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Re: Martinez et al, v Kulongoski and Defense of Marriage Coalition PAC
Case #05C-11023

Dear Mr. Johnson, Mr. Fletcher and Mr. Clark:

This matter came before the court on September 26th, 2005, for hearing on cross-motions for Summary Judgment filed by all parties. The parties agree that there exist no genuine issues of material fact in dispute in this case and that this court's ruling on the Motions for Summary Judgment will be dispositive. At issue in this case is the constitutionality of the process by which Measure #36 which was passed by the voters of this state on November 2nd, 2004.

Plaintiffs' complaint makes three distinct challenges to the constitutionality of Measure 36. First, they contend that Measure 36 did not merely amend the Oregon Constitution, but rather it revised the constitution - something that can only be done by the Oregon legislature; Second, plaintiffs claim that the adoption of Measure 36 violated the "separate-vote" requirement of Article XVII, section 1, of the Oregon constitution by making multiple amendments to the constitution without separate votes on each. In that claim, plaintiffs allege that Measure 36 amends at least eleven other provisions of the Oregon constitution; Third, plaintiffs claim that Measure 36 does not amend the constitution at all; rather, they contend that Measure 36 represents a mere statement of policy and not a "law or amendment" upon which the people may vote.

As I indicated during oral argument, I will limit most of my analysis to plaintiffs' first two claims, as I believe plaintiffs' third claim has already been answered adversely to plaintiffs by the Oregon Supreme Court in the case of Li v. Oregon, 338 Or 376 (2005).

The Oregon Constitution may be altered in four different ways: (1) An amendment referred to the voters by the legislature (Article XVII Section 1); (2) One or more amendments, or a new constitution, proposed by a constitutional convention, if a convention is approved by referendum (Article XVII Section 3); (3) A revision referred to the voters by the legislature, after receiving approval from "two-thirds of all the members of each house" (Article XVII & 2); (4) An amendment through the initiative powers reserved to the people of the state of Oregon (Article VI Section 1(2)(a)). It is plaintiffs' contention that Measure 36, which was adopted through the initiative powers reserved to the people, alters the fundamental concept of "justice" enshrined in the Oregon Constitution and, therefore, constitutes a revision which must be referred to the voters by the legislature, rather than an amendment which could be adopted through the initiative process. Defendants and interveners rely upon the case of Lowe v. Keisling, 130 Or App 1 (1995), which considered the validity of a proposed initiative measure that contained within it a ban on same-sex marriage and found that it was an amendment rather than a revision; they further argue that Measure 36 by virtue of its length and limited scope is not a revision.

No court has conclusively defined the difference between an "amendment" and a "revision". The Oregon Court of Appeals has noted that while it is "impossible to draw a precise line between an amendment and a revision", a proper amendment may have a "ripple effect" on other provisions of the constitution. Barnes v. Paulus, 36 Or App 327 (1978). Relying on Barnes, the court in Lowe looked to whether the proposed measure would effect a "fundamental change [to] the constitution" in determining whether it was an amendment or a revision. Similarly, in finding that the proposal at issue was a revision rather than an amendment, the Oregon Supreme Court in Holmes v. Appling, 237 Or 546 (1964) found that the measure was a "thorough overhauling of the present constitution".

In the Lowe case, the Oregon Court of Appeals rejected the argument that a proposed initiative measure that included, among other matters, a ban on same-sex marriage, did not effect a revision. Section 2(a) of that proposed measure stated that neither the State nor the local governments could grant marital status or spousal benefits on the basis of homosexuality. Despite the plaintiffs' argument in the Lowe case that the proposed measure would have "profound impacts on existing fundamental rights" the court found that the proposed measure "would not result in the kind of fundamental change in the constitution that would constitute a revision, but rather it would be an amendment". Plaintiffs attempt to distinguish Measure 36 from the proposed measure contained in the Lowe case by arguing that the proposed measure in Lowe would not "deprive, nullify, or diminish the holding or exercise of any rights guaranteed by the Oregon or the United States Constitutions". To interpret the proposed measure in Lowe in the manner suggested by plaintiffs in this case in order to distinguish it from Measure 36, would, in my opinion, have the effect of nullifying the effect of that proposed measure. It is unlikely that the Court in Lowe interpreted the measure in such a way since "the court's function is to interpret constitutional language in a way that 'harmonizes' potentially conflicting provisions." See State

v. Powell, 171 Or App 81 (2000). In this court's opinion, there is no legal distinction between the marriage provision at issue in Lowe and Measure 36; Accordingly, Measure 36 is properly characterized as an amendment rather than a revision to the Oregon Constitution.

I next turn to the question of whether Measure 36 violated the Separate-Vote requirement of Article XVII Section 1 of the Oregon Constitution.

The so-called "separate-vote" requirement of the Oregon Constitution is set forth in Article XVII & 1, which provides that "when two or more amendments shall be submitted in the manner [provided] to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately". This requirement "addresses the extent to which a proposed amendment would modify the existing constitution", Armatta v. Kitzhaber, 327 Or 250 (1998). The "proper inquiry" in a separate-vote analysis is "to determine whether, if adopted, the proposal would make two or more changes to the constitution that are substantive and that are not closely related". See Armatta. Those changes may be implicit or explicit. See Lehman v. Breadbury, 333 Or 231 (2002).

The Oregon Supreme court has already determined that Measure 36 has substantive effect - See Li v. Oregon, 338 Or 376 (2005). This court, therefore, must determine whether it makes any other substantive changes to the constitution, and, if so, whether those changes are closely related.

Defendants' (and intervener) first argument is that any changes made by Measure 36 to the constitution are "necessary corollaries" to the new provision added to the constitution by Measure 36 and thus cannot be considered as changes that are separate from the new provision itself. They point out that the Armatta court recognized that "by implication, a single constitutional amendment may affect one or more constitutional provisions without offending the separate-vote requirement". See also Baum v. Newbry, 200 Or 576 (1954). Defendants further make the argument that if Measure 36 is found to violate the separate-vote requirement that this would result in two (or more) votes in every case - one on the new material and one on how that material would change the existing constitutional provisions - I find this argument to be plainly erroneous. Not all constitutional amendments will affect existing constitutional provisions.

I also reject defendants' and intervener arguments that the shortness and simplicity of Measure 36 indicates that it cannot contain more than one constitutional amendment. In this court's opinion, Measure 36 does affect two other sections of the Oregon Constitution - Measure 36 constrains how the courts may interpret Article I Section 20, the Privileges and Immunities clause. Because it affects how the courts may interpret that article of the constitution, it is a substantive change. Furthermore, Measure 36 amends Article I Section 21, which prohibits the passage of a law that impairs the obligation of contracts. Measure 36 prohibits the recognition of same-sex marriages entered into in other states or countries. The contractual obligations of persons in those marriages will not be recognized in Oregon and thus, their contractual obligations will be impaired. In this court's opinion, therefore, Measure 36 makes three substantive changes to the Oregon Constitution. However, as will be set out more fully below,

even though an amendment may cause more than one change to the Oregon constitution, this does not mean that the amendment violates the separate-vote requirement.

In this court's opinion these changes made by Measure 36 are closely related and do not run afoul of the separate-vote requirement. In this analysis, I consider the relationship among the affected constitutional provisions, as well as the relationship among the changes that were made in those provisions. See Armatta and Lehman. The constitutional provisions that are affected by Measure 36 are diverse; the privileges and immunities clause is in no way related to the clause prohibiting the impairment of contracts and neither is directly related to an amendment that denies same-sex couples the right to marry. It is unquestionable, however, that these changes made to the constitution by Measure 36 are closely related, in that they are the same in each case - each portion of the constitution is amended to take away from same-sex couples the right to have a civil marriage even if that marriage is recognized by another jurisdiction.

Measure 36 is, therefore, an exception to the proposition that "it is difficult to make related changes to unrelated constitutional provisions". See Lehman. As such, I find that Measure 36 does not violate the separate-vote requirement of the Oregon Constitution.

Finally, as to Plaintiffs' claim that measure 36 is a statement of "policy" rather than substantive law, I believe that issue has already been addressed and answered in the Li v. Oregon case.

Accordingly, I find Measure 36, as passed by the voters of the State of Oregon, to have been enacted pursuant to constitutional requirements; therefore, plaintiffs' motions for Summary Judgment are denied. Defendants' and Intervener motions for Summary Judgment are allowed pursuant to ORCP 47. Mr. Fletcher and Mr. Clark should confer and submit an appropriate Order and Judgment consistent with this opinion.

Very Truly Yours,

Joseph C. Guimond
Circuit Court Judge

JCG:js