meaning being out-of-state marriages when the question is legal recognition, and a second meaning being in-state marriages when the question is validity. And, as the state explained in its opening brief, Measure 36 applies both to in-state and out-of-state marriages. (State Measure 36 Opening Br 8).

In the state's view, the text of Measure 36 resolves the question whether it applies to marriages licensed and solemnized in Oregon before its effective date. The measure provides, in relevant part, that "only a marriage between one man and one woman shall be valid or legally recognized as a marriage." Those terms on their face are broad enough to apply to pre-existing marriages. Such a marriage may be "valid or legally recognized" if it is "between one man and one woman," and it shall not be

“valid or legally recognized” if it is not. Furthermore, because the term “marriage” covers marriages entered into in other states and in Oregon, once Measure 36 goes into effect it prohibits the State of Oregon and its political subdivisions from recognizing as legal the 3000 same-sex marriages licensed by the County before April 20, 2004.

The state acknowledges that the foregoing analysis does not resolve the question whether Measure 36 is intended to render the existing same-sex marriages void *ab initio*, or “retrospectively,” as plaintiffs would say. The state also agrees that, except for the lack of express language stating such an intent, the measure’s text provides little help in answering that question.

That said, in the state’s view this court need not resolve the issue in this case for the following reasons. The state has not given any legal recognition to these marriages to date, other than registering the marriage license-and-solemnization documents as required by the trial court’s judgment. And the text of the measure makes clear that, after the Measure takes effect on December 2, 2004, neither the State of Oregon, nor its political subdivisions, may legally recognize the 3000 same-sex marriages.

As a result, the distinction between marriages that are merely voidable,⁴ and those that are void *ab initio*,⁵ is a distinction without any legal consequence in this case.⁶ As explained in the state's opening brief on Measure 36, the measure forbids the state and its subdivisions from recognizing any marriage between a man and a man or a woman and a woman, whenever and wherever that marriage was executed. The prospective effect of Measure 36 does not depend on whether the marriage was void *ab initio* or merely voidable, at least with respect to governmental action that would "recognize" the marriage by giving it any legal effect. After the effective date

⁴ ORS 106.030 states:

When either party to a marriage is incapable of making such contract or consenting thereto for want of legal age or sufficient understanding, or when the consent of either party is obtained by force or fraud, such marriage shall be void from the time it is so declared by judgment of a court having jurisdiction thereof.

⁵ ORS 106.020 states:

The following marriages are prohibited; and, if solemnized within this state, are absolutely void:

(1) When either party thereto had a wife or husband living at the time of such marriage.

(2) When the parties thereto are first cousins or any nearer of kin to each other, whether of the whole or half blood, whether by blood or adoption, computing by the rules of the civil law, except that when the parties are first cousins by adoption only, the marriage is not prohibited or void.

⁶ The distinction might be significant in litigation arising from a private contractual agreement -- such as an insurance policy -- under which one party to the contract seeks to enforce or resist enforcement of a term dependent upon the marital status of a same-sex couple holding a license issued before April 20, 2004 by Multnomah County. But that is not this case. And, in any litigation in which the state or a political subdivision were a party, Measure 36 would require the government-party to treat the marriage license as if it had never been issued by the county and as if the trial court never had ordered the Registrar to register the license.

of Measure 36, no same-sex marriage is legally recognizable in Oregon. And the combined effect of the state's refusal to give legal force to any same-sex marriages to date and the passage of Measure 36 is the same as if those marriages were determined to be void *ab initio*. In light of that combined effect, it makes no practical legal difference in this case and between these parties whether such marriages are "void" *ab initio* or merely "voidable," or whether, in the plaintiff's and county's parlance, the measure is to be given "retrospective" or merely "prospective" effect.

Finally, plaintiffs' assertion that Measure 36 must be construed to avoid a potential as-applied impairment-of-contracts claim is not properly before this court. Plaintiffs did not assert any contracts clause claims in the trial court proceeding. Consequently, no such claims have been developed in the record in this proceeding. In the context of this case, plaintiffs' as-applied impairment-of-contracts arguments are merely speculative and should be addressed only if raised appropriately in a separate lawsuit.

IV. The Registration Requirement

The parties appear to be in agreement that Measure 36 does not render moot the question whether the trial court erred in requiring 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. (*See* State Measure 36 Opening Br 4, 11; Plaintiffs Measure 36 Opening Br 3-4; DOMC Measure 36 Opening Br 8-10; County Measure 36 Opening Br 10).

V. Plaintiffs' Proposed Remedy in Light of Measure 36

In their opening briefs on the merits, plaintiffs asked this court to conclude that the trial court erred in failing to extend the right to marry to same-sex couples. (Plaintiffs App Br 39). Plaintiffs now ask this court to choose a remedy in light of Measure 36. (Plaintiffs Measure 36 Opening Br 23-25). Specifically, for unmarried same-sex couples, they ask this court to (1) declare that they are entitled to the benefits of marriage; (2) extend the benefits to them; and (3) order the legislature to create a civil union statute within 90 days of the order. For the 3,000 same-sex couples to whom Multnomah County already issued marriage licenses, plaintiffs ask this court to require the state to recognize their same-sex relationships retroactively under a civil union statute. (*Id.*).

For the reasons outlined in the state's briefs on the merits, the trial court properly concluded that the legislature should be given a reasonable opportunity to cure the Article I, section 20, violation the trial court found. The legislature is the most appropriate branch of government to choose in the first instance among the remedies available in light of Measure 36. *See Hughes v. State of Oregon*, 314 Or 1, 33 n 36, 838 P2d 1018 (1992).

VI. The Fourteenth Amendment

The County asserts that "an analysis of Oregon's marriage laws under the Fourteenth Amendment is not rendered moot by the passage of Measure 36." (County Measure 36 Opening Br 11). That misses the point. Plaintiffs in their answering brief on the merits confirmed that they make no claim under the Fourteenth Amendment to the United States Constitution. (*See* Plaintiffs Resp Br 44). Accordingly, without

regard to the approval of Measure 36, the question whether Oregon's marriage laws violate the Fourteenth Amendment is not, and never has been, properly before this court for decision.

CONCLUSION

For the reasons discussed above, and in the state's opening brief on Measure 36 and the state's 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' Answering 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 30, 2004.

I further certify that I directed the State Defendants'-Appellants,' Cross-Respondents' Answering 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 30, 2004, by mailing two copies, with postage prepaid, in an envelope addressed to:

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