

IN THE SUPREME COURT OF THE  
STATE OF OREGON

MARY LI and REBECCA KENNEDY; STEPHEN KNOX, M.D., and ) Multnomah County  
ERIC WARSHAW, M.D.; KELLY BURKE and DOLORES DOYLE; ) Circuit Court  
DONNA POTTER and PAMELA MOEN; DOMINICK VETRI and ) No. 0108 07915  
DOUGLAS DEWITT; SALLY SHEKLOW and ENID LEFTON; )  
IRENE FARRERA and NINA KORICAN; WALTER FRANKEL and )  
CURTIS KIEFER; JULIE WILLIAMS and COLEEN BELISLE; BASIC ) Supreme Court  
RIGHTS OREGON, an Oregon not-for-profit corporation; and ) No. S51612  
AMERICAN CIVIL LIBERTIES UNION OF OREGON, an Oregon not-  
for-profit corporation, )  
)  
)  
Plaintiffs-Respondents, Cross-Appellants, )  
and )  
)  
MULTNOMAH COUNTY, a political subdivision of the state of Oregon, )  
)  
)  
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, )  
and )  
)  
)  
DEFENSE OF MARRIAGE COALITION, an assumed business name of )  
OREGON FAMILY COUNCIL, an Oregon not-for-profit corporation; )  
CECIL MICHAEL THOMAS; NANCY JO THOMAS; DAN MATES; )  
and DICK JORDAN OSBORNE, )  
)  
)  
Intervenor-Defendants-Appellants, Cross-Respondents.

---

**INTERVENOR-DEFENDANTS-APPELLANTS, CROSS-RESPONDENTS**

**DEFENSE OF MARRIAGE COALITION, et al.'s**

**~~RESPONSE MEMORANDUM ON MOOTNESS AND MOTION TO DISMISS~~**

---

Appeal from the Judgment of the Circuit Court of the State of Oregon for the County of Multnomah  
entered June 24, 2002.

Honorable Frank L. Bearden, Circuit Court Judge

---

NOVEMBER 30, 2004

Kelly W.G. Clark, OSB #83172  
Kristian S. Roggendorf, OSB #01399  
O'DONNELL & CLARK LLP  
1706 NW Glisan Street, Suite 6  
Portland, Oregon 97209  
Telephone Number: 503.306.0224

Benjamin W. Bull, Arizona Bar #00940  
Jordan Lorence, Minnesota Bar #25210  
ALLIANCE DEFENSE FUND  
15333 N. Pima Road, Suite 165  
Scottsdale, AZ 85206  
Telephone Number: 480-444-0020

Herbert G Grey, OSB # 81025  
4800 SW Griffith Dr #320  
Beaverton OR 97005  
Telephone Number: 503-641-4908

Raymond M. Cihak, OSB # 94560  
Pamela S. Hediger, OSB #91309  
EVASHEVSKI ELLIOTT  
CIHAK & HEDIGER PC  
745 NW Van Buren St.  
P.O. Box 781  
Corvallis, OR 97339  
Telephone Number: 541-754-0303

Kelly E. Ford, OSB #87223  
KELLY E. FORD, P.C.  
4800 SW Griffith Dr #320  
Beaverton OR 97005  
Telephone Number: 503-641-3044

Kevin Clarkson, Alaska Bar #8511149  
BRENA BELL & CLARKSON  
310 K Street, Suite 601  
Anchorage, AK 99501  
Telephone Number: 907-258-2000

NOVEMBER 30, 2004

Lynn R. Nakamoto, Esq.  
MARKOWITZ HERBOLD, et al  
1211 SW 5th Avenue, Suite 3000  
Portland, OR 97204  
Telephone: 503-295-3085

Kenneth Choe, Esq.  
AMERICAN CIVIL LIBERTIES UNION  
125 Broad Street  
New York, NY 10004  
Telephone: 212-549-2553

Of Attorneys for Plaintiffs-Respondents,  
Cross-Appellants

Agnes Sowle, Esq.  
Jenny Morf, Esq.  
OFFICE OF THE MULTNOMAH COUNTY  
ATTORNEY  
501 SE Hawthorne Blvd., Suite 500  
Portland, OR 97214  
Telephone: 503-988-3138

Of Attorneys for Intervenor-Plaintiff-  
Respondent, Cross-Appellant

Hardy Myers, Esq.  
Mary Williams, Esq.  
Richard Wasserman, Esq.  
Michael Livingston, Esq.  
DEPARTMENT OF JUSTICE  
ATTORNEY GENERAL'S OFFICE  
1162 Court Street, NE  
Salem, OR 97301  
Telephone: 503-378-4402

Of Attorneys for Defendants-Appellants,  
Cross-Respondents

Barry Adamson, Esq.  
4248 SW Galewood  
PO Box 1172  
Lake Oswego, OR 97035  
Telephone: 503-699-9914

Of Attorney for *Amicus Curiae* Barry  
Adamson

Joseph Wetzel, Esq.  
WETZEL, DEFRANT & SANDOR  
838 SW First Avenue, Suite 300  
Portland, OR 97204  
503-220-0299

Paul Benjamin Linton, Esq.  
921 Keystone Avenue  
Northbrook, IL 60062-3614  
Telephone: 847-291-3848

Richard Wilkins, Esq.  
PROFESSOR OF LAW  
513 JRCB  
Brigham Young University  
Provo, UT 84602  
Telephone: 801-422-2669

Of Attorneys for *Amicus Curiae* United  
Families International

Randall J. Wolfe, Esq.  
ATTORNEY AT LAW  
4500 Kruse Way, Suite 270  
Lake Oswego, OR 97035  
Telephone: 503-675-5100

Vincent P. McCarthy, Esq.  
Kristina Wenberg, Esq.  
AMERICAN CENTER FOR LAW & JUSTICE  
PO Box 1629  
8 South Main Street  
New Milford, CT 06776  
Telephone: 860-355-1902

NOVEMBER 30, 2004

John Tuskey, Esq.  
Shannon Woodruff, Esq.  
Laura Hernandez, Esq.  
AMERICAN CENTER FOR LAW & JUSTICE  
PO Box 64429  
Virginia Beach, VA 23467  
Telephone: 757-226-2486

Of Attorneys for *Amicus Curiae* American  
Center for Law and Justice

Mark Johnson, Esq.  
JOHNSON RENSHAW & LECHMAN-SU PC  
420 Weatherly Building  
516 SE Morrison St.  
Portland, OR 97214  
Telephone: 503-224-1640

Leslie Harris, Esq.  
Michael Moffitt, Esq.  
UNIVERSITY OF OREGON SCHOOL OF LAW  
Eugene, OR 97403-1221  
Telephone: 541-346-3852

Susan Murray, Esq.  
Beth Robinson, Esq.  
LANGROCK, SPERRY & WOOL, LLP  
210 College St.  
PO Box 721  
Burlington, VT 05402  
Telephone: 802-864-0217

Of Attorneys for *Amicus Curiae* Vermont  
Freedom to Marry Task Force, et al

Chin See Ming, Esq.  
PERKINS COIE LLP  
1120 NW Couch Street, 10th Floor  
Portland, OR 97209-4128  
Telephone: 503-727-2000

Les Swanson, Esq.  
900 SW 83rd Avenue  
Portland, OR 97225  
Telephone: 503-725-9705

Of Attorneys for *Amicus Curiae* Paula  
Abrams, et al

Daniel Hill, Esq.  
ADAMS DAY HILL  
339 Washington St. SE  
Salem, OR 97302  
Telephone: 503-399-2667

Dwight Duncan, Esq.  
333 Faunce Corner Rd.  
North Dartmouth, MA 02747  
Telephone: 508-998-9600

Of Attorneys for *Amicus Curiae* Alliance for  
Marriage

James Westwood, Esq.  
STOEL RIVES LLP  
900 SW Fifth Avenue, Suite 2600  
Portland, OR 97204  
Telephone: 503-294-9187

Pamela Harris, Esq.  
Toby Heytens, Esq.  
Karl Michael Remon Thompson, Esq.  
O'MELVENY & MYERS, LLP  
1625 Eye Street, NW  
Washington, DC 20006-4001  
Telephone: 202-383-5386

Of Attorneys for *Amicus Curiae* American  
Friends Service Committee, et al

Melanie Mansell, Esq.  
ATTORNEY AT LAW  
317 Court Street, NE Suite 203  
Salem, OR 97301  
Telephone: 503-589-1001

David Langdon, Esq.  
Jeffrey Shafer, Esq.  
LAW & LIBERTY INSTITUTE  
11175 Reading Road, Suite 103  
Cincinnati, OH 45241  
Telephone: 513-733-1038

Of Attorneys for *Amicus Curiae* Family  
Research Council

John Fagan, Esq.  
PACNW ELDER LAW OFFICE, LLC  
1210 Dry Hollow Rd., #6  
The Dalles, OR 97058  
Telephone: 541-296-1123

Joshua Baker, Esq.  
Institute for Marriage and Public Policy  
1413 K St. NW, Suite 1000  
Washington, DC 20005  
Telephone: 202-216-9430

Of Attorneys for *Amicus Curiae* Stronger  
Families for Oregon

Edward Reeves, Esq.  
STOEL RIVES LLP  
900 SW Fifth Avenue, Suite 2600  
Portland, OR 97204  
Telephone: 503-224-3380

Of Attorneys for *Amicus Curiae* Juvenile  
Rights Project, et al

Charlie Hinkle, Esq.  
STOEL RIVES LLP  
900 SW Fifth Avenue, Suite 2600  
Portland, OR 97204  
Telephone: 503-224-3380

Of Attorneys for *Amicus Curiae* Civil Rights  
and Historians

James Leuenberger, Esq.  
JAMES LEUENBERGER PC  
4800 SW Meadows Rd., Suite 300  
Lake Oswego, OR 97035  
Telephone: 503-542-7433

Mathew D. Staver, Esq.  
LIBERTY COUNSEL  
210 East Palmetto Avenue  
Longwood, FL 32750  
Telephone: 407-875-2100

Of Attorneys for *Amicus Curiae* Liberty  
Counsel

Maureen Leonard, Esq.  
ATTORNEY AT LAW  
520 SW Sixth Avenue, Suite 920  
Portland, OR 97204  
Telephone: 503-224-0212

Ellen Taussig Conaty, Esq.  
1515 SW Fifth Avenue, Suite 808  
Portland, OR 97201  
Telephone: 503-417-1117

Hon. Betty Roberts, Esq.  
2309 SW First Avenue, Suite 842  
Portland, OR 97201  
Telephone: 503-221-9929

Of Attorneys for *Amicus Curiae* Womens'  
Organizations and OTLA

Beth Allen, Esq.  
LANE POWELL SPEARS LUBERSKY LLP  
601 SW Second Avenue, Suite 2100  
Portland, OR 97204  
Telephone: 503-778-2100

Of Attorneys for *Amicus Curiae* Oregon  
Gay and Lesbian Law Association, et al

Donna Meyer, Esq.  
FITZWATER & MEYER LLP  
Three Town Center, Suite 140  
10121 SE Sunnyside Road  
Clackamas, OR 97015  
Telephone: 503-786-8191

Paul M. Smith, Esq.  
William Hohengarten, Esq.  
JENNER & BLOCK LLP  
601 Thirteenth Street, NW  
Washington, DC 20005

Nathalie Gilfoyle, Esq.  
AMERICAN PSYCHOLOGICAL ASSOCIATION  
750 First Street, NE  
Washington, DC 20002  
Telephone: 202-336-6100

Of Attorneys for *Amicus Curiae* American  
Psychological Association

John Paul Graff, Esq.  
Katherine O'Neil, Esq.  
GRAFF & O'NEIL  
Attorneys at Law  
2121 SW Broadway, Suite 100  
Portland, OR 97201  
Telephone: 503-295-3085

Ruth Borenstein, Esq.  
Sylvia Sokol, Esq.  
MORRISON & FOERSTER LLP  
425 Market Street  
San Francisco, CA 94105  
Telephone: 415-268-7000

Of Attorneys for *Amicus Curiae* Drs.  
Colman, Meyer and Sebastian

## I. INTRODUCTION

This Court can cut to the chase in this post-Measure 36 case by turning to footnote 4 of Plaintiff’s opening brief on mootness. There, in a flicker of raw candor, Plaintiffs recognize that in order to reach the issue of marriage benefits for same sex couples, either “plaintiffs’ complaint should be considered amended. . . . or, alternatively, plaintiffs respectfully seek leave to amend their complaint [on this appeal] in the interests of judicial economy.” *Plaintiffs Opening Brief on Mootness* at 15 n4. A radically amended complaint is in fact what this Court would itself have to create to reach Plaintiffs’ newly requested relief. With this, Plaintiffs themselves implicitly acknowledge that, as is, their initial case is no longer justiciable, and their existing complaint and assignments of error do not ask for the relief they now seek.

The Plaintiffs holding marriage licenses have no separate standing to argue any part of this appeal until the original validity of their licenses is determined as a preliminary matter. If their licenses are void from the outset, as DOMC Intervenors have argued, they are in the same position as the unmarried plaintiffs. The State and DOMC Intervenors have argued on this appeal that the same sex marriage licenses are void *ab initio* on sub-constitutional grounds for a failure to comply with ORS Chapter 106 in issuing the licenses. DOMC Intervenors have further argued that Article VI, Section 10 of the Oregon Constitution prevented the County from issuing such licenses in the first instance, and no party has refuted that argument. If the same sex marriage licenses Multnomah County issued were void *ab initio*, and Measure 36 is certified, neither set of Plaintiffs can obtain the relief sought in the complaint.<sup>1</sup>

---

<sup>1</sup> The organizational Plaintiffs, BRO and the ACLU, similarly do not have standing under Oregon law, *as plaintiffs themselves*, to seek the relief requested. Nor—to their credit—have they attempted to argue that they as organizations have independent standing to advance the

Furthermore, as the Alaska Supreme Court recognized in a nearly identical case, *Brause v. Alaska Dept. of Health & Social Services*, 21 P3d 357 (Alaska 2001), Plaintiffs’s entire appeal must be dismissed because Ballot Measure 36 (2004) (hereinafter “Measure 36”) has mooted their specific assignments of error. Assignments of error can themselves be rendered moot when their underlying analytical foundation is foreclosed. See *Pacific Power & Light Co. v. Department of Revenue*, 308 Or 49, 59 n5, 775 P2d 303 (1989) court’s declining of analytical option “moots . . . assignments of error” dependent on that analysis). Indeed, the only matters before this Court on behalf of Plaintiffs (and Multnomah County) are their assignments of error. Irrespective of whether or not Plaintiffs’ *claims* are rendered completely moot in relation to the underlying action, their *appeal* certainly is. Because Measure 36 would foreclose the sole analytical option advanced by Plaintiffs on appeal, their appeal is unquestionably moot.

Finally, Plaintiffs’ eleventh hour attempt to change their election of remedy fails to save their appeal from mootness. On the record in this case, there is simply no live controversy before this Court over the granting of marriage benefits. Notwithstanding the stunning new prayer contained at the end of Plaintiffs’ Opening Brief on Mootness—asking this Court to start issuing orders to separate and co-equal branches of government—the Plaintiffs have never requested a civil union remedy and cannot do so for the first time on appeal in supplemental briefing. See *Plaintiffs’ Opening Brief on Mootness* at 23–26. While Plaintiffs at the trial court level might amend their complaint, or do so on remand, or even file a new action for specific benefits attendant to marriage, such contingencies are not presented in this appeal, and this Court should not actively help create newly requested relief on speculative claims. And because Plaintiffs did not pray for the civil union

---

Plaintiffs’ assignments of error.

remedy at any point—and *still* offer no pleading, no analysis, and no briefing as to how the constitutional guarantee of equality in Article I, Section 20 might apply to each of the “over 500 rights, responsibilities, benefits, and obligations” attached to marriage, or even categories of benefits—there is no logical basis on which this Court can fashion a remedy.<sup>2</sup> See ER-13, *Plaintiffs’ Amended Complaint* at 4 (alluding to number of benefits attached to marriage).

Simply put, the case first brought by Plaintiffs—and argued in three previous briefs to this Court—is no more. The case that Plaintiffs now want to bring—through an undefined amended complaint, requested in a footnote, without any suggestion of what that amended complaint might look like, what benefits it attacks as unconstitutional, or what analysis would apply to each benefit or category of benefit—is unprecedented and unworkable.

## II. RESPONSE

The arguments against mootness advanced by Plaintiffs fail in four ways. First, the only assignments of error on appeal from Plaintiffs to this Court are whether marriage is a privilege or immunity, and whether the proper remedy for an Article I, Section 20 violation is to extend *marriage*—not the unspecified benefits of marriage alone—to same sex couples. Because these assignments of error are foreclosed by the certification of Measure 36, the Plaintiffs’ appeal is entirely moot.

Second, the validity of the licenses already issued must be addressed as a preliminary matter. If the same sex marriage licenses issued by Multnomah County are void from the outset—under ORS Chapter 106 as the State and DOMC Intervenors argue or Article VI, Section

---

<sup>2</sup> See Section II.D., *infra*, 11–12.

10 as DOMC Intervenors argue—then all of the individual Plaintiffs are in the same boat; they are constitutionally precluded from marriage under any circumstances as a result of Measure 36.

Third, Plaintiffs cannot instantly slam it into reverse at 140 m.p.h. and change their choice of remedy on appeal, after the main briefing has ended. The absolute inability of this Court or any trial court, in light of Measure 36, to provide the specific relief requested in the First Amended Complaint deprives this Court of an active case and controversy.

Finally, the shotgun relief requested by Plaintiffs—one shell with over 500 shot, each of the 500 apparently directed to its proper target *by this Court*—is analytically unsound in that Plaintiffs offer no pleading, analysis, or structure by which to judge the constitutionality of various types of benefits attached to marriage. Similarly, the massive separation of powers problems inherent in the new prayer offered by Plaintiffs underscore the staggering difficulties posed by altering the fundamental nature of a case at this late date in the litigation.

**A. PLAINTIFFS ASSIGNMENTS OF ERROR ARE LOGICALLY FORECLOSED; THEIR APPEAL IS MOOT**

All parties are apparently in agreement that Measure 36, upon certification, will prevent any branch of State government from allowing or ordering same sex couples to marry. Because the alleged right to marry is the sole basis for Plaintiffs’ complaint, trial court briefing, assignments of error, and Supreme Court briefing, and because that option has been completely foreclosed by Measure 36, Plaintiffs’ appeal is moot.

Plaintiffs opening brief on appeal stated, “[the trial court] failed to extend *the right to marry* to same sex couples. This was error.” *Plaintiffs Opening Brief* at 1 (emphasis added). They set out three assignments of error each to two rulings of the trial court. The Plaintiffs’ first,

second, and third assignments of error claimed that it was error for the trial court not to extend the institution of marriage itself to same sex couples. *Id.* at 21–22.<sup>3</sup> Plaintiffs argued that “***the right to marry*** constitutes a “privilege” under Article I, Section 20.” *Id.* at 22 (emphasis added). Their fourth, fifth, and sixth assignments of error complained of the trial court’s deferring to the Legislature the option of creating a remedy for what the trial court found to be a constitutional infirmity in the distribution of the legal benefits of marriage. *Id.* at 38–39.<sup>4</sup> Plaintiffs argued that “[t]he ***only*** permissible and appropriate way to remedy the Article I, Section 20 violation at issue is to allow same-sex and different-sex couples to ***marry on the same terms.***” *Id.* at 39 (emphasis added). These, and only these, two general arguments comprise the entirety of Plaintiffs’ original case and appeal.

Normally, assignments or cross-assignments of error are rendered moot by an adverse decision by the appellate court. *See Meskimen v. Larry Angell Salvage Co.*, 286 Or 87, 96–97, 592 P.2d 1014 (1979) (“the first and fifth assignments [of error] have been rendered moot by our disposition of defendant’s appeal”). As noted in the Introduction, *supra*, an assignment of error can also be mooted when a necessary logical component of the assignment is rejected or otherwise foreclosed. *Pacific Power & Light Co. v. Department of Revenue*, 308 Or at 59 n5 (court’s

---

<sup>3</sup> Multnomah County assigned error on this issue in the form of its “First Question on Review,” answered with a “Proposed Rule of Law” that states “[t]he ***right to enter marriage, as distinct from the benefits that may flow from marriage***, is a privilege in and of itself that is protected by Article I, Section 20[.]” *Multnomah County Opening Brief* at 1 (emphasis added).

<sup>4</sup> Multnomah County assigned error on this issue in the form of its “Second Question on Review,” answered with a “Proposed Rule of Law” that states (presumptuously) “the rights and privileges ***created by ORS Chapter 106*** shall be extended to include same sex couples.” *Multnomah County Opening Brief* at 1 (emphasis added). The County explicitly limited its requested relief to only the marriage statutes, not any statutes that confer a benefit on married people.

declining of analytical option “moots . . . assignments of error” dependent on that analysis).

All parties agree—explicitly or implicitly—that same sex or homosexual couples have no prospective right to marry following the certification of Measure 36. The Plaintiffs’ assignments of error are based on “the right to marry,” and “marr[iage] on the same terms.” With Measure 36, these conceptual foundations become a legal impossibility. These assignments of error are quite plainly moot.<sup>5</sup>

**B. THOSE PLAINTIFFS WHO RECEIVED SAME SEX MARRIAGE LICENSES MUST DEMONSTRATE THE VALIDITY OF THOSE LICENSES BEFORE THEY CAN MAKE ARGUMENTS BASED ON THEM.**

Individual Plaintiffs who have received same sex marriage licenses from Multnomah County argue that they have standing to advance the assignments of error on appeal. This is incorrect for alternate reasons. In the first instance, the validity of those licenses must be determined apart from Article I, Section 20 based on the State’s and DOMC Intervenors’ challenges—that is, those Plaintiffs cannot begin to argue that Article I, Section 20 validates their licenses if Multnomah County had no authority to issue them in the first place. Thus this Court must resolve the State’s

---

<sup>5</sup> Interestingly, Plaintiffs discuss their second (declaratory judgment relief for registration of licenses) and third (APA review) claims for relief below as if these claims were at issue on appeal. *Plaintiffs’ Opening Brief on Mootness* at 3. Leaving aside the disputed nature of the trial court’s ruling on Plaintiffs’ fourth claim for relief (mandamus) there has been absolutely no argument up to this point that any of the other claims for relief were part of the trial court’s ruling or part of this appeal. In fact, Plaintiffs’ additional claims for relief have no bearing whatsoever on the justiciability of their current appeal. Indeed, the only reason the case was put on the fast track (and the primary reason the record is incomplete) was so this Court could quickly decide the very issue that all parties now agree is moot—the Plaintiffs’ first claim for relief, whether marriage itself must be offered to same sex couples. Therefore, if Plaintiffs now want some relief from this Court other than what they originally asked for, it should not be done in this accelerated appeal, but should be done as a result of a properly framed case in the trial court and Court of Appeals. Purported judicial economy is no excuse for ignoring the (constitutional) rules of justiciability.

sole assignment of error and DOMC Intervenors' third assignment of error prior to addressing whether they have an Article I, Section 20 challenge. If the licenses of the Plaintiffs with marriage certificates are void from the outset, they are in precisely the same spot as those Plaintiffs who never obtained same sex marriage licenses, and their assignments of error are moot because all Plaintiffs assigned error only on the basis of the "right to marry."<sup>6</sup> *See* Section II.A, *supra*.

Alternatively, if these Plaintiffs are in fact legally married, they lack standing to argue about a civil union remedy because granting civil unions to same sex couples does not have a practical effect on the rights of same sex couples who are already married. *See Barcik v. Kubiaczyk*, 321 Or 174, 182, 895 P.2d 765 (1995) (case must have practical effect on rights of parties to remain justiciable). Nothing in the Record below demonstrates any tangible interest of the "married Plaintiffs" in extending only the benefits of marriage, exclusive of the institution itself, to all same sex couples.

**C. PLAINTIFFS ELECTED MARRIAGE ITSELF AS THEIR SOLE REMEDY BELOW, AND THEY ARE PRECLUDED FROM REQUESTING FOR THE FIRST TIME ON APPEAL THE BENEFITS ATTENDANT TO MARRIAGE.**

Plaintiffs' attempt to salvage their appeal from mootness by amending their prayer in a footnote before this Court is procedurally improper. Plaintiffs have become wholly untethered from their original pleading, and are futilely grasping at thin and brittle straws to preserve it. Up to this point, Plaintiffs and *amici* friendly to Plaintiffs have dismissed and rejected civil unions and similar

---

<sup>6</sup> Additionally, those Plaintiffs with marriage licenses lack standing to argue about the effects of Measure 36 on those licenses in this litigation. This Court's only question was whether any portion of the appeal was moot. While DOMC Intervenors fully agree that Measure 36 does not foreclose civil unions, the question whether Measure 36 voids or renders same sex marriage licenses "unrecognizable" is not before this Court, on this record, in this appeal.

solutions as “inherently ‘separate and unequal,’” “impermissible segregation,” “anathema in constitutional jurisprudence,” and “always unconstitutionally stigmatizing.” *See Plaintiffs’ Reply* at 5, 10; *Plaintiffs’ Opening* at 47.<sup>7</sup> Now, Plaintiffs rush to ask to amend their complaint in a footnote to seek the remedy that they have expressly refused to seek from the beginning.<sup>8</sup> Indeed, Plaintiffs have never asked for the remedy of marriage benefits alone, never accepted the possibility of the remedy of marriage benefits alone, and most importantly have not presented a case or analysis in which this Court could even *begin* to award such benefits.

Plaintiffs’ choice of marriage as their sole remedy up to now prevents them from changing their sought-for remedy on appeal. As the Oregon Court of Appeals aptly summarized in *Emmert Indus. Corp. v. Sanders*, 131 Or App. 113, 883 P.2d 1304 (1994):

**“When a case is tried on a certain theory, a different theory cannot be pursued on appeal. *Millers Mut. Fire Ins. Co. v. Wildish Const. Co.*, 306 Or 102, 107, 758 P2d 836 (1988). In determining whether a theory has been presented, courts look to the pleadings, the prayer and the arguments at trial. *Friesen v. Fuiten*, 257 Or. 221, 231, 478 P.2d 372 (1970). Nonetheless, plaintiff did not plead a claim for foreclosure of a contractual lien, and made no argument to the trial court on that ground. Plaintiff contends that its failure to pursue the remedy at trial does not preclude it from raising ‘this consistent remedy on appeal.’**

“Plaintiff’s effort to frame its position as an ‘alternative remedy’ does not change the fact that it did not assert a claim for foreclosure of a contractual lien or pray for that remedy. ***Plaintiff is asking us to reverse a judgment on the basis of a theory***

---

<sup>7</sup> Although DOMC Intervenors disagree with Plaintiffs’ analysis, Plaintiffs strenuously argue that civil unions are even unconstitutional under federal law. *Plaintiffs Reply* at 10 n6. In light of these arguments, Plaintiffs’ rush to the civil union remedy can be charitably characterized as opportunistic at best.

<sup>8</sup> Plaintiffs not only ask this Court to disregard their voluminous prior briefing on the inappropriateness of civil unions, but they have taken diametrically opposite and mutually exclusive legal positions in the same litigation, and even in the briefing before this very Court. Either civil unions are unconstitutional or they are not. The lack of full marriage as a remedy does nothing to alter the constitutional nature of civil unions, and the disingenuousness of Plaintiffs’ new position borders on the reckless or frivolous.

***argued for the first time on appeal. We will not address the argument.”***

*Emmert Indus. Corp. v. Sanders*, 131 Or App at 116–117 (emphasis added). Under this Court’s precedent in *Millers* and *Friesen*, and looking to the pleadings, prayer and arguments below (as well as before this Court), civil unions have never been desired, sought, or justified by Plaintiffs until November 17, 2004—in fact, Plaintiffs have been completely hostile to civil unions until now. *Millers* absolutely prevents them from changing their prayer before this Court.

Plaintiffs here are in precisely the same position as the unsuccessful plaintiffs in *Brause v. Alaska Dept. of Health & Social Services*, 21 P3d 357 (Alaska 2001). In *Brause*, the plaintiffs were a same sex couple who alleged the state’s refusal to grant them a marriage license violated the Alaska Constitution. Just as has occurred here in Oregon, while their suit was pending, the voters of Alaska enacted a constitutional amendment limiting marriage to one man and one woman, thereby mooted those counts of their complaint. *Id.* at 358.

However, unlike plaintiffs here, the *Brause* plaintiffs had alleged an additional count, brought under Alaska's declaratory judgment authority, seeking a ruling that another Alaska statute (which has no Oregon counterpart)—forbidding that state to grant same sex couples the benefits of marriage—violated the federal and Alaska constitutions. *Id.* The court observed, however, that the plaintiffs “[did] not allege that [they] have been denied any specific benefits.” *Id.* at 358. In the face of the plaintiffs' argument on appeal that they were being denied the benefit of “at least 115 separate rights which are afforded to people who are able to marry,” *id.* at 360, the court reasoned the case presented a “level of abstraction” with which it was not prepared to deal. *Id.* The Alaska court concluded that, “without more immediate facts it will be difficult to deal intelligently with the legal issues presented.” *Id.* Accordingly, it affirmed the trial court's dismissal for lack of standing,

finding the plaintiffs had failed to demonstrate a sufficient need for immediate decision, in the absence of specific allegations they were suffering present harm. *Id.*

Indeed, from a practical standpoint, Plaintiffs here do not present a live case or controversy with respect to the benefits attached to marriage because they have not sought these benefits independently, and they have not established on the record below any interest in the benefits of marriage independent of the institution itself. For instance, the benefits-related interests that individual Plaintiffs alleged are as follows:

- *Li and Kennedy.* These plaintiffs allege that they are worried about *future* developments in their lives based on their lack of married status. In fact, they allege Kennedy and their child currently receive domestic partner health benefits through Li's employer. *Amended Complaint* ¶ 14.
- *Burke and Doyle.* Paragraph 23 of the amended complaint alleges Doyle's employer offers spousal health care coverage at no additional charge, but does not allege that the employer is a government agency. As a private company, any decision it makes to offer domestic partner benefits on the same basis as marital benefits would be purely voluntary (absent a statute requiring insurance companies to offer benefits on an equal basis—a law that does not now exist), even if this Court was to decide Article I, section 20 requires public employers to offer such benefits on an equal basis to domestic partners.<sup>9</sup>
- *Potter and Moen.* These plaintiffs, both Portland police officers, allege a theoretical financial harm that *might* occur to one of them should the other be killed in the line of duty. *Amended Complaint* ¶ 31. Since that has not occurred, they make no claim to a current denial of benefits.
- *Knox and Warshaw.* This couple alleges no tangible deprivations of any type. The closest their allegations come to alleging loss of any benefits is "they and their children lack the legal protections that come with marriage." *Amended Complaint* ¶ 39. These allegations lack the kind of present tangible harm necessary to have standing to pursue a claim even for domestic partner benefits.
- *Vetri and DeWitt.* This couple alleges DeWitt is currently eligible for group health benefits as Vetri's partner, but that they *may* suffer harm when Vetri retires, in that DeWitt may not then

---

<sup>9</sup> Even the broad holding of *Tanner v. OHSU*, 157 Or App 502, 971 P2d 435 (1998), only extended to government employers.

- be eligible to continue participation in the PERS group health insurance plan. *Amended Complaint* ¶ 44. This alleged future harm *may* or *may not* come to pass (depending on such variables as whether DeWitt survives Vetri, whether they are then still a couple, and whether the plan actually denies DeWitt benefits at that time). Litigation cannot be based on such speculation. Certainly their allegations lack any complaint of tangible present harm.
- *Sheldow & Lefton*. Like the complaint of Burke and Doyle, this couple complains of lack of spousal coverage through Lefton’s employer’s health insurance plan, but they do not allege the employer is a governmental unit. *Amended Complaint* ¶ 50. They also complain about the *future* loss of spousal retirement and social security benefits, *Amended Complaint* ¶ 51, but again, the failure to allege a current loss of retirement benefits payable by an Oregon governmental unit dooms those allegations from supporting standing to argue a right to a civil union. *Amended Complaint* ¶¶ 58, 59, 61.
  - *Farrera and Korican*. According to plaintiffs’ counsel Lynn Nakamoto, this couple terminated their relationship and so have no further standing in the case. *See Letter to this Court Administrator dated September 30, 2004* at 2. Moreover, their complaint alleges nothing more specific than their generalized anxiety about their future.
  - *Frankel and Kiefer*. This couple complains of the *possible* loss of future survivorship benefits, and a variety of other *possible* problems they might encounter in the future, if denied marriage status. *Amended Complaint*, ¶¶ 69, 70. Some of their allegations relate to benefits controlled by federal law, which this court would be unable to address in any event, in light of the federal Defense of Marriage Act and 1 U.S.C. § 7.
  - *Williams and Belisle*. This couple alleges the lack of uncertain emotional benefits they would enjoy if married (“if they were married, they would have a greater sense of security, safety, and equality.”) *Amended Complaint*, ¶ 77. There is nothing in their complaint concerning tangible benefits of marriage or an equivalent civil union status.

Thus, apart from the fact Plaintiffs are now arguing contrary to a position they have taken throughout this litigation, they can never get to the point of arguing alternative remedies because they have no actual case or controversy before this court on the benefits of marriage. Also, because there is no record demonstrating any attempt by any plaintiff to obtain any of the benefits of marriage other than by “marriage” itself (*e.g.*, by applying for a civil union license, claiming rights under intestate succession for death of partner, a *Tanner* scenario involving employment rights),

there is no ripe claim for anything except marriage.<sup>10</sup> Without satisfying the basic “case or controversy” element of justiciability, this Court is without jurisdiction to give Plaintiffs what they now request.

**D. PLAINTIFFS REQUESTED RELIEF IS AT BEST UNCERTAIN IN SCOPE AND EFFECT, AND ANALYTICALLY UNDEFINED.**

Plaintiffs in their footnote do not discuss which specific statutory and common law benefits are subject to their reading of Article I, Section 20 in light of Measure 36. Without a logical structure for evaluating the myriad benefits attached to marriage—*e.g.* an amended complaint—there is no way for this Court to determine which benefits must be constitutionally extended to same sex couples and which benefits are simply rational legislative choices, not constitutionally suspect. Indeed, Plaintiffs just claim the general proposition of a constitutional right to “marriage benefits” for same sex couples—without an amended complaint, a proposed rule of law, or any other means by which this Court could determine what it is exactly that Plaintiffs are asking for.

Several examples illustrate the utter unmanageability of Plaintiffs’ footnote reference to amending their complaint. Some benefits, consequences, or obligations of marriage might be logically sound targets of an amended complaint. One can imagine, for example, a straightforward Article I, Section 20 challenge to intestate succession as provided in ORS 112.015–112.115, although there are arguments supporting the constitutionality of that statute as written as well.

---

<sup>10</sup> Remedies law may well ultimately bar these specific Plaintiffs’ later litigation. *Ladd v. General Insurance*, 236 Or at 264-265 (“The pleader is barred, however, only in cases where initially there were two efficacious remedies.”). However, this bar will not effect other similarly situated potential plaintiffs.

However, the analysis used to attack intestate succession would be unsuitable to say the least in an attack on the conclusive presumption of paternity of a child born in wedlock found in ORS 109.070(1)(a) (presumes paternity of cohabiting husband when wife becomes pregnant, even in void marriage). A rational Legislature might certainly choose to apply the presumption of paternity—a benefit of marriage—to a heterosexual couple, but not to a lesbian couple who are both definitionally incapable of “paternity,” or to two gay men, who cannot both be a biological father to a child. Indeed, even considering the scenario underscores the problems inherent in Plaintiffs’ one-shell-500-shot attempt at an amended complaint.

These two statutes are only two of the of the oft-claimed “500 benefits” of marriage, but they illustrate how and why a court-mandated, broad brush civil unions remedy—a remedy for purported *constitutional* violations—cannot work. A Legislature might choose such an analytically confusing approach: one law creating “civil unions” and then applying all of the statutes on marriage to those civil unions, might arise from the legislative process out of a desire for simplicity or political pragmatism. But this Court has no such legislative power, and is properly limited—by notions of separation of powers, institutional competence, and judicial review—to considering *remedies* for specific constitutional challenges to specific laws.

There are still other practical problems inherent in painting with too broad a brush; it simply leaves the entire canvas a mess. Determining what factors go into defining what is a “civil union,” outside the institution of marriage, is a uniquely legislative process that the Court is not equipped to handle. Does the qualifying group consist only of same sex couples who have lived together for a period of time, or who intend to live together? Do they have to be homosexual, or is being same sex enough? Are there consanguinity restrictions? Do civil partners have to declare their enduring

love and affection for each other? Are civil unions to be restricted to same sex couples or would it be sexual orientation discrimination to do so? At minimum, these are all legislative choices, ones the court cannot and should not make, certainly not in the context of this accelerated, limited record case. The issue of civil unions, as presented in Plaintiffs' shotgun approach, is a nonjusticiable issue.

Tellingly, insofar as the Plaintiffs fail to articulate a coherent remedial course at this late stage of litigation, Plaintiffs go so far as to request this Court to *order* the Legislature and the Governor to *craft, pass, and sign legislation* for what Plaintiffs have—up to now— argued was a patently unconstitutional remedy. *Plaintiffs' Opening Brief on Mootness* at 23–26. This Court absolutely cannot order the Legislature to pass a particular bill, nor order the Governor to sign such legislation if it did pass. *See* Or Const Art III § 1; U.S. Const Art IV § 4 (Republican Form of Government Guarantee Clause). This breathtaking request is at best an unthinking invitation for this Court to stage a judicial *coup d'etat*, or a momentary ignorance of the elementary separation of powers principles of this nation taught to every schoolchild.

////

////

////

////

////

////

////

////

////

////

////

////

////

////

////

### III. CONCLUSION

Plaintiffs' appeal should be dismissed at this time, because the marriage licenses are void, the plaintiffs are all unmarried and are precluded from marriage, that status is all they asked for, both their former and newly requested relief are impossible for this Court to grant in this case, and their assignments of error are equally moot. For the foregoing reasons, the appeals of Plaintiffs and Multnomah County should be dismissed.

Submitted this \_\_\_\_ day of November, 2004

O'DONNELL & CLARK LLP

---

Kelly Clark, OSB #83172  
Kristian Roggendorf, OSB #01399

Herbert G Grey, OSB # 81025  
4800 SW Griffith Dr #320  
Beaverton OR 97005

Kelly E. Ford, OSB #87223  
KELLY E. FORD, P.C.  
4800 SW Griffith Dr #320  
Beaverton OR 97005

Kevin Clarkson, Alaska Bar #8511149  
BRENA BELL & CLARKSON  
310 K Street, Suite 601  
Anchorage, AK 99501

Benjamin W. Bull, Arizona Bar #00940  
Jordan Lorence, Minnesota Bar #25210  
ALLIANCE DEFENSE FUND  
15333 N. Pima Road, Ste 165  
Scottsdale, AZ 85260

Raymond M. Cihak, OSB # 94560  
Pamela S. Hediger, OSB #91309  
EVASHEVSKI ELLIOTT CIHAK &  
HEDIGER  
745 NW Van Buren St  
Corvallis OR 97339