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## 2004 Ballot Measure Report Measures 35 & 36

City Club of Portland (Portland, Or.)

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## 2004 Ballot Measure Report **Measure 35**

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### **Constitutional Amendment State of Oregon Ballot Measure 35:**

LIMITS NONECONOMIC DAMAGES (DEFINED) RECOVERABLE FOR PATIENT INJURIES CAUSED BY HEALTHCARE PROVIDER'S NEGLIGENCE OR RECKLESSNESS

#### **Majority Recommends a NO vote on Measure 35**

Measure 35 proposes to cap non-economic damages in medical malpractice cases at \$500,000 (adjusted annually for inflation). Measure 35's proponents contend that this cap is necessary to control rapidly increasing medical malpractice insurance premiums, that, in their view, are a key factor in escalating health care cost inflation, are forcing existing doctors to abandon the practice of medicine and are discouraging others from entering the medical field. Proponents assert that these problems are most acute in rural Oregon and in certain high-risk specialties, but it is just a matter of time before people throughout Oregon have difficulty accessing health care.

Though the members of your committee agree on most points, we did not reach a unanimous recommendation on how to vote on Measure 35. While acknowledging the problems cited by the proponents of Measure 35, the majority of your committee recommends a "no" vote because the measure does not address the core issues underlying the complex problems of increasing medical malpractice premiums, rising health care costs and reduc-

*City Club members voted on October 22, 2004 to adopt the contents and majority recommendation of this report as the Club's official position. City Club recommends a NO vote on Ballot Measure 35.*

tions in access to care. The majority concludes that the potential savings in medical malpractice insurance premiums are modest at best and do not outweigh the consequences of denying an injured party the right to have damages awarded by a jury. Even if savings are realized from capping non-economic damages, Measure 35 does not ensure that insurance companies will pass those savings on to policy holders through lower medical malpractice premiums. Finally, the proponents did not make a convincing case that health care providers, as a class, should be singled out for constitutional protection from large non-economic damage awards, while other groups remain exposed to such liability awards.

The minority of your committee recommends a "yes" vote on Measure 35 because, by capping awards and making claims more predictable, it would help contain malpractice premiums and encourage insurers to offer malpractice policies to new doctors, who sometimes find it difficult to secure coverage. Slowing the growth of malpractice premiums will also remove a disincentive for doctors to locate in Oregon and provide a better environment to retain those who already practice here.

## I. INTRODUCTION

Ballot Measure 35 will appear on the ballot as follows:

**AMENDS CONSTITUTION: LIMITS NON-ECONOMIC DAMAGES (DEFINED) RECOVERABLE FOR PATIENT INJURIES CAUSED BY HEALTHCARE PROVIDER'S NEGLIGENCE OR RECKLESSNESS.**

**Result of "Yes" Vote:**

"Yes" vote limits recovery of non-economic damages (defined) for negligent or reckless injury to patient by healthcare provider to \$500,000 (adjusted annually for inflation).

**Result of "No" Vote:**

"No" retains the current law, which places no limit on jury award of non-economic damages (defined) for injury caused by negligence, recklessness of healthcare provider.

**Summary:**

Amends constitution. Under current law, there is generally no limit on jury awards of non-economic damages to patient, patient's legal representative, or patient's spouse for injury caused for negligent or reckless injury caused by an Oregon health care provider or health care entity to \$500,000. Defines non-economic damages to include pain; mental suffering; emotional distress; loss of society, companionship, services; loss of sexual relations; inconvenience; interference with normal and usual activities apart from employment. Specifies formula to adjust for inflation annually. Limitation applies regardless of extent of injuries, number of people entitled to damages, or number of defendants sued. Does not apply to wrongful death claims. Applies to suits filed after January 1, 2005. Other provisions.

**Estimate of Financial Impact:**

There is no financial impact on state or local government expenditures or revenues.

*(The language of the caption, question, and summary was certified by the Oregon Secretary of State.)*

The petitioners who placed Ballot Measure 35 on the November 2004 ballot seek to stabilize medical malpractice insurance premiums by limiting the amount of non-economic damages that can be awarded in medical malpractice cases. Proponents of Measure 35 propose a strategy that they claim will have a positive affect on patients' access to health care and related factors including cost,quality,and fairness.

City Club of Portland formed your committee to analyze Measure 35 and recommend a position to members and the community. Committee members were screened to ensure that no person had an economic or personal interest in the outcome of the study or has taken a public position on the subject of the measure. The study was conducted from August 9 to September 20, 2004. Your committee interviewed proponents and opponents of the measure and other interested individuals,and reviewed relevant articles, reports and other materials.

## II. BACKGROUND

### A. Compensation for Medical Malpractice in Oregon

In the state of Oregon, patients injured while receiving health care may sue their health care provider for medical malpractice. Medical malpractice is the failure of a medical professional to follow accepted standards of practice of his or her profession, resulting in harm to the patient.

Medical malpractice lawsuits are intended to compensate individuals for injuries caused by errors in medical care,and to encourage safer medical practices. Damages awarded for all types of malpractice claims are divided into three types: economic, punitive and non-economic. Measure 35 proposes to cap only non-economic damages in medical malpractice cases. There are three types of malpractice damage awards:

**Economic damages** are awarded to compensate plaintiffs for actual economic losses and costs that will be incurred. These costs include lost wages, medical treatment,durable medical goods such as wheelchairs,and at-home medical services such as home nursing. Measure 35 does not propose to cap economic damages.

**Punitive damages** are awarded to punish defendants for particularly egregious conduct. In Oregon,the plaintiff must show by "clear and convincing" evidence that a defendant "acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others."<sup>1</sup> Punitive damages are intended to deter the defendant and others from committing similar acts in the future. Under Oregon law,60 percent of the punitive damages award is paid to the Criminal

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<sup>1</sup> ORS 31.730

Injuries Compensation Account of the Department of Justice Crime Victims' Assistance Section. The remaining 40 percent of the punitive damages award is paid to the prevailing party. The prevailing party's attorney is paid from this 40 percent, and the attorney's fee is capped at 20 percent of the gross punitive damages award.<sup>2</sup> Measure 35 does not propose to cap punitive damages; however, under existing law, punitive damages cannot be awarded against most individual health providers (e.g., physicians, dentists, nurses) when they act within the scope of their license and "without malice."<sup>3</sup>

**Non-economic damages** are awarded to compensate plaintiffs for any injury that does not have a financial value. Measure 35 defines non-economic damages to include pain; mental suffering; emotional distress; loss of society, companionship or services; loss of sexual relations; inconvenience; and interference with normal and usual activities apart from employment. Measure 35 proposes to limit non-economic damages in medical malpractice cases to \$500,000 adjusted annually for inflation.

While the number of medical malpractice claims in Oregon has remained relatively constant over the past 15 years, the damages awarded from these suits have been increasing. Since 1999, the average amount paid on claims has increased 90 percent.<sup>4</sup>

## **B. Insuring Against Medical Malpractice Liability**

Healthcare providers purchase malpractice insurance to protect themselves from losses in the event they are sued. Medical malpractice insurance premiums vary widely by medical specialty and geography. Therefore, average costs can be misleading, because they can disguise wide variations across states and trends over time. However, as a general proposition, it is fair to say that, beginning in the late 1990s, medical malpractice insurance premiums began increasing rapidly for most physicians, most notably in Oregon in 1999.<sup>5,6</sup>

The number of companies providing medical malpractice insurance in Oregon has declined significantly since 1997, when there were 15 providers. Now only two major insurers are covering doctors in Oregon. They are CNA and Northwest Physicians Mutual.<sup>7</sup>

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<sup>2</sup> ORS 31.735

<sup>3</sup> ORS 31.740

<sup>4</sup> Grover, Stephen. "Medical Malpractice Damage Caps: Impacts of Limiting Non-economic Damages," *ECORNorthwest Medical Report*, p.13 (July 29, 2004). (Prepared for the Oregon Medical Association)

<sup>5</sup> General Accounting Office, *Medical Malpractice: Implications of Rising Premiums on Access to Health Care*, pp.8-9 (2003) ("GAO Report")

<sup>6</sup> Grover, at pp.6-8

<sup>7</sup> Hospitals and health systems obtain insurance in a separate market (or self-insure claims).

***Oregon's medical malpractice insurance crisis has not escaped the notice of state policymakers. In 2003, the Legislature passed HB 3630, the Rural Subsidy Bill, which created a program to reimburse rural physicians for a portion of their medical malpractice insurance premiums.***

CNA is the fourth-largest commercial insurer in the United States and the largest provider of medical malpractice insurance in Oregon. CNA has more than one million policyholders in the U.S. and internationally.

Northwest Physicians Mutual Insurance Company was founded by a group of Salem - area physicians and is licensed to issue insurance in Oregon and seven other western states. The company primarily writes medical malpractice insurance to qualified physicians in Oregon, California and Idaho. Since 1999, NPM has experienced significant financial difficulties. The company has stopped writing new obstetrician/gynecologist or family practice/obstetrician policies unless the physician is joining an existing group of five or more. <sup>8</sup>

Oregon's medical malpractice insurance crisis has not escaped the notice of state policymakers. In 2003, the Legislature passed HB 3630, the Rural Subsidy Bill, which created a program to reim-

burse rural physicians for a portion of their medical malpractice insurance premiums. The bill, which is intended to ease the medical malpractice insurance premium crisis until a more permanent solution can be found, went into effect January 1, 2004 and will expire at the end of 2007. Obstetricians are reimbursed for up to 80 percent of their malpractice insurance premiums; family physicians who deliver babies are reimbursed up to 60 percent; all other rural physicians are reimbursed up to 40 percent. The rural subsidy program is administered by SAIF, and over 1,000 doctors are currently enrolled with approximately \$3.2 million spent, as of August 2004, on premium reimbursement. <sup>9</sup> Funding for the program comes from the Oregon General Fund.

### **C. Recent History of Tort Reform in Oregon**

Limits on civil damage awards were first introduced in Oregon in 1987 in response to escalating malpractice insurance premiums. At the urging of a task force appointed by Governor Vic Atiyeh,

<sup>8</sup> Grover, at 18 (citing Oregon Department of Consumer and Business Services, *Target Report of Financial Examination of Northwest Physicians Mutual Insurance Company* (June 30, 2002))

<sup>9</sup> SAIF, 2004

and with bipartisan support, the Oregon Legislature passed the Tort Reform Act.<sup>10</sup> This act included a \$500,000 cap on non-economic damages in all civil cases. Under the law, the jury could not be informed of the \$500,000 cap, so in some cases juries awarded non-economic damages in excess of \$500,000. It was the role of the trial judge to reduce the damages to comply with the cap.

In 1994, the Oregon Court of Appeals held that the \$500,000 cap on non-economic damages violated the Oregon Constitution because it interfered with the constitutional right to trial by jury.<sup>11</sup> In 1999, the Oregon Supreme Court upheld the reasoning of that decision when, in Lakin v. Senco Products, Inc., it struck down the statutory cap on non-economic damages.<sup>12</sup>

Nine days after the Lakin case was decided, the Oregon Legislature referred a constitutional amendment to the voters of Oregon. The referendum was Ballot Measure 81, which sought to give the power of capping all civil damages to the Oregon Legislature. The amendment would have given the Oregon Legislature the authority to limit damages awarded in any type of civil damage case. The Oregon State Bar and the Oregon Trial Lawyers Association of Portland studied Measure 81 in April 2000 and recommended a "no" vote. Measure 81 was defeated in the May 2000 primary election by a margin of three to one.

It is worth noting that governmental healthcare providers in Oregon, including Oregon Health & Science University and Oregon's 20 public health districts, already operate under strict liability caps (\$100,000 for non-economic damages, with a \$200,000 maximum for all damages for each claimant in a single incident).<sup>13</sup> These caps are an outgrowth of the doctrine of sovereign immunity and are unrelated to the Tort Reform Act.<sup>14</sup> Therefore, they were not affected by the Oregon Supreme Court's invalidation of the cap on non-economic damages in the Lakin case.

**Governmental health care providers in Oregon, including Oregon Health & Science University and Oregon's 20 public health districts, already operate under strict liability caps.**

<sup>10</sup> SB 323 (1987). A tort occurs when someone deliberately or through carelessness causes harm or loss to another person or their property. (www.legal-definitions.com)

<sup>11</sup> Tenold v. Weverhaeuser Co., 127 Or App 511, 873 P.2d 413 (1994), review dismissed 321 Or 561 (1995)

<sup>12</sup> 329 Or 62, 987 P.2d 463 (1999). The cap continues to apply to claims under Oregon's wrongful death statute. Greist v. Phillips, 322 Or. 281, 906 P.2d 789 (1995).







<sup>13</sup> ORS 30.265 to .270

<sup>14</sup> A doctrine precluding the institution of a suit against a government without its consent.






## II. ARGUMENTS PRO AND CON

### A. Arguments Advanced by Proponents of Measure 35:

- 
 Jury awards and the high cost of defending lawsuits lead to increases in malpractice premiums.
- 
 High premiums for medical liability insurance are limiting access to health care. Doctors, obstetricians and surgeons, are leaving rural practices because they cannot afford to pay malpractice insurance premiums. Even in urban areas, physicians are leaving or limiting their practices resulting in patients having fewer health care resources within their geographic area.
- 
 Awards drive up the cost of health care services because increases in premiums are passed on to patients. Doctors, fearing large suits, practice "defensive medicine," which often includes over-prescribing expensive tests.
- 
 Large jury awards and overly generous awards, won by attorneys who play on jurors' emotions, do not correlate with actual fault on the part of a physician, but rather with bad medical outcomes.
- 
 Medical malpractice insurance premiums affect not just doctors who have claims against them, but all doctors. Even obstetricians who have faced few or no lawsuits are seeing their rates rise by 30 percent or more per year.
- 
 Non-economic damages will decelerate increases in premiums, as demonstrated by existing damage caps in Oregon.

### B. Arguments Advanced by Opponents of Measure 35:

- 
 The current system is the proper method for determining legal damages. A "one-size-fits-all" cap is unfair. Limiting non-economic damage awards will deny injured patients and their families the right to compensation for catastrophic errors.
- 
 Awards are not the reason malpractice insurance premiums are increasing. The increase is caused by poor financial returns on investments made by insurance companies. Premiums have increased in states with and without liability caps on jury awards.
- 
 Measure 35 does not call for malpractice insurance premiums to be lowered. The way to guard against high premiums is to directly regulate the insurance industry.

**Number of rural doctors in Oregon has increased, not decreased.** Rural hospitals are closing units due to low patient volume and the rising costs of maintaining obstetric units (including anesthesiologists, ultrasound technicians, facility costs), not because doctors cannot afford malpractice premiums.

**Jury awards for pain and suffering are not the norm.** Only nine jury verdicts over \$1 million for economic damages in medical malpractice cases have occurred in Oregon since the Oregon Court of Appeals overturned caps in the Tenold case in 1994.

**Prior experience in Oregon shows that caps do not reduce the number of claims.** Costs per claim have risen with inflation and the ever-increasing risk of medical procedures.

**Limiting jury awards removes an important tool for patients to hold doctors and other health care professionals accountable.**

**Medical malpractice costs are not a significant factor in high health care costs.**

**The insurance subsidy program enacted by House Bill 3630 is helping in rural areas and should be allowed to continue to work.**

## IV. DISCUSSION

Your committee unanimously agreed on most of the underlying factors that are relevant to an analysis of Measure 35. However, because committee members weighed the factors differently, four members of the committee recommend a "no" vote on Measure 35, while three committee members recommend a "yes" vote.

### A. The Malpractice Insurance Crisis Is Real: Premiums Are Increasing Rapidly and Insurers Are Exiting the Market

Your committee unanimously agreed that there is a crisis related to the cost and availability of medical malpractice insurance in Oregon. A 2004 report by ECONorthwest reveals doubling and tripling of premiums each year for many providers.<sup>15</sup> Premiums have increased for health care

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<sup>15</sup> Refer to note 6.

providers large and small, rural and urban, and for large self-insured systems such as Providence Health System (because of increases in re-insurance premiums). Doctors in higher-risk specialties, such as obstetrics and surgery, are seeing particularly large rate increases. Premiums for doctors at the OB/GYN Health Center in Medford tripled from 2000-2003; this increase, along with the cost of new medical equipment, prompted them to join the Providence Health System rather than continue operating independently. Between 1999 and 2004, Northwest Physicians Mutual increased premiums 172 percent for family practitioners, the practice area with the lowest malpractice premiums.

Regardless of cost, malpractice insurance is also becoming difficult to obtain for new doctors starting in private practice because some insurers are unwilling to write policies for doctors lacking a professional history. Only two major providers of medical malpractice insurance operate in Oregon, and one of those is limiting new policies and has a weak financial rating. The community of John Day nearly lost obstetrics services for lack of an insurer willing to write a policy for a doctor hired to replace a retiring practitioner. Coverage became available only when the state Department of Rural Health intervened. Experts testified that unless changes occur, medical malpractice insurance premiums will continue to escalate. Your committee heard persuasive testimony that, without some type of intervention, medical malpractice insurance premiums will continue to escalate. Further, your committee found no evidence that premiums would stop increasing barring such intervention. All members of your committee agree that some action is necessary, but we disagree on what should be done.

## **B. Multiple Factors Are Pushing Medical Malpractice Insurance Premiums Higher: Higher Damage Awards Are a Contributing Factor**

In 2004, The New England Journal of Medicine published an overview outlining the interplay of several factors affecting malpractice insurance rates:

• Premium rates tend to move in cycles. During times of tough competition, insurers price insurpensively to gain or retain market share, and then when costs exceed premiums, they raise premiums.

• Economic shifts in financial markets affect the income insurers earn from their investments. Market downturns, insurers have to recoup their losses elsewhere.

• Catastrophic claims, such as those resulting from natural disasters or terrorist attacks, drive up costs for insurance companies. For instance, CNA, one of Oregon's two primary malpractice insurers, was a major provider of workers' compensation insurance for companies located in New York City's World Trade Center.

Medical malpractice payouts are increasing. Awards are going up quickly and each big award sets a precedent that drives the next award request in future cases.

Proponents and opponents disagree about how much each factor contributes to the problem the proponents of Measure 35 hope to solve.

Proponents of Measure 35 contend that claim payments are the most significant costs that malpractice insurers face, accounting for about two-thirds of their total costs and that recent increases in claims are being reflected in soaring premiums.<sup>16</sup> Dr. Colin Cave, the chief petitioner for Measure 35, testified that total payouts for malpractice claims increased from \$15 million in 1999 to \$60 million in 2003 (a 300 percent increase). The proponents' data show that since the Oregon Supreme Court invalidated caps in 1999, the average demand per claim has gone from \$870,000 to \$3.6 million, and the average demand for an obstetric claim has risen to \$9.5 million.<sup>17</sup>

Opponents of Measure 35 argue that awards for non-economic damages have little to do with rising premiums. They are able to identify only eight Oregon cases since 1997 in which juries awarded over \$1 million for a malpractice claim. Instead of focusing on claims costs, they say premiums have increased to make up losses insurers experienced in the financial markets over the past several years and to recover from undercharging premiums to increase market share in the 1990s.

Both the proponents and the opponents of Measure 35 cited statistical studies supporting their positions. These studies appeared to be conducted or funded by groups that have taken a public position on damage caps; therefore your committee was reluctant to rely on their conclusions. Your committee was most persuaded by an extensive study by the U.S. General Accounting Office in August 2003. The committee viewed the GAO as an unbiased organization with the experience and expertise to evaluate this issue. The GAO submitted its report to three independent health policy researchers with expertise in malpractice-related issues and to the American Medical Association. Each of the independent researchers generally concurred with the GAO's findings. The AMA objected to portions of the report, but did not quarrel with the GAO's conclusion that medical malpractice insurance premiums increased more slowly in states with non-economic damage caps. The GAO focused on non-economic damage caps because "published research generally finds that these caps have a greater impact on medical malpractice premium rates and claims payments than some other tort reform measures."<sup>18</sup>

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<sup>16</sup> Grover

<sup>17</sup> Proponents of Measure 35 assert that this increase is directly related to the Oregon Supreme Court's removal of the \$500,000 non-economic damages cap in 1999. Measure 35 opponents point to the 1994 Court of Appeals decision in Tenold to argue that the cap on non-economic damages was effectively removed as early as 1994, even though the Oregon Supreme Court did not definitively invalidate caps until 1999. Evaluating the effect of the 1994 decision is difficult because many claimants likely assumed the \$500,000 cap remained in effect until the state's highest court invalidated it in 1999.

<sup>18</sup> GAO Report

**Your committee is concerned that Measure 35 attempts to solve a complex problem by addressing only one of many potential contributing factors.**

Although your committee relied heavily on the GAO report, it does have limitations, particularly in that it studied a relatively small number of states over a relatively short period of time. The lack of information regarding the effect of caps was an obstacle in your committee's work, mostly because a significant number of Oregon health care providers currently have the benefit of caps.<sup>19</sup> At least one public health district already subject to caps was recently notified of a 100 percent increase in its malpractice premium for the coming year. Your committee could not determine if this definitively means that caps are not effective at reducing premiums, or whether it means that, if caps are to work, they must apply to all health care providers in the state to reduce the overall risk pool for insurers.

Your committee is concerned that Measure 35 attempts to solve a complex problem by addressing only one of many *potential* contributing factors. Also, nothing in the measure compels insurers to pass on any savings to policyholders in the form of lower premiums. Because Measure 35 would have no effect on many of the factors that potentially influence the cost of medical malpractice insurance and would not compel insurers to pass savings on to policyholders, it is unclear whether the measure would, in fact, reduce medical malpractice insurance premiums.

### **C. If Measure 35 Reduces Medical Malpractice Rates, It Is Unlikely to be the Panacea Touted by Its Proponents.**

Proponents of Measure 35 claim that its passage would address three important social problems of concern to Oregonians:

- improve access to health care;
- result in greater fairness in the system of compensating medical errors; and
- improve the quality of care, improve the adversarial health care climate and remove barriers to practice medicine.

<sup>19</sup> Refer to discussion accompanying note 14.

For the following reasons, your committee concludes that passage of Measure 35 might positively influence some of these areas.

### **1. Access to Health Care**

Your committee heard convincing evidence of both new and longstanding problems of access to health care in Oregon, especially in rural areas often characterized by high unemployment and aging populations. Rural populations typically have a high percentage of Medicaid and Medicare patients, and Oregon's Medicare and Medicaid reimbursements are among the lowest in nation. Rural doctors and hospitals, therefore, often receive less income than their urban counterparts, making increases in malpractice premiums difficult to absorb.

Problems being faced now in rural Oregon may foreshadow what is to come for urban areas. Though urban health care providers are cushioned somewhat by advantageous economies of scale and a more diverse mix of patients (i.e. lower percentage of Medicare and Medicaid patients), urban areas are starting to face issues related to access of care.

As with so many aspects of Measure 35, the proponents and opponents do not agree on the extent of the problem. The opponents cite statistics indicating that the number of doctors in Oregon—including in rural areas—is remaining steady or even increasing. They contend that factors like longer hours and lower earning potential are more important factors than malpractice premiums in attracting and retaining rural doctors. The proponents question the opponents' statistics, contending that not all of the doctors included in the numbers are actively practicing or, if they are practicing, they are not carrying a full patient load. The proponents are more alarmed by surveys that show a significant number of rural doctors intend to leave practice in the near future.

Your committee heard convincing testimony from Karen Whitaker, vice provost and director of the OHSU Center for Rural Health, that there are significant issues related to access of care in some, but not all, parts of rural Oregon and that these problems tend to be concentrated in certain high risk fields. Several witnesses testified that high malpractice premiums are putting a strain on health care delivery in rural Oregon.<sup>20</sup> Therefore, if Measure 35 helps stabilize malpractice insurance rates, it should reduce one disincentive to practice in rural areas and could make more doctors available in rural Oregon. This would, in turn, improve access to healthcare.

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<sup>20</sup> Although these witnesses cited medical malpractice insurance premiums as a problem, they did not necessarily agree that Measure 35 would solve the problem.

## 2. Fairness of the Medical Malpractice Compensation System

Measure 35's proponents criticize a system of compensation that provides disproportionate awards to a small number of people, while consuming a staggering amount of resources in transaction costs. Implicit in their argument is that non-economic damage awards, which, by their nature cannot be objectively measured, are frequently arbitrary and excessive and, therefore, unfair to health care providers who are forced to defend claims.

Measure 35's opponents contend that juries are capable of determining whether awards are proportionate to the claimant's injuries. They agree that only a small portion of injured patients ever receive awards through Oregon's current system for compensating victims of medical malpractice, but they conclude that patients—not doctors—bear the brunt of any unfairness in the system.

Your committee agrees that the current system for compensating bad medical outcomes is already unfair:<sup>21</sup>

• Awards for non-economic damages are subjective and inconsistent; a jury may be swayed by emotional factors instead of an objective way to set compensation. Studies have shown that juries tend to reward a suffering plaintiff based on the extent of the injury regardless of the degree of fault of the doctor.<sup>22</sup>

• Excessive and contentious legal recourse by proving that somebody is to blame for a patient's injuries is the only way for a victim of medical injury to be compensated. There is no other "social safety net" on which victims can fall back.

• Compensation is available only if the patient can show fault, the current system encourages defensive medicine against doctors who may not actually be negligent.

• The fear of blame and the possibility that a health care provider could lose personal assets discourages a more collaborative system for compensating patients injured by a medical error.

• Because of costly attorney and expert witness fees, injured parties typically receive less than half the dollar awarded by juries in medical malpractice lawsuits.

• Even when a large award is made, it can take years for the patient to receive the money.

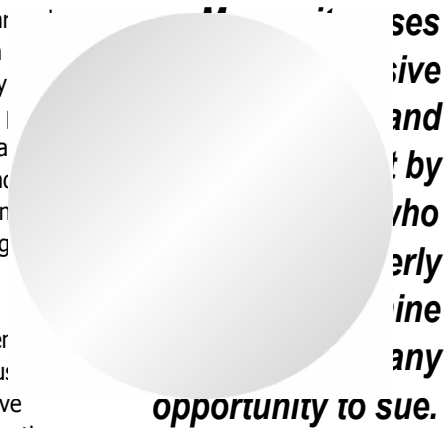
<sup>21</sup> Your committee agrees that there is a pressing need for reform of the system for compensating victims of medical injuries. Suggestions for reforms appear in Appendix A.

<sup>22</sup> New England Journal of Medicine, 1996

People who view non-economic damage awards as frequently arbitrary or excessive will likely view Measure 35 as increasing the fairness of the system for compensating consequences of medical malpractice. Not only will health care providers be spared liability, but more funds will be available to pay claims for demonstrable damages to other claimants. People who view non-economic damage awards as generally appropriate will likely view Measure 35 as making an already unfair system slightly more unfair. The additional unfairness will be concentrated on a small number of injured people for whom the system will be extremely unfair, specifically cases that have small economic damages but high non-economic damages.<sup>23</sup>

**3. Quality of Care, Adversarial Climate, and Risk of Liability**

Many witnesses described a pervasive climate of fear and hostility experienced by physicians who perceive an overly zealous legal machine waiting for any opportunity to impose liability. According to witness testimony, this perception discourages disclosure of important information that could improve medical safety, quality of care and doctor accountability. This climate also has a demoralizing effect on doctors and discourages "the best and brightest" from wanting to practice medicine.



Witnesses from a variety of health care fields frequently referred to the ramifications of declining morale caused by the malpractice insurance crisis. They said prospective doctors choose specialized practices based in part on the liability risk associated with a particular specialty. As Whitaker commented, "the doctors' perception is their reality" because doctors will make career decisions based partly on their perception of the risks and costs of practicing medicine.<sup>24</sup>

Witnesses also told your committee that the medical malpractice insurance system should not be about only what happens after a bad medical outcome occurs. They stressed its potential relationship with efforts to improve patient safety and quality of care. As Dr. Glenn Rodriguez of Providence Medical Center put it, "We've had the current malpractice tort system for 40 years, and it hasn't improved patient safety at all."

<sup>23</sup> Examples include a woman who undergoes a mastectomy based on a misdiagnosis of breast cancer, and a stay-at-home parent with no income who becomes disabled. In such cases, the patient's life has been dramatically affected, but the economic damages are likely to be small.

<sup>24</sup> In fact, perceptions may be more important than reality. Individual health care providers in Oregon are already largely insulated from liability from punitive damages, and large awards frequently are satisfied by larger entities (e.g., hospitals, insurers and health systems) rather than individual health care providers.



Your committee does not believe Measure 35 will improve patient safety or quality of care because it will not change the basic malpractice system. It will have only a limited effect on the adversarial health care climate, because it will not alter the fundamental fault-based system. However, by managing one part of potential liability, it may reduce doctors' fears of liability. If Measure 35 reduces this fear among doctors, it could have a positive effect on decisions to continue to perform, or to enter, higher-risk specialties.

**D. The Content of Measure 35 Should Not Be in the Constitution, But the Oregon Supreme Court Has Left the Proponents No Alternative.**

A key consideration for your committee was the extent to which it is appropriate to amend the Constitution with Measure 35, even if the measure serves a public good. Because statutory limits on non-economic damages violate the constitutional right to a jury trial, a constitutional amendment is the only way to enact these caps.

This reality does not mean that use of the initiative process is a desirable means to amend the Constitution in this case. Given the complexity of the issues, proponents and opponents of caps both rely on simplistic sloganeering (e.g., 'stop frivolous lawsuits;' 'trust juries') that does not address the true issues. When the campaigns do go beyond slogans, both proponents and opponents cite a dizzying array of apparently conflicting statistics to support their positions. Finding unbiased, knowledgeable observers who are capable of evaluating the competing statistical claims is difficult. If the Oregon Constitution is going to be amended with respect to such a complex issue, your committee believes that it should be done through a more objective deliberative process.

Finally, your committee does not believe the Constitution should include details as specific as dollar amounts for medical malpractice caps.

## V. MAJORITY CONCLUSIONS & RECOMMENDATION

After weighing the factors and decisions set forth in the Discussion section of this report, a majority of your committee concludes that:

Number of factors affect malpractice insurance premiums, and there is insufficient evidence to show that addressing the single factor of non-economic damages will materially affect premiums. Even if insurers do realize savings if Measure 35 is adopted, there is no assurance that insurers will pass on savings to health care providers in the form of lower premiums.

Malpractice insurance premiums are not the primary cause of the health care access problem in Oregon. Measure 35 would not affect malpractice insurance premiums enough to make a significant difference in longstanding issues in rural health care. Measure 35 would at best be an incomplete solution to the complex problem of health care access and quality.

Measure 35 is disproportionately unfair to the small number of malpractice victims who receive awards but would be constitutionally unable to receive them.

Measure 35 would do nothing to address the much-needed reform of the expensive and complex system for compensating victims of bad medical outcomes.

Measure 35 should be subjected to more extensive deliberation and scrutiny before it is placed in the Oregon Constitution.

**A majority of your committee, therefore, recommend a NO vote on Measure 35.**

Respectfully submitted,

Alana Bove Finn  
Francis Lancaster  
Bert Lowry  
Mark Skolnick, *chair*

## VI. MINORITY CONCLUSIONS AND RECOMMENDATION

After weighing the factors and issues set forth in the Discussion section of this report, a minority of your committee concludes that:

Imposing non-economic damages would have a decelerating effect on the growth of premiums in many of the states that have enacted caps. Although the extent of the impact cannot be determined at this time, we believe that the dire circumstances, particularly in rural Oregon, justify taking this step.

Imposing non-economic damages may be unfair for a few Oregonians who might otherwise be compensated with larger awards, a greater public good would be accomplished by slowing down the growth of medical malpractice premiums.

Slowing malpractice premiums would provide a better environment for doctors entering the profession in Oregon and help retain doctors who already are here.

High malpractice premiums, the rapidly shrinking Oregon Health Plan, and lower Medicare and Medicaid payments all threaten the delivery of a critical and essential health care service to our citizens. Spiraling medical malpractice premiums further stress an already fragile health care system. We believe controlling the malpractice insurance crisis would be an important positive first step in addressing this systemic crisis.

Amendment to the Oregon Constitution is a blunt instrument, one that should be used only as a last resort. The 1999 decision of the Oregon Supreme Court has left a vote on a constitutional amendment as the only path to this necessary reform.

**A minority of your committee, therefore, recommends a YES vote on Measure 35.**

Respectfully submitted,

Patricia Elliott  
Joanne Kahn  
Rhidian Morgan

Advisor and Staff to the Full Committee:

Jeff Knapp, *research adviser*  
Wade Fickler, *research director*

**ACKNOWLEDGEMENTS**

Your committee acknowledges and appreciates the support and advice of our Research Advisor, Jeff Knapp and City Club Research Director Wade Fickler.

**VI. APPENDICES****A. Other Alternatives**

Your committee identified alternative approaches that are reportedly working in other states. Your committee believes some of these concepts are worthy of further consideration.

• review of insurance premium increases by a public commission, to force insurance companies to justify their increases. California's 1975 Medical Injury Compensation Reform Act is a model used by other states. The California law puts a \$250,000 cap on non-economic damages, limits attorney fees to a sliding scale, and regulates malpractice rate increases proposed by insurance companies. Attorneys' fees are set to a sliding scale of 40 percent of the first \$40,000 awarded, down to 15 percent for amounts over \$600,000.

• an expert panel to review cases to separate bad medical outcomes from the actual "e" cases.

• a table of "standard compensation" for bad medical outcomes, through some sort of trust fund, possibly a reserve fund created from malpractice insurance premiums. It would be necessary to go to court to get this compensation.

• a tiered system that differentiates severe cases and allows a higher level of awards.

• allow patients to access information related to malpractice claims so they can select physicians more carefully, based on their professional history.

• expand the Patient Safety Commission created last year by the Oregon Legislature. The commission was created to "build the framework for a voluntary reporting system that will track medical errors without exposing the reporting parties to litigation."<sup>25</sup>

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<sup>25</sup> The Business Journal, "Patient Safety Group Seeks More Funding," August 6, 2004

**B. Witnesses**

Colin Cave, M.D., Past President of the Oregon Medical Association, Chief Petitioner for Measure 35  
 Tom Sadoris, M.D., Internist, Private Practice  
 Glen Rodriguez, M.D., Chief Medical Officer, Providence Health System  
 Charlie Burr, Campaign Manager, No on 35 Campaign/Trust Juries for Responsible Solutions Committee  
 Jason Reynolds, Executive Director, Oregon Consumer League  
 Karen Whitaker, Vice Provost, OHSU; Director, Center for Rural Health  
 Bill Taylor, Staff Attorney, Oregon House Judiciary Committee  
 Peter Merck, Corporate Management Analyst, State Accident Insurance Fund (SAIF)  
 Kathy Brooks, plaintiff in a malpractice claim  
 Sherry Heaton, Insurance Broker, Chivaroli and Associates  
 Jack Polance, Attorney at Law, Private Practice  
 Victor Van Der Does, Chief Executive Officer, Morrow County Health District  
 Ronnie Emden, M.D., Obstetrician, Vancouver Clinic  
 Bob Howser, Hospital Administrator, Blue Mountain Hospital District

**C. Resources**

"America's Medical Liability Crisis Backgrounder: Oregon," American Medical Association, Updated July 8, 2004.  
 "Do Caps Improve Access To Health Care?" *Health Care State Rankings*, 2004 (p 426). Morgan Quinto Press.  
 "Do Caps Reduce Malpractice Premiums?" *Medical Liability Monitor*, October 2003.  
 "How Do Emergency Surgery Premiums Compare?" *Medical Liability Monitor*, October 2003.  
 "How Insurance Reform Lowered Doctors' Medical Malpractice Rates in California: And How Malpractice Caps Failed," The Foundation for Taxpayer and Consumer Rights, March 7, 2003.  
 "Impact of Medical Malpractice Caps on Health Care Costs and Access," Oregon AFL-CIO ([www.workingfamiliesvote.com](http://www.workingfamiliesvote.com)), July 19, 2004.  
 "Limiting Tort Liability for Medical Malpractice," Economic and Budget Issue Brief: A series of issue summaries from the Congressional Budget Office, January 8, 2004.  
 "Medical Malpractice: Implications of Rising Premiums on Access to Health Care" United States General Accounting Office (GAO) Report to Congressional Requesters, August 2003.  
 "Oregon's Increase Number of Doctors: Government Data Refutes Medical Lobby Claims," Public Citizen Congress Watch and OSPIRG, August 2004.  
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- Studdert, David M., LL.B., Sc.D., M.P.H., Mello, Michelle M., J.D., Ph.D., and Brennan, Troyen A., M.D., J.D., M.P.H. "Medical Malpractice" *New England Journal of Medicine*, January 15, 2004, Vol.350:283-292, No.3.
- Studdert, David M., LL.B., Sc.D., M.P.H., Mello, Michelle M., J.D., Ph.D., Yang, Y. Tony, "Are Damages Caps Regressive? A Study of Malpractice Jury Verdicts" *Health Affairs*, July-August, 2004.

[www.cna.com](http://www.cna.com)

[www.npmic.com](http://www.npmic.com)



## 2004 Ballot Measure Report Measure 36

Published in the City Club of Portland Bulletin, Vol. 86, No. 21, Friday, October 22, 2004



### Constitutional Amendment State of Oregon Ballot Measure 36:

AMENDS THE CONSTITUTION: ONLY MARRIAGE BETWEEN ONE MAN AND ONE WOMAN IS VALID OR LEGALLY RECOGNIZED AS MARRIAGE.

Your committee listened carefully to proponents of Measure 36 who argued in favor of limiting marriage to opposite-sex couples. Ultimately, we were not persuaded that the institution of marriage would be strengthened by codifying the exclusion of same-sex couples by a constitutional amendment. Your committee believes strongly in the institution of marriage and in its vital importance to families in Oregon; marriage should be encouraged and fostered in all our communities. For these reasons, your committee concludes that denying same-sex couples the status of marriage discriminates against and harms same-sex couples and their families, and does not benefit opposite-sex couples in any meaningful way. Your committee also reiterates previous City Club concerns over the process and precedent of amending the Oregon Constitution on contentious issues by a simple majority vote. One does not have to be in favor of same-sex marriage to find good reasons to vote against this measure.

**For these reasons, your committee unanimously recommends a NO vote on Measure 36.**

*City Club members voted on October 22, 2004 to adopt the contents and recommendation of this report as the Club's official position. City Club recommends a NO vote on Ballot Measure 36.*

## I. INTRODUCTION

Ballot Measure 36 will appear on the ballot as follows:

**AMENDS THE CONSTITUTION: ONLY MARRIAGE BETWEEN ONE MAN AND ONE WOMAN IS VALID OR LEGALLY RECOGNIZED AS MARRIAGE.**

**Result of "Yes" Vote:**

"Yes" vote adds to the Oregon Constitution a declaration of policy that only marriage between one man and one woman is valid or legally recognized as marriage.

**Result of "No" Vote:**

"No" vote retains existing constitution without provision declaring that only marriage between one man and one woman is valid or legally recognized as marriage.

**Summary:**

Amends the constitution. Oregon statutes currently provide that marriage is a civil contract entered into in person between individuals of the opposite sex, that is, between males and females at least 17 years of age who solemnize the marriage by declaring, "they take each other to be husband and wife." The existing Oregon Constitution contains no provision governing marriage. Currently, the State of Oregon recognizes out-of-state marriages that are valid in the state where performed, unless the marriage violates a strong public policy of Oregon. Measure adds to Oregon Constitution a declaration that the policy of the State of Oregon and its political subdivisions is that "only a marriage between one man and one woman shall be valid or legally recognized as a marriage."

**Estimate of Financial Impact:**

There is no financial effect on the state or local government expenditures or revenues.

*(The language of the caption, question, and summary was certified by the Oregon Secretary of State.)*

Proponents of Measure 36 seek to amend the Oregon Constitution by adding a statement of policy that only marriage between one man and one woman is valid or legally recognized as marriage. The measure is part of a national trend to clearly define marriage in state constitutions so that the definition excludes same-sex couples. In addition to Oregon, 11 other states will vote on marriage definition laws in the November 2004 election.

City Club formed a committee of nine members to analyze Measure 36. In keeping with Club standards of fair and impartial analysis, City Club screened committee members to ensure that no member had taken a public position on same-sex marriage. Your committee met for six weeks; interviewed proponents, opponents and several legal experts; and independently researched relevant articles, reports and other materials.



## II. BACKGROUND

The debate over same-sex marriage in the United States is not new. In 1971, two men in Hennepin County, Minnesota, filed suit after being denied a marriage license by the county clerk. In its ruling, the Minnesota Supreme Court concluded that same-sex couples had no legal right to marry because marriage was "inherently" an opposite-sex union.<sup>1</sup> Two years later, the Kentucky Supreme Court also ruled against a same-sex couple seeking a marriage license, citing three different dictionary definitions stating marriage to be a union between one man and one woman.<sup>2</sup>

In 1993, the Hawaii Supreme Court ruled its state marriage laws likely violated the Hawaii Constitution.<sup>3</sup> The ruling never took effect because Hawaii voters amended their Constitution; nonetheless, the court's action spurred federal lawmakers to create the Defense of Marriage Act. DOMA defines marriage as the union of one man and one woman and prevents any state from being required to recognize contrary definitions from other states. The federal Defense of Marriage Act was passed by both houses of Congress and signed into law by President Clinton in 1996.<sup>4</sup>

As of September 1, 2004, 38 states have passed similar statutory laws, and four states have passed constitutional amendments banning same-sex marriage. Oregon has no state law similar to DOMA. Chapter 106 of the Oregon Revised Statutes regulates marriage in this state.<sup>5</sup>

Passage of DOMA and various state laws prohibiting same-sex marriages has not settled the matter. The Vermont Supreme Court ruled, in 1999, that Vermont's marriage laws were unconstitutional because they denied legal benefits and protections to same-sex couples that are available

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<sup>1</sup> Baker v. Nelson (Minn. 1971)

<sup>2</sup> Jones v. Hallahan (Ken. 1973)

<sup>3</sup> Baehr v. Lewin/Miike (Haw. 1994). The court did not rule that Hawaii's marriage laws were unconstitutional. Rather, it ruled that they were subject to "strict scrutiny" because they were a form of gender discrimination. The court ordered the state to show that its marriage laws furthered a compelling state interest. The order was made moot when Hawaii voters amended their state constitution. The amendment to the Hawaii Constitution reads, "The legislature shall have the power to reserve marriage to opposite-sex couples." (Haw. Const. Art. 1, §23).

<sup>4</sup> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship (28 U.S.C. §1738(c)).

<sup>5</sup> A definition of marriage is contained in ORS 106.010: "Marriage is a civil contract entered into by males at least 17 years of age and females at least 17 years of age, who are otherwise capable, and solemnized in accordance with ORS 106.150." Various other sections of ORS 106 form the broader legal understanding of marriage.

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to opposite-sex couples.<sup>6</sup> The court ordered Vermont's Legislature to remedy this inequity; the Legislature in turn created same-sex "civil unions." Several states have subsequently refused to recognize same-sex civil unions performed in Vermont.<sup>7</sup> Moreover, many legal scholars have questioned the constitutionality of DOMA on grounds that it is an over-extension of congressional power<sup>8</sup> and violates equal protection and due process rights under the U.S. Constitution.<sup>9</sup>

In November 2003, the Supreme Judicial Court of Massachusetts ruled that denial of marriage licenses to same-sex couples is unconstitutional.<sup>10</sup> In response, President Bush, in his January 2004 State of the Union address, warned that the courts could rule DOMA unconstitutional and called for an amendment to the United States Constitution banning same-sex marriage.<sup>11</sup> The proposed amendment came to the floor, but failed to pass the U.S. Senate in July 2004. On November 2, 2004 Oregon, along with 11 other states, will vote on proposed legislation to limit marriage to opposite-sex couples.

Proponents of "traditional marriage" in Oregon responded to the Massachusetts ruling in February 2004 by submitting two "defense of marriage" constitutional amendments. The proposed amendments were submitted to the Oregon Secretary of State for pre-election review on February 19, 2004.<sup>12</sup> Chief petitioners of both measures withdrew their initiatives on March 2, 2004. That same day, two significant things also occurred: a third initiative, which subsequently became Measure 36, was submitted to Oregon's Secretary of State; and Multnomah County officials announced they would begin issuing marriage licenses to same-sex couples the following day. Following the Multnomah County decision, more than 3,000 same-sex couples were married, before a state court ordered Multnomah County to stop issuing marriage licenses to same-sex couples.

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<sup>6</sup> Baker v. State (Ver. 1999)

<sup>7</sup> Rosengarten v. Downes, 802 A.2d 170 (Conn. App. Ct. 2002) (trial court had no jurisdiction to dissolve civil union); Burns v. Burns, 253 Ga. App. 600 (2002) (mother was not married to her civil union spouse and thus, under divorce consent decree, could not have visitation with children while cohabitating with civil union spouse). A trial court in Texas respected a civil union for purposes of dissolving it, but later vacated its decision at the request of the state Attorney General and granted a new trial. In the Matter of the Marriage of R.S. & J.A., No. F-185.063, Agreed Final Decree of Divorce (Tx. Dist. Ct., 279th Judicial Dist. Mar. 3, 2003). The parties subsequently withdrew their suit.

<sup>8</sup> Johnson, Julie. 1997. "The Meaning of 'General Laws': The Extent of Congress' Power Under the Full Faith and Credit Clause and the Constitutionality of the Defense of Marriage Act." *University of Pennsylvania Law Review* 145:1611-1647. See also Ruskey-Kidd, Scott. 1997. "The Defense of Marriage Act and the Overextension of Congressional Authority." *Columbia Law Review* 97:1435-1482.

<sup>9</sup> Note. 2004. "Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage." *Harvard Law Review* 117:2684-2707.

<sup>10</sup> Goodridge v. Department of Public Health (Mass. 2003)

<sup>11</sup> Text of State of the Union address on White House Web site:

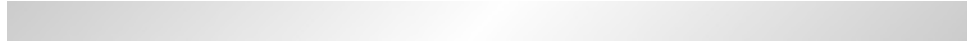
[www.whitehouse.gov/news/releases/2004/01/20040120-7.html](http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html)

<sup>12</sup> One proposed amendment read, "Only marriage between one man and one woman is valid or recognized; same legal status for unmarried individuals is prohibited." The other read: "Marriage is a civil contract entered into in person by one male and one female" (Office of the Secretary of State, Oregon).

In April 2004, a Multnomah County Circuit Court judge found Oregon's marriage statutes to be in violation of the privileges and immunities clause, Article 1, Section 20 of the Oregon Constitution.<sup>13</sup> The Court thereby ordered the state of Oregon to register all same-sex marriages already performed in Multnomah County. The court simultaneously ordered Multnomah County to stop issuing same-sex licenses until the Legislature had an opportunity to consider amending the marriage statutes. The court also barred further legal proceedings until the Oregon Supreme Court ruled on the matter.<sup>14</sup>

Should Measure 36 fail, the focus of the debate likely will shift to the lawsuit currently before the Oregon Supreme Court. The court's decision may settle the debate outright, or it may turn the matter over to the Legislature for consideration.

Should Measure 36 pass, it will almost certainly be challenged in state and federal courts. Meanwhile, the status of the same-sex couples married in Multnomah County is likely to remain in limbo.







### III. ARGUMENTS PRO AND CON

#### A. Arguments Advanced in Favor of the Measure

Proponents of Measure 36 contend the following:

##### Rights and Legal Issues

-  Constitutional amendment is necessary to stop the actions taken by Multnomah County in issuing marriage licenses to same-sex couples.
-  Measure 36 has provided an opportunity for public debate on Oregon's willingness to accept a new definition of marriage.
-  Passage of Measure 36 will insert into the Oregon Constitution an unambiguous and common-sense definition of marriage.
-  Changing the traditional understanding of marriage will open the door to marriages based on a variety of other relationships.

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<sup>13</sup> "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

<sup>14</sup> Mary Li et al. and Multnomah County vs. State of Oregon et al vs. Defense of Marriage Coalition et al. (Mult. Co. 2004)

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City Club must retain its position on traditional marriage regardless of actions taken in other jurisdictions.

Measure 36 does not preclude extending other legal benefits to same-sex couples.

### Purpose and Benefits of Traditional Marriage

Traditional marriage has always been between one man and one woman.

The primary purpose of marriage is to bear and rear children. The state has long had an interest in supporting traditional marriage as an institution to promote stability and an optimal environment for raising children.

The scientific study of the effects on children reared in same-sex households is at best unclear; at worst it shows that children who grow up in same-sex parenting environments are disadvantaged.

### Equality

Measure 36 would treat homosexuals and heterosexuals equally because both would be able to marry someone of the opposite sex.

Sexual orientation is a choice, not an immutable characteristic, such as race or sex. It is appropriate for the state to regulate behavioral choices.

## IL Arguments Advanced Against the Measure

Opponents of Measure 36 contend the following:

### Rights and the Constitution

Historically the purpose of the Constitution has been to protect the rights of minorities—especially unpopular minorities. Amending the Constitution to deny rights to minorities is wrong.

Amending the Constitution is a drastic step that should be taken slowly and carefully; it requires public deliberation. Measure 36 has been pushed forward too quickly and threatens to deprive the public of a meaningful discussion on same-sex marriage.

If Measure 36 passes, the legal limbo in which same-sex couples married in March and April find themselves could continue for years.

state law does not prohibit discrimination based on sexual orientation. If Measure 36 is passed, the Legislature could view it as a reason to forego new civil rights legislation to protect homosexuals in areas other than marriage.

Benefits and Protections

The state's interest to encourage stable families. Defining marriage as an opposite-sex union denies same-sex couples and their families hundreds of legal benefits and protections that foster stable families.

Measure 36 does nothing to promote stable homes or the well-being of children.

Dignity and Respect

Measure 36 attempts to codify in the Constitution the concept that same-sex relationships are inferior to opposite-sex relationships, and by implication that homosexuals are less worthy than heterosexuals.

Opposite-sex marriage is as much about attaining dignity and respect as it is about obtaining legal and financial benefits. Even if Measure 36 does not specifically prohibit "civil unions" or a similar, marriage-like status, it fails to recognize that dignity and respect are principal social benefits of marriage.

Measure 36 is not solely about "defending marriage;" it is also about some members of the public who are uncomfortable with homosexuality.

The institution of marriage and "traditional family life" in Multnomah County have not suffered from the issuance of marriage licenses to same-sex couples. Recent experience with same-sex marriages in Multnomah County shows that concerns voiced by proponents of Measure 36 are exaggerated.

**IV. DISCUSSION**

Your committee believes marriage has served society remarkably well over the ages. It reflects the value society places on love, fidelity and commitment. Marriage is vital to the stability of families and, by extension, the stability of society. Changes to the institution of marriage should be undertaken with caution and only after serious deliberation.

Your committee interviewed many witnesses and independently researched this issue. We recognize the significance of the institution of marriage, and we are convinced that both sides care

deeply about its place in society. After careful deliberation, we recommend a NO vote on Measure 36. The most significant issues we considered are summarized below.

### Language of the Measure

The proposed constitutional amendment reads: "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."<sup>15</sup> To understand the legal language, the committee heard testimony from retired Oregon Supreme Court Justice Hans Linde.

The drafters' choice of the word "policy" seems an attempt to limit Oregon's obligation to recognize same-sex marriages performed in other states. Judge Linde testified:

"The United States Constitution (Art. IV, §1) requires every state to give 'full faith and credit' to 'the public acts, records, and judicial proceedings' of other states (presumably including decisions involving marital status), but courts have carved out an exception if doing so would contravene the state's 'public policy.' The measure seeks to invoke this exception against recognizing same-sex marriages that were legally contracted in other states."<sup>16</sup>

At the same time, the amendment language does not address the question of providing legal benefits of marriage to same-sex couples in the form of "civil unions" or similar arrangements. Every legal expert who testified before your committee thought that even if Measure 36 passes, Oregon would be free to create same-sex civil unions. Your committee struggled to understand why proponents should want to deny legal standing to the civil unions of other states while leaving open the possibility of creating civil unions in Oregon. For this reason, we believe the language of Measure 36 will not contribute to a speedy legal resolution of this issue for Oregonians.

### The Nature of Homosexuality

Proponents of Measure 36 stated that homosexuality is a choice. They further testified that Measure 36 would, therefore, treat homosexuals and heterosexuals alike by enabling both to marry someone of the opposite sex. Conversely, Measure 36 would prohibit both homosexuals and heterosexuals from marrying someone of the same sex. Your committee finds this argument disingenuous. Measure 36 is clearly designed to exclude homosexuals from marriage and, as such, from the legal and emotional benefits that flow from marriage.

***Proponents of Measure 36 ... testified that Measure 36 would, therefore, treat homosexuals and heterosexuals alike by enabling both to marry someone of the opposite sex.***

<sup>15</sup> Emphasis added.

<sup>16</sup> Memorandum written by Judge Hans Linde for your committee

Science has not discovered a single cause of homosexuality, but there is wide agreement in the medical community that homosexuality is not a choice. In 1973, the American Psychiatric Association removed homosexuality from its list of mental disorders.<sup>17</sup> Since then the Association has resolved to fight discrimination based on sexual orientation in housing, public accommodations and licensing. Today, the American Medical Association's official position is that homosexuality is not a mental disorder and that patients cannot change their sexual orientation.<sup>18</sup> And the American Psychology Association states, "[H]uman beings cannot choose to be either gay or straight. Sexual orientation emerges for most people in early adolescence without any prior sexual experience. Although we can choose whether to act on our feelings, psychologists do not consider sexual orientation to be a conscious choice that can be voluntarily changed."<sup>19</sup>

In 1994, a City Club study committee examined the nature of homosexuality. Their report concluded, "There is a strong biological component in the genesis of homosexuality. Given this, sexual orientation appears to be more an immutable trait than a personal choice."<sup>20</sup> Proponents of Measure 36 offered testimony they believed refuted this conclusion, but your committee was not persuaded.

Your committee believes that the Constitution should treat all citizens equally. As homosexuality is not a choice, it is wrong to amend the Constitution to deny same-sex couples equal access to marriage.

### **The Tradition of Marriage**

Witnesses in support of Measure 36 argued that the measure would only codify what has long been accepted by society: that marriage has always been between one man and one woman. They further argue that no one can know the full consequences of changing this definition to include same-sex relationships. Your committee does not dispute this, but we nonetheless find it an unconvincing justification for denying same-sex couples the right to marry. Marriage is not a static institution. It has undergone considerable change in its legal definition over time. Wives were once considered the property of husbands. In many states, marriages between people of different races were legally prohibited. Such laws today are deemed unjust in a modern, democratic society. Attitudes and patterns of behavior are also changing. Many individuals are choosing to marry later, if at all, and have fewer children; far

***Marriage is not a static institution. It has undergone considerable change in its legal definition over time. Wives were once considered the property of husbands***

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<sup>17</sup> American Psychiatry Association. [www.psych.org/public\\_info/homose~1.cfm](http://www.psych.org/public_info/homose~1.cfm)

<sup>18</sup> American Medical Association policy H160.991 "Health Care Needs of the Homosexual Population"

<sup>19</sup> American Psychological Association. <http://www.apa.org/pubinfo/answers.html>

<sup>20</sup> City Club of Portland. 1994. "Homosexuality in Oregon." Vol. 76. No. 6

more women work outside the home than just a few decades ago. All of these trends bear witness to the changing nature of our families and society. At the same time, homosexuals have struggled and achieved a measure of acceptance in society. Your committee believes homosexuality should not be a legal basis for discrimination.

Traditional beliefs about marriage are often grounded in religious teaching. Your committee recognizes that marriage includes a religious component. Churches, synagogues and mosques most certainly can, and do, have their own views on who can marry, and many choose to consecrate only opposite-sex marriages. No law should infringe upon that right. Ultimately, however, the state regulates marriage as a civil—not religious—contract. And as such, the state is obligated to set aside particular religious beliefs and provide same-sex couples equal access to civil marriage.

### Impact on Children

Supporters of Measure 36 argue that only traditional marriages (i.e., opposite-sex marriages) should be sanctioned by the state because they have proved the best model for a stable environment in which to bear and rear children. Your committee does not dispute the benefits of raising children in parent families, but we are not convinced that families headed by opposite-sex couples offer a more beneficial environment to children than families headed by same-sex couples. Most scientific research has found no differences in the welfare of children reared by same-sex parents compared to children reared in traditional families.<sup>21</sup>

***Voters will decide ... whether the parents of children being raised by same-sex couples have the right to marry.***

Witnesses in support of Measure 36 allege that scientific literature on same-sex parenting lacks methodological rigor and long-term observation. A study in the *American Sociological Review*, the most thorough review of same-sex parenting research to date, echoed some of these concerns.<sup>22</sup> However, your committee believes this alone is not an adequate reason to support Measure 36 because the right of same-sex couples to rear children is not in dispute. Same-sex couples raise children now and will continue to do so if Measure 36 passes. Voters will decide, however, whether the parents of children being raised by same-sex couples have the right to marry. Your committee finds Measure 36 to be inconsistent with proponents' stated belief that children should be raised in stable two-parent families.

Measure 36 proponents also argue that procreation is an essential element of marriage. One witness testified that "the only reason the state is involved in marriage is for the procreation of chil-

<sup>21</sup> Perrin, Ellen, C., and the Committee on the Psychosocial Aspects of Child and Family Health of the American Academy of Pediatrics. 2002. "Technical Report: Co-parent and Second-Parent Adoption by Same-Sex Parents." *Pediatrics* 109:341-346.




<sup>22</sup> Stacey, Judith, and Timothy J. Biblarz. 2001. "(How) Does the Sexual Orientation of Parents Matter." *American Sociological Review* 66:159-183.



dren." Your committee disagrees. Couples marry with a variety of intentions; some choose to have children and others do not. Couples are not required to state their intentions or capabilities to bear children to the government prior to qualifying for a marriage license.

### Legal Benefits and Obligations

Comparisons between unmarried same-sex couples and married opposite-sex couples are difficult because married couples receive more than 1,000 legal protections and benefits not available to unmarried couples. There are 1,138 federal marriage benefits and hundreds of state benefits accorded to married couples.<sup>23</sup> Love and commitment brings couples together, but legal benefits help keep married couples together. The legal benefits of marriage include:

-  to medical benefits; including hospital visitation and the ability to make medical decisions for an incapacitated partner.
-  to economic benefits; including Social Security, health insurance, retirement savings plans.
-  to family care benefits; including the right to unpaid leave from their jobs to care for an elderly parent and the right to live together in nursing homes.

Marriage, however, is more than a collection of benefits; it also carries with it certain obligations. Your committee believes it is important for voters to acknowledge that one element of marriage is the legal "road map" it provides for conflict resolution. While divorce is an unfortunate reality, a marriage contract allows a court to order a fair distribution of the couple's assets and ensure each parent takes responsibility for his or her children. Same-sex couples in long-term relationships currently face great legal uncertainty when their relationships end. This is an unfortunate burden to the couple and is a wholly unreasonable and unnecessary burden for their children.

### Societal Benefits

Beyond the legal benefits of marriage, there are also many social benefits of marriage. A 1995 review of major scholarly literature on marriage found that married people engage in fewer risky behaviors, such as alcohol and drug abuse, have lower mortality rates, and greater wealth than single or cohabitating individuals.<sup>24</sup> In a separate review, the American Academy of Pediatrics concurred:

"Marriage is beneficial in many ways. Married men and women are physically and emotionally healthier and are less likely to engage in health risk behaviors, such as alcohol or drug abuse, than are unmarried adults. Married men and, to a slightly lesser extent, married women live longer. These positive health

<sup>23</sup> United States General Accounting Office. [www.nclrights.org/publications/pubs/2004GAO.pdf](http://www.nclrights.org/publications/pubs/2004GAO.pdf)

<sup>24</sup> Waite, Linda, J. 1995. "Does Marriage Matter." *Demography* 32:483-507.

outcomes of marriage are not primarily the result of self-selection but reflect that people behave differently when they are married."<sup>25</sup>

Your committee recognizes that marriage is not a panacea and not necessarily the right choice for every couple. But we also believe that the benefits of marriage extend to the public at-large: longer, healthier and economically secure lives are in everyone's interest. There is no evidence that the societal benefits of marriage would not extend to same-sex couples. Therefore, we feel it is in the state's interest to encourage marriage for all citizens, including same-sex couples.

### **Is Same-sex Marriage the Beginning of a Slippery Slope?**

Witnesses in favor of Measure 36 argue that if marriage is extended to same-sex couples then the state could not place any restrictions on marriage eligibility. Proponents argue, for example, that the legality of same-sex marriages would open the door to polygamous marriages.

Your committee cannot determine all the long-term effects of allowing same-sex marriage, but we are not convinced that a "slippery-slope" argument justifies support for Measure 36. To the contrary, we are confident that the Legislature and the citizens of Oregon can reasonably define marriage while not denying marriage to same-sex couples. Oregon law already limits who can marry whom. If same-sex couples are allowed to marry, the state might have to revisit some of these limits, and this could be difficult. But your committee does not believe that same-sex couples should be denied the right to marry because the Legislature might be forced to review marriage eligibility laws.

Conversely, if there is a slippery slope to be avoided, your committee believes it could very well be the advent of civil unions. Your committee is deeply concerned that creating a legal alternative to marriage—such as civil unions—could serve to undermine the institution of marriage. A substitute institution would likely not be exclusive to same-sex couples and it could, more often than not, reflect economic expediency rather than a deep, emotional commitment. This in turn could have long-term negative consequences on the institution of marriage.

### **City Club's Position on Constitutional Amendments**

In 1996, City Club recommended three criteria for constitutional amendments:

- 1) Amendments should relate only to the structure, organization and powers of the government, and the rights of the people with respect to their government.
- 2) Initiated amendments qualifying for the ballot should first be referred to the Legislative Assembly for deliberative consideration and then submitted to the people at the next general election.

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<sup>25</sup> American Academy of Pediatrics. "Family Pediatrics: Report of the Task Force on the Family." *Pediatrics* 111: 1548.

3) Amendments should require three-fifths majority for approval.<sup>26</sup>

Measure 36 fails on the second and third criteria. The measure was not submitted to the Legislative Assembly for deliberative consideration. In fact, it was certified on August 1, 2004, leaving only three months for public debate. And Oregon requires only a simple majority vote to pass a constitutional amendment.

## V. CONCLUSIONS

**The legal language** of the measure is ambiguous and unlikely to lead to a resolution of the issue of same-sex marriage in Oregon.

**Questions** regarding the legal rights of individuals under Oregon's Constitution should not be decided by a simple majority vote.

**Amendments** to Oregon's Constitution should be publicly debated by the state's Legislature before being referred to voters.

**Oregon** defines and regulates marriage as a civil contract. The state therefore has an obligation to provide equal treatment before the law.

**Sexual orientation** should not be the basis for legal discrimination in Oregon.

**Denying** same-sex couples the status of marriage discriminates against and harms same-sex couples and their families. Further, allowing same-sex marriage would not harm opposite-sex couples or the institution of marriage in any meaningful way.

**Marriage** has proved health and social benefits to individuals and their families who participate in it.

**The benefits** of marriage extend to the wider public: longer, healthier and economically secure lives are in everyone's interest. Therefore, it is in the state's interest to encourage marriage for all citizens, including same-sex couples.

**Legal alternatives** to marriage—such as civil unions—are not adequate substitutes for the right to marry.

<sup>26</sup> City Club of Portland. 1996. "The Initiative and Referendum in Oregon." Vol. 77. No. 36.

## VI. RECOMMENDATION

Your committee unanimously recommends a NO vote on Measure 36.

Respectfully submitted,

Alan K. Brickley  
Sylvia Golden  
John Horvick  
Tom K. Iverson  
Morgan O'Toole-Smith  
Khalid Wahab  
Kurt Wehbring  
Tom Welsh  
Ed Gronke, *chair*

Leslie Morehead, *research adviser*  
Wade Fickler, *research director*

## VII. APPENDICES

### Witnesses

Kelly Clark, Attorney, Defense of Marriage Coalition  
Charlie Hinkle, Affiliated Attorney, American Civil Liberties Union  
Mark Johnson, Attorney, Johnson Renshaw & Lechman-Su PC  
Judge Hans Linde, Justice, Oregon Supreme Court (ret.)  
Donna R. Meyer, Attorney, Fitzwater & Meyer LLP  
Georgene Rice, Communications Director, Defense of Marriage Coalition  
Roey Thorpe, Executive Director, Basic Rights Oregon

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