IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

MARY LI and REBECCA KENNEDY; STEPHEN KNOX, M.D., and ERIC WARSHAW, M.D.; KELLY BURKE and DOLORES DOYLE; DONNA POTTER and PAMELA MOEN; DOMINICK VETRI and DOUGLAS DEWITT; SALLY SHEKLOW and ENID LEFTON; IRENE FARRERA and NINA KORICAN; WALTER FRANKEL and CURTIS KIEFER; JULIE WILLIAMS and COLEEN BELISLE; BASIC RIGHTS OREGON; and AMERICAN CIVIL LIBERTIES UNION OF OREGON,

Plaintiffs,

and

MULTNOMAH COUNTY,

Intervenor-Plaintiff,

vs.

STATE OF OREGON; THEODORE KULONGOSKI, in his official capacity as Governor of the State of Oregon, HARDY MYERS, in his official capacity as Attorney General of the State of Oregon; GARY WEEKS, in his official capacity as Director of the Department of Human Services of the State of Oregon; and JENNIFER WOODWARD, in her official capacity as State Registrar of the State of Oregon,

Defendants,

and

DEFENSE OF MARRIAGE COALITION, CECIL MICHAEL THOMAS, NANCY JO THOMAS, DAN MATES, and DICK OSBORNE,

Intervenors-Defendants.

No. 0403-03057

PLAINTIFFS' OPPOSITION TO INTERVENORS-DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

(ORAL ARGUMENT REQUESTED)

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I. INTRODUCTION

Intervenors-defendants' arguments must fail for the following reasons: (1) marriage in and of itself is a privilege for purposes of Article I, section 20; (2) the exclusion of lesbian and gay couples from marriage discriminates based on sexual orientation and is therefore subject to an exacting level of scrutiny; (3) the exclusion of same-sex couples from marriage discriminates based on gender and is therefore subject to an exacting level of scrutiny; (4) there is no genuine difference between lesbian and gay couples and heterosexual couples that justifies the exclusion of lesbian and gay couples from marriage; and (5) the historical exceptions doctrine is inapposite to the analysis in this case.

II. ARGUMENT

A. Marriage in and of itself is a privilege for purposes of Article I, section 20.

Contrary to intervenors-defendants' mischaracterizations, plaintiffs seek a declaration that the exclusion of lesbian and gay couples from marriage in and of itself violates article I, section 20. And, contrary to intervenors-defendants' assertions, marriage in and of itself is a privilege for purposes of Article I, section 20.

Intervenors-defendants fail to discuss or even cite Oregon case law that sets forth the definition of the term "privilege." The Oregon Supreme Court has defined the term "privilege" as follows: "Whenever a person is denied some advantage to which he or she would be entitled but for a choice made by a government authority, article I, section 20 requires that the government decision to offer or deny the advantage be made by permissible criteria and consistently applied." City of Salem v. Bruner, 299 Or 262, 268-69, 702 P2d 70 (1985) (quotation omitted) (emphasis added); see also David Schuman, The Right to "Equal Privileges and Immunities:" A State's Version of "Equal Protection," 13 Vt L Rev 221, 230 (1988) ("The definition is expansive enough to

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implicate article I, section 20 whenever the state might unequally deprive a citizen of something potentially desirable. * * * 'Potential advantages, 'whether or not they are advantageous in a particular instance,' are sufficient."); State v. Clark, 291 Or 231, 236-37, 630 P2d 810 (1981) (noting that "[t]he original concern of article I, section 20, with special privileges or 'monopolies'" was reflected in early cases involving the issuance of licenses).

Intervenors-defendants have admitted that a marriage in and of itself confers the significant advantage of social recognition and respect upon the two people who enter into a marriage as well as their children. Specifically, intervenors-defendants have admitted that, when two people enter into a marriage, they express their commitment in a way that is universally honored as a commitment of the highest order. (Am Answer in Intervention ¶ 4.) Intervenors-defendants have further admitted that, when two people enter into a marriage, they and their children are assured uniform recognition as a family unit. (Id.)

Such social recognition and respect is one of the most significant advantages that marriage confers. Plaintiffs' declarations bear out this proposition. For example, although plaintiffs Frankel and Kiefer had lived with and cared for Kiefer's mother for thirteen years, hospital personnel did not readily recognize Frankel as a member of Kiefer's mother's family when he sought to visit her in the intensive care unit as she was dying. (Frankel Decl ¶ 9.) Hospital personnel did not readily recognize Frankel as a member of Kiefer's mother's family because Frankel and Kiefer are not married. (Id.) The fact that hospital personnel did not readily recognize Frankel as a member of Kiefer's mother's family exacerbated Frankel and Kiefer's distress during a time of family crisis. (Id.)

Thus, intervenors-defendants cannot dispute that the state sanction of the marital relationship in and of itself is a privilege for purposes of Article I, section 20. (See also

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Intervenors-Defs' Memo of Law in Support of Mot for Partial Summ J ("Intervenors-Defs' Mot for Partial Summ J") at 15 ("Marriage is civil in nature, and it is a secular relationship that has always been subject to regulation by the civil state.") (citation and footnote omitted).)

B. The exclusion of same-sex couples from marriage discriminates against lesbian and gay individuals based on their sexual orientation.

Intervenors-defendants' assertion that the exclusion of same-sex couples from marriage does not discriminate against lesbian and gay individuals based on their sexual orientation is absurd.[1] The parties to this action agree that, by their own terms, the Oregon marriage statutes do not permit either a male individual to marry another male individual or a female individual to marry another female individual. (See Intervenors-Defs' Mot for Partial Summ J at 32-33.) By definition, a male individual who seeks to enter into an intimate relationship with another male individual seeks to enter into a gay relationship, and a female individual who seeks to enter into an intimate relationship with another female individual seeks to enter into a lesbian relationship. Thus, by definition, where the Oregon marriage statutes discriminate against a male individual who seeks to enter into an intimate relationship with another male individual, they discriminate against an individual who seeks to enter into a gay relationship. Similarly, where the Oregon marriage statutes discriminate against a female individual who seeks to enter into an intimate relationship with another female individual, they discriminate against an individual who seeks to enter into a lesbian relationship. Accordingly, because the Oregon marriage statutes do not permit either a male individual to marry another male

[1] Intervenors-defendants concede that sexual orientation is a true class. (Intervenors-Defs' Mot for Partial Summ J at 26.)

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individual or a female individual to marry another female individual, they discriminate against lesbian and gay individuals based on their sexual orientation.[2]

Intervenors-defendants' assertions are precisely the assertions made by the State of Texas and rejected by the United States Supreme Court in Lawrence v. Texas, 123 S. Ct. 2472 (2003). In Lawrence, the Court struck down a law prohibiting "deviate sexual intercourse with a person of the same sex." Id. at 2476 (quotation omitted). In its brief, the State of Texas argued that, because the law, by its own terms, prohibited sexual intimacy between "same-sex" couples instead of "lesbian and gay" couples, it did not discriminate against lesbian and gay individuals based on their sexual orientation. Lawrence v. Texas, 2003 WL 470184 at * 34 (Feb. 17, 2003) (Resp's Br) ("Under the facially neutral conduct prohibitions of section 21.06, everyone in Texas is foreclosed from having deviate sexual intercourse with another person of the same sex."). The majority opinion rejected such sophistry, acknowledging throughout its analysis that the law discriminated against lesbian and gay individuals based on their sexual orientation. See, e.g., Lawrence, 123 S Ct at 2482 ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."). The concurring opinion explained why:

> "Texas argues, however, that the sodomy law does not discriminate against homosexual persons. Instead, the State maintains that the law discriminates only against homosexual conduct. While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class."

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[2] The fact that the Oregon marriage statutes permit lesbian and gay individuals to marry people of a different sex is entirely beside the point. (See Pls' Memo of Law in Support of Mot for Partial Summ J at 21 n3.)

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Id. at 2487 (O'Connor, J, concurring). Thus, the Court confirmed that (1) the essential distinction between lesbian and gay individuals and heterosexual individuals is that the former seek to enter into intimate relationships with people of the same sex and the latter seek to enter into intimate relationships with people of a different sex, and (2) where a law discriminates based on the essential distinction between lesbian and gay individuals and heterosexual individuals, it discriminates based on sexual orientation.

Here, because the exclusion from marriage is based on the essential distinction between lesbian and gay individuals and heterosexual individuals, it likewise discriminates based on sexual orientation. Accordingly, this Court should reject intervenors-defendants' assertions that the exclusion of same-sex couples from marriage does not discriminate against lesbian and gay individuals based on their sexual orientation.[3]

C. The exclusion of same-sex couples from marriage discriminates against individuals based on their gender.

The parties to this action agree that, by their own terms, the Oregon marriage statutes permit a male but not a female to marry a female and, similarly, permit a female but not a male to marry a male. (See Intervenors-Defs' Mot for Partial Summ J at 32-33.)

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It necessarily follows that the Oregon marriage statutes discriminate against individuals based on their gender.

Intervenors-defendants, however, assert that, because the Oregon marriage statutes permit males and females to marry persons of a different sex, the Oregon marriage statutes do not discriminate against individuals based on their gender. Intervenors-defendants, however, misapprehend a fundamental principle of constitutional law: Constitutional rights are individual rights not class rights. In the landmark case Perez v. Lippold, 198 P2d 17 (Cal 1948), the California Supreme Court became the first court in the nation to strike down an anti-miscegenation law. In doing so, it rejected the argument that the law applied equally to whites and non-whites:

> "It has been said that a statute such as section 60 does not discriminate against any racial group, since it applies alike to all persons whether Caucasian, Negro, or members of any other race. The decisive question, however, is not whether different races, each considered as a group, are equally treated. The right to marry is the right of individuals, not of racial groups. The equal protection clause of the United States Constitution does not refer to rights of the Negro race, the Caucasian race, or any other race, but to the rights of individuals."

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[3] Even if a disparate impact analysis were warranted, intervenors-defendants' assertions would still be fatally flawed. Contrary to intervenors-defendants' assertions, where there is a disparate impact on a class, Article I, section 20 jurisprudence does not require a showing that the disparate impact on the class is intentional: "According to OHSU, the fact that such a facially neutral classification has the unintended side effect of discriminating against homosexual couples who cannot marry is not actionable under Article I, section 20. We are not persuaded by the asserted defense. Article I, section 20, does not prohibit only intentional discrimination. * * * OHSU has taken action with no apparent intention to treat disparately any true class of citizens. Nevertheless, its actions have the undeniable effect of doing just that. As in Zockert, OHSU's intentions in this case are not relevant. What is relevant is the extent to which privileges or immunities are not made available to all citizens on equal terms." Tanner v. Oregon Health Scis. Univ., 157 Or App 502, 524-25, 971 P2d 435 (1998) (citing Zockert v. Fanning, 310 Or 514, 800 P2d 773 (1990)).

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Id. at 20 (citation omitted); see also Shelley v. Kraemer, 334 US 1, 22 (1948) ("The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.") (footnote omitted). Thus, the case law confirms that "indiscriminate imposition of inequalities" is still discrimination.[4]

Here, because the Oregon marriage statutes discriminate against individuals based on their gender, it is likewise irrelevant whether there is any disparity between males as a class and females as a class. Accordingly, this Court should reject intervenors-

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[4] Contrary to intervenors-defendants' assertions, this fundamental principle of constitutional law is not derived solely from cases involving race discrimination. It is also derived from cases involving gender discrimination. See, e.g., Hewitt v. State Accident Ins. Fund Corp., 294 Or 33, 653 P2d 970 (1982) (finding gender discrimination even though there was no disparity between males as a class and females as a class, i.e., male surviving partners experienced discrimination vis-à-vis female surviving partners to the same extent that female partners who worked to ensure the security of their surviving families experienced discrimination vis-à-vis male partners who worked to ensure the security of their surviving families); Hillesland v. Paccar, Inc., 80 Or App 286, 722 P2d 1239 (1986) (finding gender discrimination even though there was no disparity between males as a class and females as a class, i.e., female workers whose male spouses were not entitled to pregnancy benefits experienced discrimination vis-à-vis male workers whose female spouses were entitled pregnancy benefits to the same extent that the male spouses of the female workers experienced discrimination vis-à-vis the female spouses of the male workers). That said, cases involving race discrimination are instructive in this case. This is so even if such cases involved notions of white supremacy. Under Article I, section 20, a court first determines whether the discrimination is based on race. If the court determines that the discrimination is based on race, it then determines whether the discrimination is justified. Notions of white supremacy are relevant to the determination of whether the discrimination is justified. They are not relevant, however, to the determination of whether the discrimination is based on race. Thus, cases involving race discrimination are instructive in this case even if such cases involved notions of white supremacy.

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defendants' assertions that the exclusion of same-sex couples from marriage does not discriminate against individuals based on their gender.[5]

D. Because the exclusion of same-sex couples from marriage discriminates based on sexual orientation and gender, the level of scrutiny to be applied is an exacting one.

Although intervenors-defendants question whether an exacting scrutiny should apply to sexual orientation discrimination, Tanner makes clear that an exacting scrutiny does in fact apply. Tanner, 157 Or App at 524. Tanner applies an exacting scrutiny to sexual orientation discrimination in light of the fact that "homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice." Id. This is a fact on which the State agrees. (See Pls' Memo of Law in Support of Mot for Partial Summ J at 16-19.) Moreover, Tanner applies an exacting scrutiny to sexual orientation discrimination in light of the definition of the term "immutability" set forth in Oregon case law: "[I]mmutability – in the sense of inability to alter or change – is not necessary. * * * We therefore understand from the cases that the focus of suspect class definition is not necessarily the immutability of the common, class-defining characteristics, but instead the fact that such characteristics are historically

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[5] Intervenors-defendants' argument that to challenge restrictions on marriage based on sexual orientation and gender, plaintiffs must challenge all restrictions on marriage, is absurd. Plaintiffs have no standing, no desire, and no need to do so. The fact that state action discriminates against multiple classes does not preclude one class from challenging the state action separate and apart from the other classes. For example, where a state employment policy discriminates against African-Americans and women, African-Americans may challenge the policy as a form of race discrimination regardless of whether women challenge the policy as a form of gender discrimination. Here, plaintiffs may challenge restrictions on marriage based on sexual orientation and gender regardless of whether others challenge restrictions on underage, incestuous, or polygamous marriages. Challenges to restrictions on marriage based on sexual orientation and gender are, of course, analytically distinct from challenges to restrictions on underage, incestuous, or polygamous marriages. Unlike the former restrictions, it is likely that the latter restrictions would be found (1) not to discriminate against suspect classes, and/or (2) to be justified. Plaintiffs note that intervenors-defendants' argument is in tension with their express assertion that they are not making "a slippery slope argument." (Intervenors-Defs' Mot for Partial Summ J at 30 n15.)

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regarded as defining distinct, socially-recognized groups that have been the subject of adverse social or political stereotyping or prejudice." Tanner, 157 Or App at 522-23; see also Hewitt, 294 Or at 46 (gender, alienage, and nationality are inherently suspect although they are subject to change); State v. Freeland, 295 Or 367, 375, 667 P2d 509 (1983) (religion is inherently suspect although it is subject to change); Moccio v. Department of Human Resources, 103 Or App 207, 214, 796 P2d 1233 (1990) (creed and age are inherently suspect although they are subject to change). Thus, an exacting level of scrutiny applies to sexual orientation discrimination.

Moreover, an exacting scrutiny applies to gender discrimination, a point that intervenors-defendants concede. (Intervenors-Defs' Mot for Partial Summ J at 26.)

Although intervenors-defendants claim to apply strict scrutiny here, they in fact apply rational basis review. In doing so, they demonstrate an egregious lack of facility with the concepts of strict scrutiny and rational basis review. Intervenors-defendants concede that, "[w]here a law discriminates against a 'true class,' a rational basis is all that is required to uphold the discrimination." (Id. at 18-19 (citations omitted).) Intervenors-defendants further concede that, "[w]hen the law disfavors a suspect class, it is subject to a more exacting or 'strict' scrutiny." (Id. at 19 (quotation omitted).) Curiously, intervenors-defendants then conflate strict scrutiny and rational basis review, absurdly suggesting that, under strict scrutiny, plaintiffs bear the burden of disproving any conceivable basis, excluding anti-gay bias, that the State may have for excluding lesbian and gay couples from marriage. This, of course, is rational basis review.

Under strict scrutiny, plaintiffs do not have the burden of showing that the exclusion of lesbian and gay couples from marriage is not justified. Rather, the State and intervenors-defendants have the burden of showing that the exclusion of lesbian and gay couples from marriage is justified. In Hewitt, the Oregon Supreme Court adopted this signature characteristic of strict scrutiny: "The suspicion may be overcome if the reason

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for the classification reflects specific biological differences between men and women." Hewitt, 294 Or at 46 (footnotes omitted). Because intervenors-defendants have not shown that the exclusion of lesbian and gay couples from marriage is justified, their arguments must fail. See § II.E, infra.

Moreover, under strict scrutiny, the inquiry is not whether there is any conceivable basis, excluding anti-gay bias, that the State may have for excluding lesbian and gay couples from marriage. Rather, the inquiry is whether the State has an actual basis for excluding lesbian and gay couples from marriage. In Hewitt, the Court adopted this signature characteristic of strict scrutiny, too: "[The suspicion] is not overcome when other personal characteristics or social roles are assigned to men or women because of their gender and for no other reason. That is exactly the kind of stereotyping which renders the classification suspect in the first place."[6] Id. Thus, in Hewitt, it was not enough that the State could hypothesize, for example, that female partners are more dependent on male workers than male partners are dependent on female workers. Similarly, here, it is not enough that the State could hypothesize, for example, that lesbian and gay couples are not as fit to be parents as heterosexual couples. The difference must be an actual one and a relevant one.

[6] Intervenors-defendants rely on State v. Hunter, 208 Or 282, 300 P2d 455 (1956), for the proposition that gender discrimination may be justified by "the promoting of the general welfare and good morals." Id. at 286 (quotation omitted). Hewitt expressly renounces Hunter's analysis on this point. Hewitt, 294 Or at 38.

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Because intervenors-defendants' arguments assume rational basis review, they are inapposite to the analysis in this case.[7]

E. The exclusion of lesbian and gay couples from marriage is not justified by any genuine difference between lesbian and gay couples and heterosexual couples.

The Court cannot permissibly conclude that any difference between lesbian and gay couples and heterosexual couples concerning procreation or parenting is a relevant difference justifying the exclusion of lesbian and gay couples from marriage.

Procreation. Most significantly, excluding lesbian and gay couples from marriage does not encourage heterosexual couples to bring children into their families via procreative sexual intercourse. There is simply no link between the two. Heterosexual couples will continue to bring children into their families via procreative sexual intercourse regardless of whether lesbian and gay couples are permitted to marry. Because intervenors-defendants cannot refute that the exclusion of lesbian and gay couples from marriage does not advance whatever interest the State may have in encouraging procreative sexual intercourse, their arguments must fail for this reason alone.

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[7] Intervenors-defendants also egregiously misapprehend rational basis review. Even under rational basis review, anti-gay bias is not a cognizable basis for excluding lesbian and gay couples from marriage. See Romer v. Evans, 517 US 620 (1996) (anti-gay bias is not even a legitimate governmental interest); see also United States Dep't of Agric. v. Moreno, 413 US 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare [governmental] desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."). Moreover, even under rational basis review, a proffered basis for excluding lesbian and gay couples from marriage must have some basis in reality. See Heller v. Doe, 509 US 312, 321 (1993) ("[E]ven the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation."). Thus, intervenors-defendants' implicit suggestion that, under rational basis review, plaintiffs would have the burden of disproving any conceivable basis, including anti-gay bias, that the State may have for excluding lesbian and gay couples from marriage is incorrect. Even under rational basis review, plaintiffs would not need to disprove anti-gay bias as a basis for excluding lesbian and gay couples from marriage.

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Moreover, in light of the State's own laws, policies, and practices, it is not even rational to think that the State actually prefers couples to bring children into their families via procreative sexual intercourse over other means (e.g., adoption, artificial insemination). The State's own laws, policies, and practices make clear that the State values equally children who are brought into their families via procreative sexual intercourse and children who are brought into their families by other means. See, e.g., ORS 109.050. Like heterosexual couples, lesbian and gay couples bring children into their families by means other than procreative sexual intercourse. (Johnson Decl ¶ 6; see also Li Decl ¶¶ 11-12 (one child); Knox Decl ¶¶ 11-15 (three children); Burke Decl ¶¶ 10-12 (one child); Potter Decl ¶¶ 7, 13-14 (two children).) Indeed, intervenors-defendants have conceded that "homosexual couples adopt or otherwise care for children." (Intervenors-Defs' Mot for Partial Summ J at 22.) "Oregon law does not disadvantage those children in any way of which we are aware, except by virtue of the marriage statutes." (Stipulated Facts ("Stip I"), Ex 5, Attorney General's Opinion, at 9.)

More to the point, the State's interest in marriage is not to ensure that couples bring children into their families via procreative sexual intercourse. Indeed, intervenors-defendants have conceded that "many heterosexual couples do not bear children." (Intervenors-Defs' Mot for Partial Summ J at 22.) And, the State does not require those couples to indicate their ability or desire to have children through procreative sexual intercourse in order to be married. (See Pls' Memo of Law in Support of Mot for Partial Summ J at 4.)

Thus, the State's own laws, policies, and practices preclude the conclusion that any difference between lesbian and gay couples and heterosexual couples concerning procreation is a relevant difference justifying the exclusion of lesbian and gay couples from marriage.

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Parenting. Intervenors-defendants have submitted affidavits of purported experts in support of their assertion that lesbian and gay couples are not as fit to be parents as heterosexual couples.[8] The social science research and the child welfare professional community, however, are monolithic in their conclusion that lesbian and gay couples are just as fit to be parents as heterosexual couples. (Stacey Decl ¶¶ 1-20; Br of Amici Juvenile Rights Project, Nat'l Ass'n of Soc Workers, Or Chapter of Nat'l Ass'n of Soc Workers, Open Adoption & Family Servs, Inc, Or Psychological Ass'n, and Portland Parents, Families and Friends of Lesbians and Gays.) The Court, however, need not reach the issue of the truth of the affidavits of the purported experts submitted by intervenors-defendants because the State's own laws, policies, and practices preclude the conclusion that it is even rational to think that the State's interest in marriage is to discourage lesbian and gay couples from bringing children into their families.

The State has stipulated that it actively endorses parenting by lesbian and gay couples and parenting by heterosexual couples on equal terms. (Stipulated Facts

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[8] The proffered experts are Dr. Throckmorton, an associate professor of psychology and counselor at a Christian college in Pennsylvania, and Dr. Satinover, a psychiatrist. Drs. Throckmorton and Satinover are both proponents of "conversion" or "reparative" therapy, a highly controversial treatment that purports to be able to change the sexual orientation of lesbian and gay individuals to heterosexuality. The American Psychiatric Association ("APA") rejects the notion that homosexuality is a disorder requiring treatment and the idea that sexual orientation can be changed through such therapy. See http://www.psych.org/public_info/ gaylesbianbisexualissues22701.pdf (stating that there is "no published scientific evidence supporting the efficacy of 'reparative therapy' as a treatment to change one's sexual orientation"). The APA therefore "opposes any psychiatric treatment, such as 'conversion' or 'reparative' therapy, which is based upon the assumption that homosexuality per se is a mental disorder, or based upon a prior assumption that the patient should change his/her sexual orientation." Id. Dr. Throckmorton's website (www.DrThrockmorton.com) features his views in support of "conversion" therapy as well as his opposition to equal marriage and parenting rights for lesbian and gay individuals. Dr. Satinover is the author of Homosexuality and the Politics of Truth, in which he offers a religious-based argument against same-sex sexual activity as immoral and supports efforts to "treat" homosexuality. Drs. Throckmorton and Satinover have both been honored by the National Association for Research and Therapy of Homosexuality ("NARTH"), an organization devoted to advancing "conversion" therapy, for their work in this area. (See also Stacey Decl ¶ 7.)

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Between Pls and Defs ("Stip II") ¶¶ 1-2.) The State has stipulated that it permits couples whom it knows to be lesbian or gay to adopt children. (Stip II ¶ 2; Johnson Decl ¶¶ 9-10; Li Decl ¶¶ 11-12 (one child); Knox Decl ¶¶ 11-15 (three children); Burke Decl ¶¶ 10-12 (one child); Potter Decl ¶¶ 7, 13-14 (two children).) Moreover, the State has stipulated that, following either a joint adoption by a lesbian or gay couple or a second-parent adoption by a lesbian or gay partner, it issues a birth certificate for the child on which the same-sex parents are denominated "parent" and "parent" instead of the standard "mother" and "father." (Stip II ¶ 1; see also Johnson Decl ¶ 11; Li Decl ¶ 13; Knox Decl ¶¶ 13-15; Burke Decl ¶ 13; Potter Decl ¶ 14.) The State has further stipulated that it places children with foster parents whom it knows to be lesbian or gay. (Stip II ¶ 2.) The State goes so far as to recruit foster parents whom it knows to be lesbian or gay. (See Croteau Decl. ¶¶ 1-5.) In addition, in child custody and child visitation disputes, the sexual orientation of a parent has long been deemed by state courts to be irrelevant for purposes of determining the best interests of a child. In re Marriage of Ashling, 42 Or App 47, 599 P2d 475 (1979); see also Johnson Decl ¶ 8. These are only some of the ways in which the State has actively endorsed parenting by lesbian and gay couples and parenting by heterosexual couples on equal terms.[9] See also, e.g., OAR 839-009-0210 (parental leave for state employees).

Thus, the State's own laws, policies, and practices preclude the conclusion that any difference between lesbian and gay couples and heterosexual couples concerning parenting is a relevant difference justifying the exclusion of lesbian and gay couples from marriage. Indeed, as the Massachusetts Supreme Judicial Court concluded in Goodridge, "[e]xcluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from

[9] Even intervenors-defendants concede that "some * * * same-sex couples raise healthy children." (Intervenors-Defs' Mot for Partial Summ J at 24.)

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enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which children will be reared, educated, and socialized." Goodridge, 798 NE2d at 964 (quotation and footnote omitted). As plaintiffs' declarations make clear, lesbian and gay couples are raising children regardless of their exclusion from marriage. Permitting lesbian and gay couples to marry would serve only to enhance the welfare of their children.[10]

F. The historical exceptions doctrine is inapposite to the analysis in this case.

The historical exceptions doctrine has never been applied to the constitutional right to equal privileges and immunities,[11] and for good reason. By its nature, equality is a concept that must account for the emergence, over time, of minorities that are oppressed by the majority. Indeed, it is the enduring check on the tyranny of the majority that is the sine qua non of any constitutional guarantee of equality. Such forward thinking is manifest in the arguments that were advanced in support of the Oregon Bill of Rights by the framers of the Oregon constitution:

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[10] Should the Court – notwithstanding the reality that the State has no concerns with parenting by lesbian and gay couples, as reflected in its laws, policies, and practices – decide to consider the affidavits of intervenors-defendants' purported experts, the expert declaration submitted by plaintiffs, (see Stacey Decl.), would create a genuine dispute of material fact that would defeat summary judgment. Intervenors-defendants assert that a conflict between experts would not create a genuine dispute of material fact, but offer no authority to support their assertion. Intervenors-defendants offer no such authority because there is none. Even under rational basis review, plaintiffs would be afforded an opportunity to disprove the proffered basis for excluding lesbian and gay couples from marriage. Thus, should the Court decide to consider the affidavits of intervenors-defendants' purported experts, plaintiffs would respectfully request the opportunity to conduct expert discovery and depositions; to move to disqualify the purported experts, if appropriate; and to participate in an evidentiary hearing at which the experts of all parties to this action may be heard. Plaintiffs submit, however, that none of this is necessary in light of the State's clearly expressed views about parenting by lesbian and gay couples, which are evident in its laws, policies, and practices.

[11] The historical exceptions doctrine has been applied only in the contexts of free expression and jury trials. (See Intervenors-Defs' Mot for Partial Summ J at 4-7.)

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> "Delazon Smith argued in favor of the bill: 'The history of the world teaches us that the majority may become fractious in their spirit and trample upon the rights of the minority; that through the madness of party spirit they may infringe upon the rights of individual citizens. Then, if the individual is to be protected in this point in which he is endangered, there must be restrictions put into the constitution. The people must say we will limit ourselves in certain principles.'"

David Schuman, The Creation of the Oregon Constitution, 74 Or L Rev 611, 625 (1995) (quotation omitted). The constitutional right to equal privileges and immunities would be meaningless if it guaranteed Oregonians nothing more than the "equality" that existed in 1857 – an "equality" that institutionalized biases based on race, sex, illegitimacy, alienage, and numerous other considerations that have since been repudiated.

Indeed, it is intervenors-defendants who fail to see "the forest for the trees." Their argument proves far too much. If intervenors-defendants are correct in their assertion that "the Historical Exceptions Doctrine recognizes that when history makes clear that a constitutional phrase, no matter how bold or ringing in its assertion, could not have been intended by the framers to replace some legal social or historic fact, then history wins out over the pure language of the Constitution," (Intervenors-Defs' Mot for Partial Summ J at 7), then no provision of the Oregon constitution, let alone Article I, section 20, can offer any protection beyond that which the framers of the Oregon constitution specifically contemplated in 1857. This is patently absurd, especially in light of 150 years of Oregon case law to the contrary. The Oregon Supreme Court has necessarily rejected the extremely cramped view of the Oregon constitution that intervenors-defendants urge this Court to take.

With respect to Article I, section 20 in particular, the text, context, history, and case law all militate in favor of interpreting the equality mandate—a mandate that does not except marriage or any other consideration from its ambit—to be dynamic, not static. See Priest v. Pierce, 314 Or 411, 416-19, 842 P2d 65 (1992). The text of Article I,

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section 20 reads in its entirety as follows: "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." By its own terms, Article I, section 20 does not limit its own application to the "equality" that existed in 1857, nor does it exempt marriage or any other consideration from constitutional scrutiny. This expansive reading is only bolstered when Article I, section 20 is placed in context with the rest of the Oregon Bill of Rights. See, e.g., Art. I, § 1 ("We declare that all men, when they form a social compact are equal in right: that all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness * * * ."); Art. I, § 33 ("This enumeration of right, and privileges shall not be construed to impair or deny others retained by the people.").

While it is well-documented that the framers of the Oregon constitution were racist and sexist, the historical record is silent about whether Article I, section 20 was intended to guarantee only the "equality" that existed in 1857, and whether Article I, section 20 was intended to except marriage or any other consideration from its ambit beyond the specific disabilities imposed on "negroes," "mulattoes," "Chinamen," and women. See Schuman, The Creation of the Oregon Constitution, at 625-34. In the absence of historical cues to the contrary, the Oregon Supreme Court has interpreted Article I, section 20 expansively. See State ex rel. Juvenile Dep't v. Reynolds, 317 Or 560, 565, 857 P2d 842 (1993) (noting that, in Clark, the Oregon Supreme Court analyzed the history of Article I, section 20 before establishing the analytical framework to be applied).

Oregon case law demonstrates that intervenors-defendants' position is indefensible. Indeed, if intervenors-defendants' position were correct, many of the celebrated decisions of the Oregon Supreme Court over the past 150 years would have to be overturned:

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> "I presume that neither this court nor the Supreme Court would say that whatever Article I, section 20, 'meant in 1857, it means precisely the same thing today.' * * * That is because the framers of the Oregon Constitution, whatever else their virtues, had a conception of equality that contemporary legal (and moral) principles has emphatically repudiated. If this court or the Supreme Court were to interpret Article I, section 20, as the framers intended, the court would have to conclude that section 20 permits official invidious governmental discrimination based on race, ethnicity, and gender, which, in turn would require overruling a significant number of cases and interpreting Oregon's equality guarantee to provide many fewer protections than the minimum required by the Equal Protection Clause of the United States Constitution."

Cox ex rel. Cox v. State, 191 Or App 1, 6-7, 80 P3d 514 (2003) (Schuman, J, concurring) (quotation omitted). It is inconceivable that, if the law were to discriminate between aliens and non-aliens with respect to ownership of real property, there would be no recourse under Article I, section 20, simply because the framers of the Oregon constitution held biased views about aliens in this regard. See Namba v. McCourt, 185 Or 579, 612, 204 P2d 569 (1949) (such a law would be "repugnant" to Article I, section 20). Similarly, it is inconceivable that, if the law were to discriminate between men and women with respect to eligibility for employment-related benefits, there would be no recourse under Article I, section 20, simply because the framers of the Oregon constitution held biased views about women in this regard. See Hewitt, 294 Or at 45-46. The Court cannot ignore the fact that Oregon case law flatly rejects intervenors-defendants' position.

In sum, nothing in the text, context, history, or case law of Article I, section 20 supports the radical position adopted by intervenors-defendants. Article I, section 20 guarantees exactly what it says it guarantees: equality of privileges and immunities.

Intervenors-defendants' argument that the Oregon constitution has been amended to remove the specific disabilities imposed on "negroes," "mulattoes," and "Chinamen" does not alter the analysis. By virtue of constitutional amendment, racial minorities are

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now entitled to equality where emigration, suffrage, and conscription are concerned. See Schuman, The Creation of the Oregon Constitution, at 632. Under intervenors-defendants' theory, however, because the framers of the Oregon constitution did not intend for racial minorities to enjoy equality in other aspects of their lives, they have no recourse under Article I, section 20 outside of these specific contexts. See Schuman, supra at 632-33 (the framers of the Oregon constitution did not intend for "negroes" and "Indians" to enjoy equality in education). Intervenors-defendants' analysis would have racial minorities seek further constitutional amendment in order to guarantee themselves equal treatment by their own government in all contexts. Indeed, in intervenors-defendants' view, if the legislature were to re-enact an anti-miscegenation law, there would be no recourse under Article I, section 20. Intervenors-defendants' argument is plainly inconsistent with Oregon case law.[12]

With respect to marriage in particular, again, there is nothing in the text, context, history, or case law of Article I, section 20 that suggests that it is exempt from constitutional scrutiny.[13] (See also Stip I, ex 4 at 6-7.) And, again, intervenors-defendants' argument proves far too much. If indeed the common understanding of the institution of marriage in 1857 is unassailable under Article I, section 20, then there is much more than the exclusion of lesbian and gay couples from marriage at stake. With the notable exception of Article XV, section 5, Oregonians in 1857 did not view marriage as an equal partnership between married men and married women. Thus, under

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[12] Plaintiffs note that, in their attempt to distinguish race from sexual orientation – two classes which plaintiffs do not presume to equate – intervenors-defendants suggest that the lesson that they have learned from slavery and its aftermath – what they euphemistically call a "constitutional dialogue" – is not that disfavored classes should be treated equally, but rather that disfavored classes must wait "100 years" and even survive a "blood[y] war" to be treated equally. (Intervenors-Defs' Mot for Partial Summ J at 11.) Needless to say, Article I, section 20 is intended to avoid such a circumstance.

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intervenors-defendants' theory, if the legislature were to re-enact laws that imposed civil inequalities on married women (e.g., the inability to sue for loss of consortium), there would be no recourse under Article I, section 20. Again, intervenors-defendants' argument is plainly inconsistent with Oregon case law.

The fact that Article XV, section 5 provides that "[t]he property and pecuniary rights of every married woman, at the time of marriage or afterwards, acquired by gift, devise, or inheritance shall not be subject to the debts, or contracts of the husband; and laws shall be passed providing for the registration of the wife's seperate [sic] property" does not change the analysis. Intervenors-defendants' analysis would have Article XV, section 5 setting a ceiling above which no individual rights may be obtained under Article I, section 20. Thus, in intervenors-defendants' view, Article I, section 20 may not be invoked to secure marriage equality for lesbian and gay couples. But, under intervenors-defendants' theory, it is equally true that Article I, section 20 may not be invoked to secure marriage equality for married women beyond the ability to own separate property and maintain separate finances (e.g., the ability to sue for loss of consortium). Indeed, under intervenors-defendants' theory, the ability to own separate property and maintain separate finances is the sum total of the "equality" that women enjoy under the Oregon constitution.

In addition, intervenors-defendants' analysis contradicts a fundamental canon of constitutional construction: Where possible, a constitutional provision is not to be read in derogation of another constitutional provision. See Vannatta v. Keisling, 324 Or 514, 527, 931 P2d 770 (Or 1997) ("Any particular forms of expression that have been removed from [Article I, section 8] by a subsequent constitutional amendment must be

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[13] Intervenors-defendants' reliance on Reynolds v. United States, 98 US 145 (1878), is misplaced. Reynolds says nothing about historical exceptions to constitutional guarantees.

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construed carefully to give effect to the scope of the later exception, but no more, lest the salutary value of Article I, section 8, unintentionally be lost."); see also State v. Cianci, 591 A2d 1193, 1202 (RI 1991) ("When more than one construction of a constitutional provision is possible, one of which would diminish or restrict a fundamental right of the people and the other of which would not do so, the latter must be adopted.") (quotation omitted); Brimmer v. Thomson, 521 P2d 574, 580 (Wyo 1974) (recognizing "the basic and universally accepted rule that statutory and constitutional provisions which tend to limit the candidacy of any person for public office or exclude any citizen from participation in the elective process must be construed in favor of the right of the voters to exercise their choice and should be construed strictly and not extended to cases not clearly covered thereby"); Howton v. Morrow, 106 SW2d 81, 82 (Ky 1937) ("[P]rovisions in statutes and Constitutions imposing restrictions upon the right of a person to hold office should receive a liberal construction in favor of his eligibility."). Simply put, intervenors-defendants' position is indefensible.

For all of the foregoing reasons, the Court must reject the extremely cramped view of the Oregon constitution that intervenors-defendants urge it to take. The historical exceptions doctrine does not apply to the constitutional right to equal privileges and immunities.

G. Intervenors-defendants have no standing to assert their fourth counterclaim.

Intervenors-defendants do not have standing to assert their own counterclaims simply because they have been permitted to unite with defendants in resisting plaintiffs' claims. The Oregon Supreme Court has made clear that "[an intervenor-defendant's] standing to [assert a counterclaim] must be determined under the rule governing intervention, ORCP 33, and under the declaratory judgment law, ORS chapter 28."

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Rendler v. Lincoln County, 302 Or 177, 180-81, 728 P2d 21, 23 (1986) (emphasis added).

In their fourth counterclaim, intervenors-defendants assert that they are entitled to the following relief: (1) "a declaration that ORS Chapter 106 allows marriage only between one man and one woman" (Am Answer in Intervention ¶ 59); (2) "an injunction prohibiting Intervenor-Plaintiff Multnomah County from issuing same-sex marriage licenses or licenses otherwise contrary to the plain meaning of ORS Chapter 106" (id. ¶ 60); (3) "an order voiding *ab initio* the actions of Intervenor-Plaintiff Multnomah County, as they relate to issuing marriage licenses to same sex pairs, and as they relate to any subsequent ceremonies by which such individuals purported to be married" (id.); and (4) attorney fees (id. ¶ 61). Presumably, intervenors-defendants assert that they are entitled to such relief under the Uniform Declaratory Judgments Act. See ORS 28.020. Intervenors-defendants do not have standing under the Uniform Declaratory Judgments Act to assert such a counterclaim.

"[A] complaint under [the Uniform Declaratory Judgments Act] must show how plaintiff's 'rights, status, or other legal relations are affected' by an instrument or enactment, the construction or validity of which he seeks to have determined." Gruber v. Lincoln Hosp. Dist., 285 Or 3, 7, 588 P2d 1281 (1979). With respect to their fourth counterclaim, intervenors-defendants allege that their rights have been affected in five ways: (1) "All Intervenor-Defendants are opposed to the actions of Intervenor-Plaintiff Multnomah County, as set forth below, on political, philosophical, moral, or religious grounds" (Am Answer in Intervention ¶ 3); (2) "Intervenor-Defendants Cecil Michael Thomas, Nancy Jo Thomas, Dan Mates, and Dick Jordan Osborne all have standing as Multnomah County residents, voters, and taxpayers with an interest in the open and public functioning of lawfully limited government, and thus have been adversely affected" (id.); (3) "Intervenor-Defendants Cecil Michael Thomas and Nancy Jo Thomas,

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as husband and wife, and DOMC have standing as persons and an organization with an interest in defending the traditional institution of marriage in Oregon, defined statutorily in ORS Chapter 106 as a union between one male and one female as husband and wife" (id.); (4) "Intervenor-Defendants Cecil Michael Thomas, Nancy Jo Thomas, Dan Mates, and Dick Jordan Osborne all have standing as taxpayers in Multnomah County who are concretely affected by a decision to extend marriage benefits and attendant costs to the taxpayers of the County to the same-sex partners of Multnomah County employees" (id.); and (5) "Intervenor-Defendants Cecil Michael Thomas and Nancy Jo Thomas are constituents of Multnomah County Commissioner Lonnie Roberts; Commissioner Roberts was shut out of the decision of County Commissioners in this case. These Intervenor-Defendants were therefore actually disenfranchised on the current issue, and have standing on that basis as well"[14] (id.). These allegations serve only to confirm that intervenors-defendants do not have standing to assert their fourth counterclaim.

With respect to intervenors-defendants' first, second, third, and fifth allegations, it is fatal that intervenors-defendants have not alleged "some injury or other impact upon a legally recognized interest beyond an abstract interest in the correct application or the validity of a law." League of Or. Cities v. State, 334 Or 645, 658, 56 P3d 892 (2002) (citation omitted). In other words, it is dispositive that intervenors-defendants have suffered no injury beyond general offense. Time and again, the Oregon Supreme Court has held that such an injury is not sufficient to confer standing:

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[14] Intervenors-defendants were not disenfranchised. The governmental action of which they complain was executive not legislative in nature. (See Stip I ¶ 11.) Moreover, Commissioner Roberts had an opportunity to participate and did in fact participate in a legislative process that resulted in an affirmation of this executive action. (See Stip I ¶ 30.)

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> "It must be at once apparent that the plaintiffs have no standing to maintain this suit. The wrong of which they complain – if there be a wrong – is public in character. The complaint discloses no special injury affecting the plaintiffs differently from other citizens * * * even though it be natural that they should feel more deeply upon the subject than other members of the general public * * * . No right, status, or legal relation of the plaintiffs is involved, and no legal interest of theirs will be affected by the action of the Governor. There is no case for declaratory relief where the plaintiff seeks merely to vindicate a public right to have the laws of the state properly enforced and administered. The plaintiffs have a difference of opinion with the Governor, but that does not of itself make a justiciable controversy. They ask for no relief except that the court declare what the law is. But * * * a private citizen is deemed to have an insufficient interest in a declaration of what the law is. In effect, all that the plaintiffs seek by their complaint is an advisory opinion respecting the proper exercise of the governor's * * * power."[15]

Eacret v. Holmes, 215 Or 121, 124-25, 333 P2d 741 (1958) (quotations and citations omitted) (emphasis added).

Intervenors-defendants' fourth allegation is an allegation of taxpayer standing. The circumstances under which a taxpayer has standing to challenge governmental action are not present here. "When a taxpayer relies on his or her status as a taxpayer to establish standing under ORS 28.020, the complaint must show a present or foreseeable financial interest; that is, the taxpayer must allege that the challenged government action actually or potentially affects the taxpayer's taxes adversely." Chadwick v. Alexander, 310 Or 700, 704, 801 P2d 797 (1990) (citing Gruber). Although intervenors-defendants have alleged that their taxes may be adversely affected as a result of "a decision to extend marriage benefits and attendant costs to the taxpayers of the County to the same-sex partners of Multnomah County employees," facts of which the Court may take judicial

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[15] For the same reasons, intervenors-defendants' claims for injunctive relief must fail. "[S]tanding to enjoin a governmental action requires an allegation that the challenged action injures the plaintiff in some special sense that goes beyond the injury the plaintiff would expect as a member of the general public." Eckles v. State, 306 Or 380, 386, 760 P2d 846 (1988).

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notice render the allegation meritless. The County already offers employment benefits to the domestic partners of its lesbian and gay employees to the same extent that it offers employment benefits to the spouses of its heterosexual employees. Multnomah County Personnel R. 4-20-020; see also Sowle Aff ¶ 3; Li Decl ¶ 15. The cost to the County of such employment benefits would not increase if its lesbian and gay employees were to marry their domestic partners. Even if it would, it is entirely speculative and indeed improbable that intervenors-defendants' taxes would increase as a result. "Standing under this section has been denied when the showing of the required effect has been too speculative or entirely missing." Gruber, 285 Or at 7 (citations omitted); see also McKinney v. Watson, 74 Or 220, 224, 145 P 266 (1915) ("[I]n the absence of any showing of facts from which the court can deduce the legal conclusion that [taxpayer plaintiff] is about to suffer a greater burden of taxation than before, his contention appears to be a mere academic proposition.").

Intervenors-defendants do not have standing to assert their fourth counterclaim. Accordingly, their fourth counterclaim must be dismissed. See also Utsey v. Coos County, 176 Or App 524, 32 P3d 933 (2001).

III. CONCLUSION

For the foregoing reasons as well as those set forth in Plaintiffs' Memorandum of Law in Support of Motion for Partial Summary Judgment, plaintiffs respectfully request that the Court deny intervenors-defendants' motion for partial summary judgment and grant plaintiffs' motion for partial summary judgment on plaintiffs' first claim. Plaintiffs

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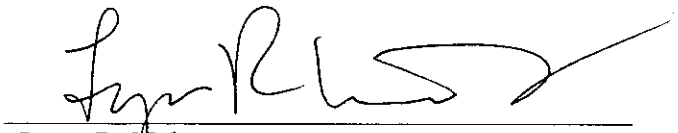
also respectfully request that the Court dismiss intervenors-defendants' first and fourth counterclaims.

DATED this 12th day of April, 2004.

By: 

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I hereby certify that I have made service of the foregoing **PLAINTIFFS' OPPOSITION TO INTERVENORS-DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT** on the party/ies listed below in the manner indicated:

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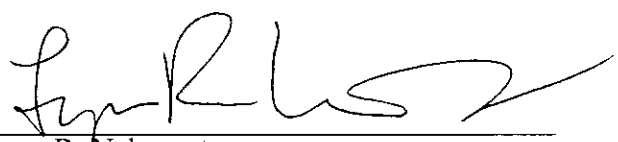

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