

IN THE SUPREME COURT OF THE STATE OF OREGON

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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.

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

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

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LYNN R. NAKAMOTO #88087  
MARKOWITZ HERBOLD, et al  
1211 SW 5<sup>th</sup> Avenue, Suite 3000  
Portland, OR 97204

Telephone: (503) 295-3085

Attorney for Plaintiffs-Respondents,  
Cross-Appellants

KENNETH Y. CHOE  
ACLU Foundation  
125 Broad Street  
New York, NY 10004

Attorney for Plaintiffs-Respondents,  
Cross-Appellants

AGNES SOWLE #87348  
JENNY MORF #98298  
Office of the Multnomah County  
Attorney  
501 SE Hawthorne Blvd., Suite 500  
Portland, OR 97214  
Telephone: (503) 988-3138

Attorneys for Intervenor-Plaintiff-  
Respondent-Cross-Appellant, Multnomah  
County

VANCE M. CRONEY #92045  
Benton County Counsel  
408 SW Monroe, Ste M209  
Corvallis, Oregon 97339  
Telephone: (541) 766-6890

Attorney for Prospective Intervenor-  
Plaintiff-Respondent, Benton County

*Continued.....*

KELLY CLARK #83172  
KRISTIAN ROGGENDORF #01399  
O'DONNELL & CLARK  
1706 NW Glisan, Suite 6  
Portland, OR 97209  
Telephone: (503) 306-0224

Attorneys for Intervenors-Defendants-  
Appellants, Cross-Appellants

HERBERT G. GREY #81025  
Attorney at Law  
4800 SW Griffith Drive #320  
Beaverton, OR 97005  
Telephone: (503) 641-4908

Attorneys for Intervenors-Defendants-  
Appellants, Cross-Appellants

BENJAMIN W. BULL  
JORDAN LORENCE  
ALLIANCE DEFENSE FUND  
15333 N. Pima Road, Suite 165  
Scottsdale, AZ 85260  
Telephone: (480) 444-0020

Attorneys for Intervenors-Defendants-  
Appellants, Cross-Appellants

HARDY MYERS #64077  
Attorney General  
PETER SHEPHERD #80106  
Deputy Attorney General  
MICHAEL C. LIVINGSTON #81297  
Assistant Attorney General  
1162 Court St., Suite 400  
Salem, Oregon 97301-4096  
Telephone: (503) 378-4402

Attorneys for Defendants-Appellants,  
Cross-Respondents State of Oregon, *et al.*

KELLY E. FORD #87223  
KELLY E. FORD, P.C.  
4800 SW Griffith Drive #320  
Beaverton, OR 97005  
Telephone: (503) 641-3044

Attorneys for Intervenors-Defendants-  
Appellants, Cross-Appellants

KEVIN CLARKSON  
BRENA BELL & CLARKSON  
310 K Street, Suite 601  
Anchorage, AK 99501  
Telephone: (907) 258-2000

Attorneys for Intervenors-Defendants-  
Appellants, Cross-Appellants

RAYMOND M. CIHAK #94560  
PAMELA S. HEDIGER #91309  
EVASHEVSKI ELLIOTT CIHAK &  
HEDIGER  
745 NW Van Buren St  
Corvallis, OR 97339  
Telephone: (541) 754-0303

Attorneys for Intervenors-Defendants-  
Appellants, Cross-Appellants



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

The state submits this reply to the arguments presented by plaintiffs, the County and DOMC in their answering briefs on Ballot Measure 36 (2004).

At the outset, it is critical to note that Measure 36 does not sever the existing statutory link between the status of civil marriage and the legal benefits extended to married persons under Oregon law. As the state explained in its opening brief on the merits filed in this case:

Under existing law, the status of marriage and the benefits Oregon statutes extend based solely on that status are inseparable. Because the statutes confer these benefits “automatically” upon married persons and, because marriage is the only way to obtain them, Oregon law has bound together the status of marriage with its attendant benefits.

(State App Br 37). Measure 36 does not affect that automatic and exclusive connection between marriage and the statutory benefits attendant to marriage.

Before Measure 36 was approved, by statutory limitation only opposite-sex couples could marry and obtain the legal benefits incident to marriage. After approval of Measure 36, it is still true that only opposite-sex couples may marry and obtain the legal benefits incident to marriage – but now that limitation is imposed both by statute and by constitutional provision.

However, Measure 36 does not address and does not affect whether, under Article I, section 20, of the Oregon Constitution, same-sex couples must be afforded the same legal benefits available to married opposite-sex couples. By its terms, Measure 36 addresses only the availability of the status of marriage. It provides that:

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.

While Measure 36 prohibits legal recognition of same-sex marriages, it does not address whether same-sex couples are entitled to the legal incidents of marriage under Article I, section 20, nor does it preclude making the legal benefits incident to marriage available to same-sex couples through some legal gateway other than marriage. Indeed, all parties to this litigation agree that Measure 36 does not reach so far as to preclude providing the statutory benefits currently attendant to marriage through some other mechanism.<sup>1</sup>

Nevertheless, DOMC contends that plaintiffs' and the County's appeals in this case must be dismissed in their entirety, based on what the state perceives to be two primary grounds. First, DOMC contends that no claim to the statutory benefits attendant to marriage is properly before this court because neither plaintiffs nor the County ever adequately pleaded a right to the statutory benefits separate from a claim to the right or opportunity to marry itself. Second, DOMC contends that any such claims to the statutory benefits attendant to marriage are premature inasmuch as no

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<sup>1</sup> See DOMC Measure 36 Answering Br 7 n 6 ("DOMC Intervenor fully agree that Measure 36 does not foreclose civil unions"); Plaintiffs Measure 36 Answering Br 3 n 4 ("Prior to the amendment, plaintiffs argued that the constitutional violation could be fully remedied in only one way – the extension of both the status of marriage and the benefits of marriage to same-sex couples. In light of the amendment, they no longer seek the extension of the status of marriage to unmarried same-sex couples in this case. They continue, however, to seek the extension of the benefits of marriage to same-sex couples."); County Measure 36 Answering Br 2 ("The County agrees with the State's assertion that the question of whether 'withholding the legal benefits incident to 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).")

parties to this proceeding have established that they have asked for and been denied any of those benefits. DOMC asserts that the only types of harm claimed are prospective future harms that may or may not occur and that they are too speculative to present a live controversy for the court to consider. The state disagrees with DOMC on both counts.

**I. The Right of Same-Sex Couples to the Statutory Benefits Attendant to Marriage Is an Issue Properly Before the Court For Resolution**

Plaintiffs asserted in their complaint that Oregon law currently precludes them from marrying, which has the practical effect of denying them the hundreds of rights, responsibilities, benefits, and obligations afforded to married persons. (*See* ER-35 to ER-36). Plaintiffs and the County then assigned as error on appeal the trial court's decision to give the Legislative Assembly an opportunity to produce legislation that would balance the substantive rights of same-sex couples and opposite-sex married couples instead of immediately extending all of the statutory benefits attendant to marriage by extending the opportunity to marry to same-sex couples. (*See* Plaintiffs App Br 38-51; County App Br 16-18). In essence, plaintiffs and the County have claimed continuously in this litigation that same-sex couples are entitled both to the opportunity to marry and the statutory benefits attendant to marriage. The fact that Measure 36 now precludes same-sex couples from marrying should not eviscerate their claim to the statutory benefits attendant to marriage. The state believes that plaintiffs and the County have adequately preserved their claim that same-sex couples are entitled to the statutory benefits attendant to marriage.

Furthermore, the state has defended the trial court's decision to allow the Legislative Assembly the opportunity to address the myriad policy decisions inherent in determining how to balance the substantive rights of same-sex couples with those of opposite-sex couples. And DOMC itself has challenged that part of the trial court's judgment, contending that "the trial court erred in crafting a remedy that extends the benefits of marriage to same sex couples." (*See* DOMC App Br 14, 60).

Consequently, regardless of whether plaintiffs and the County adequately pleaded a claim for the statutory benefits attendant to marriage, the issue remains a live issue in dispute on appeal between parties to this litigation.

The state further believes that precluding same-sex couples from all the statutory benefits attendant to marriage has sufficient present effect to present a ripe controversy for consideration by this court. For example, the testimonial privilege provided by ORS 40.255(2) is designed to provide protection from future disclosure of confidential communications between spouses that occur "during the marriage" in order to protect that intimate, interpersonal relationship throughout the course of that relationship. Consequently, the existence of the privilege promotes frank and intimate communication at this moment by protecting it from future disclosure. Furthermore, the right of a surviving spouse to receive a statutory share of the deceased spouse's estate under ORS 112.025, 112.035 and 114.105 presently affects financial decisions made by those spouses as to whether to hire an attorney to execute a will or to make other financial arrangements now to protect future financial resources.

And, in fact, the claims asserted by some of the plaintiffs explicitly address just such present effects. For example, plaintiff Donna Potter asserts that she and her partner, plaintiff Pamela Moen, have made present job choices based upon the lack of statutory benefits available to same-sex couples. (*See* ER-173 (“There are state benefits available to surviving spouses of police officers who are killed in the line of duty \* \* \* . These benefits are not available to surviving domestic partners of police officers \* \* \* ”); ER-172 (“I have chosen an off-street position \* \* \* to reduce the risk of on-the-job death or disability, in an effort to reduce the vulnerability of our family.”)). Plaintiff Potter further asserts that she and her partner plaintiff Moen “have had to hire an attorney to protect their rights as parents” and that married couples “do not have to go to the expense of hiring an attorney to try to protect themselves and their children to the degree that we have had to do so.” (ER-172 to ER-173). In the state’s view, these present effects are sufficient to present a controversy that is ripe for this court’s consideration.

ORS 28.020 authorizes persons whose “rights, status or other legal relations are affected” to seek a declaratory judgment. “As the legislature’s use of the present tense phrase ‘are affected’ implies, the controversy must involve a dispute based on present facts rather than on contingent or hypothetical events.” *US West Communications, Inc. v. City of Eugene*, 336 Or 181, 191, 81 P3d 792 (2003). That is not to say that persons seeking a declaratory judgment must point to an injury that has already occurred; instead, they can establish ripeness by pointing to existing facts that give them present legal rights or by demonstrating that their legal rights have been

“threatened.” *See, e.g., US West Communications*, 336 Or at 191 (concluding that the plaintiff’s claim was not ripe because it failed to point to existing facts that gave it present legal rights or threatened its legal rights); *Cummings Const. v. School Dist. No. 9*, 242 Or 106, 110, 408 P2d 80 (1965) (same). *See also Oregon Medical Assn. v. Rawls*, 276 Or 1101, 1108 n 10, 557 P2d 664 (1976) (acknowledging that a declaratory judgment is not “improper prior to actual injury, but only that judgment should be reserved unless some imminent injury is possible”). In this case, plaintiffs have established ripeness by pointing to facts that give them a present right to the legal benefits of marriage and by showing that their legal rights are threatened by the denial of access to those benefits. Here, not only is imminent injury possible, but actual present injury is claimed. Plaintiffs’ claims are ripe for adjudication.

DOMC relies in substantial part upon the decision of the Supreme Court of Alaska in *Brause v. State, Dept. of H. & S. S.*, 21 P3d 357 (Alaska 2001) as support for its argument that this case does not present any ripe claims to the statutory benefits attendant to marriage. That decision, however, provides little, if any, support for that proposition. In *Brause*, the plaintiffs’ complaint did not allege that they had been denied any specific benefits, and the trial court dismissed the complaint for prudential reasons. *Brause*, 21 P3d at 358. The Alaska Supreme Court reviewed the trial court’s determination only for an abuse of discretion stating: “The language of [Alaska’s declaratory judgment] statute makes it explicit that whether to issue a declaration is a discretionary decision committed to the superior court \* \* \* . Therefore we will reverse a superior court’s dismissal of a declaratory judgment action which is based

on prudential grounds only when we find that the superior court abused its discretion.” *Brause*, 21 P3d at 358.

Declining to reverse a trial court’s dismissal for abuse of discretion, as in *Brause*, does not mean that dismissal is required in this case. Oregon’s Declaratory Judgment Act provides, in pertinent part, in ORS 28.010 that: “Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed.” In this case, plaintiffs have asserted that the state has denied them access to specific statutory benefits, and the trial court explicitly issued a declaratory judgment addressed to the statutory benefits attendant to marriage under Oregon law. It was not an abuse of discretion for the trial court to have issued such a declaratory judgment under ORS 28.010 in the circumstances of this case. *See, e.g., Baker v. State*, 170 Vt 194, 744 A2d 864 (1999) (Vermont Supreme Court issued a declaratory judgment in circumstances virtually identical to those present in this case).

## **II. Plaintiffs’ Requested Remedy**

Plaintiffs in their opening brief on Measure 36 asked this court to order the Legislative Assembly to enact and the Governor to sign legislation creating an alternative civil institution that grants to same-sex couples the complete set of benefits that are conferred on opposite-sex married couples under current Oregon law. (Plaintiffs Measure 36 Opening Br 23-24). Plaintiffs appear to continue to seek that remedy in their responding brief on Measure 36. (Plaintiffs Measure 36 Answering Br 3). The state agrees with DOMC that it is beyond the judicial power of this court and would violate the separation of power principles established in the Oregon

Constitution for this court to order the Legislative Assembly to enact and the Governor to sign particular legislation. *See Oregon Const, Art III, § 1.* Indeed, this underscores the state's position that the trial court correctly determined that the Legislative Assembly should be given the opportunity to balance the substantive rights of same-sex couples and opposite-sex married couples. The state continues to contend that that is the proper resolution of this issue in this litigation.

**III. The Validity of the 3000 Marriage Licenses Issued to Same-sex Couples by Multnomah County Before the Effective Date of Measure 36 Need Not be Decided In this Case Between These Parties**

In its responding brief on Measure 36, the County continues to assert that this court must determine whether the same-sex marriages that occurred in Multnomah County before the effective date of Measure 36 were valid at the time they occurred. (County Measure 36 Answering Br 2). In the state's view, this court need not resolve that issue in this case. The state has not given any legal recognition to those marriages to date, other than registering the marriage license-and-solemnization documents as required by the trial court's judgment. And the text of Measure 36 makes clear that after the measure became effective on December 2, 2004, neither the State of Oregon, nor any of its political subdivisions, may legally recognize those marriages. In light of those two events, it makes no practical legal difference in this case between these parties at this time whether those marriages were valid at the time they occurred, whether they are void *ab initio*, or whether they are merely voidable. At this time, that question is academic for purposes of this litigation, and this court should not address it.

## CONCLUSION

For the reasons discussed above, and the reasons set forth in the state's previous briefs on Measure 36 and the merits in this case, 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.

Respectfully submitted,

HARDY MYERS #64077

Attorney General

PETER SHEPHERD #80106

Deputy Attorney General

---

MICHAEL C. LIVINGSTON #81297

Assistant Attorney General

Attorneys for Defendant-Appellants,

Cross-Respondents

State of Oregon, et al.

**NOTICE OF FILING AND PROOF OF SERVICE**

I certify that I directed the original State Defendants'-Appellants', Cross-Respondents' Reply Brief On Ballot Measure 36 to be filed with the State Court Administrator, Records Section, at 1163 State Street, Salem, Oregon 97301-2563, on December 7, 2004.

I further certify that I directed the State Defendants'-Appellants', Cross-Respondents' Reply 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 December 7, 2004, by mailing two copies, with postage prepaid, in an envelope addressed to:

*Continued.....*

Lynn R. Nakamoto #88087  
 Markowitz Herbold, et al  
 1211 SW 5<sup>th</sup> Avenue, Suite 3000  
 Portland, OR 97204  
 Telephone: (503) 295-3085

Kenneth Y. Choe  
 ACLU Foundation  
 125 Broad Street  
 New York, NY 10004

Agnes Sowle #87348  
 Jenny Morf #98298  
 Office of the Multnomah County  
 Attorney  
 501 SE Hawthorne Blvd., Suite 500  
 Portland, OR 97214  
 Telephone: (503) 988-3138

Vance M. Croney #92045  
 Benton County Counsel  
 408 SW Monroe, Ste M209  
 Corvallis, Oregon 97339  
 Telephone: (541) 766-6890

Kelly Clark #83172  
 Kristian Roggendorf #01399  
 O'Donnell & Clark  
 1706 NW Glisan, Suite 6  
 Portland, OR 97209  
 Telephone: (503) 306-0224

Kelly E. Ford #87223  
 Kelly E. Ford, P.C.  
 4800 SW Griffith Drive #320  
 Beaverton, OR 97005  
 Telephone: (503) 641-3044

Herbert G. Grey #81025  
 Attorney at Law  
 4800 SW Griffith Drive #320  
 Beaverton, OR 97005  
 Telephone: (503) 641-4908

Kevin Clarkson  
 Brena Bell & Clarkson  
 310 K Street, Suite 601  
 Anchorage, AK 99501  
 Telephone: (907) 258-2000

Benjamin W. Bull  
 Jordan Lorence  
 Alliance Defense Fund  
 15333 N. Pima Road, Suite 165  
 Scottsdale, AZ 85260  
 Telephone: (480) 444-0020

Raymond M. Cihak #94560  
 Pamela S. Hediger #91309  
 Evashevski Elliott Cihak & Hediger  
 745 NW Van Buren St  
 Corvallis, OR 97339  
 Telephone: (541) 754-0303

---

MICHAEL C. LIVINGSTON  
 Assistant Attorney General

Attorney for Defendant-Appellants,  
 Cross-Respondents