IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

JOHN S. FOOTE, MARY ELLEDGE, and DEBORAH MAPES-STICE,
Plaintiffs,

v.

STATE OF OREGON,
Defendant.

17CV49853

DECISION ISSUED FEBRUARY 14, 2018.

Argued and submitted on February 5, 2018.

Before a Special Panel of three judges, on behalf of the Clackamas County Bench: Judge Michael C. Wetzel, Judge Thomas Rastetter, and Judge Susie L. Norby.

Thomas M. Christ of Cosgrave, Vergeer Kester LLP argued the cause for plaintiffs. With him on the briefs was John A. Bennett of Bullivant, Houser Bailey, PC. Plaintiff John Foote appeared at oral argument for the plaintiffs.

Sadie Forzley of the Oregon Department of Justice, argued the cause for defendant. With her was Benjamin Gutman of the Oregon Department of Justice. With her on the briefs was Sarah KayWeston of the Oregon Department of Justice.

The Partnership for Safety and Justice (PSJ) requested intervenor status, and was allowed to argue as an Amicus Curiae pending a decision on its Motion to Intervene. Margaret S. Olney of Bennett, Hartman, Morris & Kaplan LLP argued for the proposed intervenor.

All parties stipulated on the record to allow a decision by this Special Panel on all questions.

JUDGE SUSIE L. NORBY (*Writing with unanimous concurrence.*)

Plaintiffs filed a Complaint for Declaratory Relief requesting a judicial determination invalidating the criminal sentence reduction provisions of HB 3078, a 2017 law enacted by a simple majority vote of the Oregon legislature. More specifically, plaintiffs ask that the law's sentence reduction provisions for Identity Theft and Theft in the First Degree be declared unenforceable, because the law was not passed by the 2/3rd majority vote required by Article IV §33 of the Oregon Constitution. Defendant's Answer challenged plaintiffs' Complaint on several procedural grounds, most notably standing and discretionary justiciability under the Declaratory Judgments Act. ORS 20.010 *et seq.* Defendant also challenged the merits of plaintiffs' claim on the basis that HB 3508 (2009) disabled the constitutional protection of Article IV §33 that ensures a 2/3rd majority vote, and revived the legislature's option to lower sentences by a simple majority, as it did in HB 3078.

Within this context, the following motions are before this court: (1) Defendant's Motion to Dismiss, or in the alternative, Motion for Judgment on the Pleadings, (2) PSJ's Motion to Intervene,[1] and (3) Plaintiffs' Motion for Judgment on the Pleadings.

For the reasons that follow in this opinion, we hold that: (1) plaintiffs have standing, (2) the Complaint properly invokes the Declaratory Judgment Act, (3) the PSJ is denied intervenor party status, and (4) HB 3078's sentence reduction provisions are invalid and unenforceable. Accordingly, we award plaintiffs a judgment on the merits.

I. BACKGROUND

Mandatory minimum sentences for certain repeat property offenders were referred to Oregon voters in 2008 as SB 1087, which is familiar to Oregonians by another name: Ballot

[1] In the event PSJ becomes an intervenor, it also filed a Motion to Dismiss, or in the alternative, Motion for Judgment on the Pleadings. If not, those briefings will still be part of the record as filings of an Amicus Curiae.

Measure 57 ("BM57"). Oregonians resoundingly approved BM57, and it went into effect on January 1, 2009. Before that, in 1994, the voters approved an initiative to amend the Oregon Constitution to include Article IV §33, which specifically protects voter-approved criminal sentences from legislative interference, by insuring that the legislature cannot reduce such sentences by anything less than a 2/3rd majority vote.[2]

Shortly after BM57's effective date, the legislature enacted HB 3508 by a 2/3rd majority vote, and it went into effect on July 1, 2009. That law suspended parts of BM57 between February 15, 2010 and January 1, 2012, to counterbalance the fiscal impact of BM57 increased sentences on reduced budget resources suffered during the Great Recession. That temporary partial suspension ended on January 1, 2012 as promised, and BM57 sentences have remained the law ever since.

Eight years after the BM57 voter referendum culminated in HB 3508, however, a simple majority of the legislature voted to enact HB 3078 (2017), which contains provisions reducing the BM57 mandatory minimum sentences for Identity Theft and Theft in the First Degree. When vetting HB 3078 in June 2017, the Speaker of the House obtained an advisory letter from the Office of Legislative Counsel, which opined that Article IV §33 of the Oregon Constitution no longer restricts the legislature to a 2/3rd majority vote on BM57 sentence reductions, because the adoption of HB 3508 in 2009 eliminated that constitutional limitation. The letter suggested that the implementation lull built into HB 3508 fundamentally changed BM57 by transforming the constitutionally protected, voter-approved BM57 sentences into legislatively enacted sentences susceptible to reduction by a simple majority vote.[3]

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[2] This constitutional amendment initiative was passed contemporaneously with Ballot Measure 11.

[3] The advisory letter hedges from the outset: "**Although our conclusion is not free from all doubt**, we conclude that a court would find a two-thirds vote is not required."

HB 3078 was effective on August 8, 2017. This lawsuit followed, along with dozens of disputes in criminal cases across the state that are affected by HB 3078 sentence reductions. In Clackamas County, the Chief Deputy District Attorney sought guidance from the Department of Justice, and received a response message that read:

> As you requested, I am following up with this email on our phone conversation earlier today about how criminal appeals involving the constitutionality of HB 3078 would be handled. The Attorney General is charged by statute with representing the state in all criminal cases in the Court of Appeals and Supreme Court. ORS 180.060(1)(a), (c). Based on the information and arguments that the Department of Justice has reviewed thus far, the department has concluded that HB 3078 is constitutional. Thus, I do not anticipate that we would authorize a state's appeal to argue that the statute is unconstitutional, and in a defendant's appeal I anticipate that we would concede the constitutionality of HB 3078. I also anticipate that ORS 180.060 would preclude the District Attorney's office from seeking to represent the state in a criminal case on appeal.[4]

At oral argument in this case, the Department of Justice attorney confirmed the agency's intention to continue the approach outlined in this message. Although she acknowledged that DOJ will not submit briefs to oppose HB 3078 sentence reductions in any criminal appeal, she argued that the appellate courts may choose to address the constitutionality question *sua sponte*, without any adversarial briefing by the parties.

II. JURISDICTION & PLAINTIFFS' STANDING

We begin with DOJ's request to dismiss for lack of jurisdiction arising from plaintiffs' failure to meet standing requirements. A party who invokes the Declaratory Judgments Act to invalidate a statute must first show that he is a person whose "rights, status or other legal relations" are sufficiently affected by the statute challenged. ORS 28.020. The three-part threshold test for standing requires a party to show: (a) injury or impact on a legally recognized interest beyond an abstract interest in a law's validity; (b) injury that is real or

[4] The message was written by one of the DOJ attorneys appearing herein.

probable and not hypothetical or speculative, based on present facts that are not contingent events; and (c) a direct nexus between the rights to be vindicated and the relief requested.

We recognize that the Supreme Court's opinion in Gortmaker v. Seaton, 252 Or 440 (1969), definitively precludes standing by a District Attorney under the circumstances of this case. However, John Foote, Mary Elledge and Deborah Mapes-Stice also filed the Complaint as voters who approved BM57, and who have a right to meaningful protection of BM57 sentences by governmental obedience to the requirement in Article IV §33 of Oregon's Constitution. In other words, all three voter-plaintiffs credibly suggest that they are presently being deprived of two benefits: (1) safety that they are entitled to under BM57, and (2) enhanced protection from governmental process that they are entitled to under Article IV §33 of Oregon's Constitution.[5]

These claimed deprivations are precisely the kinds of rights, status or harm that can give a party standing to request a declaratory judgment, as the Court of Appeals clarified in deParrie v. State of Oregon, 133 Or App 613, *rev. den.* 321 Or 560 (1995). The court later succinctly summarized its standing conclusion in deParrie this way:

> In *deParrie v. State of Oregon* [*citation omitted*], the plaintiffs challenged a statute that would have invalidated a local ordinance for which the plaintiffs "have had the opportunity to vote." We held that their status as residents of a city whose ordinance would be nullified by the challenged statute gave them standing to challenge the statute. *Id.* Their standing to challenge the statute, in other words, did not stem from the fact that they were deprived of the right to vote; it stemmed from their status as persons who would be deprived of the "benefits" of an altogether different enactment. Morgan v. Sisters School District #6, 241 Or App 483, ftnt. 2, (2011).

As explained in more detail below, the circumstances that gave rise to this claim involve risk that governmental agencies could act unconstitutionally, and evade review, without interested voters

[5] Although a District Attorney does not have standing under Gortmaker, we note that voter John Foote's elected office likely heightens his exposure to the breadth of ramifications of loss of BM57 sentence protection, and may also enhance his sensitivity to the loss of constitutional process protection. Elected officials are people, after all.

having a ready remedy to independently defend the state statutes and constitutional provisions they enacted to guard against such risks. We believe the voter-plaintiffs have shown impact on a legally recognized interest beyond the effect of HB 3078 itself, and a real or probable injury in both the deprivation of safety and the loss of protection from an alleged governmental bypass of a constitutional obligation. We also believe there is a direct nexus between the injury that plaintiffs claim and the relief they seek. Therefore, we conclude that plaintiffs have standing and this court has jurisdiction.[6]

III. PSJ'S REQUEST TO INTERVENE

We now turn to review of the PSJ's Motion to Intervene. We believe that intervention should generally only be allowed for individuals or organizations that represent particular constituencies if both (a) their interests are affected by the litigation, and also (b) their interests may not be adequately addressed by the parties. In this case, there is no question that PSJ's interests may be affected by the litigation, but we cannot conclude that those interests are not adequately addressed by the parties. Therefore we deny PSJ's Motion to Intervene as a party, but reaffirm its Amicus Curiae participation.

IV. DISCRETIONARY JUSTICIABILITY

Next we turn to DOJ's request for discretionary dismissal pursuant to ORS 28.060. Under the Declaratory Judgments Act, "[t]he court may refuse to render or enter a declaratory judgment where such judgment, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." ORS 28.060. "In addition, the trial court should decline to exercise its jurisdiction under [the Act] if some *more appropriate* remedy

[6] We do not address the DOJ's contention that plaintiffs failed to join necessary parties, because the DOJ withdrew it during oral argument after plaintiffs confirmed that they do not challenge any other provisions of HB 3078 except the sentence reduction provisions.

exists." *League of Oregon Cities v. State*, 334 Or 645, 652 (2002) (emphasis in original).

DOJ argues that the second prong of the discretionary jurisdiction analysis applies because a host of criminal sentencings across the state will provide forums for more appropriate remedies. It argues that the first prong applies because this court's decision will not bind other courts when made, so it will not terminate the controversy.

Those arguments are inconsistent with one another. A trial court decision never binds other courts, unless and until it is adopted by appellate authorities. But, a definitive appellate decision cannot emerge until a trial court ruling triggers an appeal. Moreover, the parties' shared certainty that various courts will continue to struggle with the impact of this controversy in individual criminal cases indefinitely *underscores* the need for a single streamlined declaratory judgment action to efficiently terminate this controversy, albeit only after it is reviewed on appeal. This is particularly true when the DOJ has proclaimed its intention to neutralize this issue in any criminal appeal.

This case is distinguished from those cited by the DOJ by one pivotal contextual element. That is, this case turns on Article IV §33 of the Oregon Constitution, a narrowly applicable voter protection provision, which gives members of a narrow class of voters (only those whose votes result in approval of a criminal sentencing mandate) the power to restrict legislative reduction of voter-approved criminal sentences by a simple majority vote of the legislature. In general, voters do not gain special constitutional status by casting a ballot. But in this finite context, they do. A declaratory judgment action can protect the interest of voters who achieve this unique constitutional status and wish to defend it, but they cannot become parties to a criminal case.

The even more unusual contextual element here is that government agencies are at odds with one another on the question presented. Some agencies, however, have more control over

the progress of criminal appeal processes, and enhanced influence over outcomes. Declining jurisdiction on this question would divest voters of the ability to defend a rare constitutional protection that pledges a check and balance on governmental action to them alone. Therefore, we deny DOJ's request for a discretionary dismissal.

V. CONSTITUTIONALITY ANALYSIS

Lastly, we consider the merits of this case under the parties' cross-motions for Judgment on the Pleadings. Article IV §33 of the Oregon Constitution created a perpetual shield to protect voter-approved criminal sentences from legislative reduction. Only a 2/3rd majority legislative enactment that plainly nullifies the voter mandate can pierce that constitutional shield and resuscitate the legislature's power to reduce voter-approved sentences by a simple legislative majority vote.

The DOJ and the Partnership for Safety and Justice, argue that HB 3508 (2009), which was publicized as a bill to perpetuate BM57, paradoxically nullified BM57 instead. They argue that even though it was promoted as an extension of the legislative voter referendum mandate, in fact HB 3508 terminated the referendum, removed the constitutional shield, and reincarnated BM57 as its identical twin – except that it became vulnerable to legislative reduction by a simple majority vote.

This argument appears propelled by the parties' conviction that budgetary savings from HB 3078 (2017) sentence reductions are urgently needed, not by dispassionate reflection on the content and context of HB 3508's embodiment of BM57 in 2009. We understand that a legislative majority apparently supported the sentence reductions in HB 3078. But, a conclusion that its 2009 precursor (HB 3508) appeared harmonious with the 2/3rds majority constitutional shield in Article IV §33 while quietly deactivating that protective safeguard, is counter-intuitive

at best and duplicitous at worst. Such a conclusion would contradict the constitutional protections afforded to voters under Article IV §3 (voter reserved referendum powers) and Article IV §33. Further, it would erode the political accountability so essential to a democracy, as HB 3508 was clearly portrayed as a temporary suspension of BM57 sentences, not a revocation.[7] A court endorsement of such governmental maneuvers would justifiably weaken public confidence in the integrity of our elected officials' commitment to our Constitution and the rule of law.

We unanimously conclude that a 2/3rd majority vote of the legislature was required to enact the sentence reduction provisions of HB 3078. The legislative simple majority vote the law received failed to pierce the shield created by Article IV §33 of Oregon's Constitution. Consequently, the sentence reduction provisions of HB 3078 are unconstitutional, and BM57 sentences remain in effect.[8]

VI. CONCLUSION

For the reasons set forth in this opinion, we rule as follows:

1. Defendant's Motion to Dismiss is denied.
2. PSJ's Motion to Intervene is denied.
3. Defendant's Alternative Motion for Judgment on the Pleadings is denied.
4. Plaintiffs' Motion for Judgment on the Pleadings is granted.

IT IS SO ORDERED, this 14th day of February, 2018.

Hon. Susie L. Norby | Hon. Michael C. Wetzel | Hon Thomas Rastetter

[7] At the very least, if voters had known that HB 3508 could expose BM57 sentences to less rigorous legislative consensus in the future, they could have written letters to their senators and representatives to express their reactions and attempt to influence the legislative vote against that bill.

[8] All parties agreed that only the sentencing reduction provisions of HB 3078 are being challenged here. All other provisions of HB 3078 are presumed valid and enforceable, and are not affected by this court's rulings.