TABLE OF CONTENTS

TABLE OF CONTENTS . . . . i-iv

TABLE OF AUTHORITIES . . . . v-xv

I. STATEMENT OF THE CASE 1

1. INTRODUCTION AND THIS COURT'S QUESTIONS 1

1) What attributes of marriage under Oregon law establish that it is a "privilege" or an "immunity" within the meaning of Article I, Section 20? 2

2A) If Oregon law allows only certain persons to marry, what characteristics of those persons demonstrate that they are a favored "class of citizens" within the meaning of Article I, Section 20 of the Oregon Constitution? 3

2B) Does the history of Article I, Section 20, including its predecessors in other states, assist in answering the question of what characteristics define those allowed to marry? 4

3) If Oregon marriage laws improperly grant privileges or immunities to certain persons, what is the appropriate remedy and what characteristics, if any, would define the persons to whom the State of Oregon must extend the privileges or immunities of marriage "upon the same terms"? 5

4) Do Oregon's marriage laws deny equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution? 6

2. NATURE OF ACTION OR PROCEEDING; RELIEF SOUGHT 7

3. NATURE OF THE JUDGMENT 8

4. STATUTORY BASES FOR APPELLATE JURISDICTION 9

5. EFFECTIVE DATES FOR PURPOSES OF APPEAL 9

6. QUESTIONS PRESENTED ON APPEAL 10

7. CONCISE SUMMARY OF THE ARGUMENTS 10

8. SUMMARY OF FACTS 12

II. ASSIGNMENTS OF ERROR 13

1. FIRST ASSIGNMENT OF ERROR 13

A. PRESERVATION 13
B. STANDARD OF REVIEW 14
C. ARGUMENTS 14

1. MARRIAGE CONSTITUTES AN HISTORIC EXCEPTION TO ANY ABSOLUTIST OR HYPER-TECHNICAL READING OF ARTICLE I, SECTION 20 THAT WOULD SUGGEST MARRIAGE MUST ENCOMPASS SAME-SEX UNIONS. 15

a. Introduction: The Forest & the Trees 15
b. Framer Intent in Oregon Constitutional Law: Still The Goal. . 15
c. Marriage, as Recognized Continuously in Statutes and Common Law since Before Statehood, Is a Historic Exception to Article I, Section 20. 20
d. Why Sexual Orientation Is Different than Race. 24
e. Constitutional Change: Two Methods, Only One of Which Is Valid. 25

2. FUNDAMENTAL BIOLOGICAL DIFFERENCES WARRANT THE LEGISLATIVE PREFERENCE FOR TRADITIONAL MARRIAGE. 27

a. Procreation 29
b. Child Rearing 31
c. Historical Status 35

3. MARRIAGE DOES NOT TRIGGER ARTICLE I, SECTION 20 PROTECTIONS BECAUSE ITS STATUTES ARE NOT FACIALLY EXCLUSIONARY, AND ONLY FACIALLY EXCLUSIONARY LAWS RIGHTLY APPLY IN A FAVORITISM ANALYSIS. 37

a. BRO Plaintiffs May Take Advantage of Marriage as it Currently Exists If They So Desire, Because Marriage Is Available to All Unmarried Individuals of Requisite Age,

Irrespective of the Individual's Gender or Sexual Orientation. 37

b. Discriminatory Impact Does Not Trigger Article I, Section 20's Protections. . . . 40

4. HOMOSEXUALS DO NOT FORM A "SUSPECT CLASS" FOR PURPOSES OF ARTICLE I, SECTION 20 ANALYSIS. . . . 44

5. MARRIAGE ITSELF IS NOT A "PRIVILEGE" OR "IMMUNITY" BY ESTABLISHED LEGAL DEFINITIONS OF THOSE TERMS. . . . 46

6. OREGON'S MARRIAGE LAWS SATISFY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION . . . 49

a. The United States Supreme Court Considered and Rejected an Equal Protection Claim . . . 49
b. There Is No Fundamental Right to Same-sex Marriage . . . 53
c. Plaintiffs Are Not Denied Equal Protection of the Laws . . . 57

D. CONCLUSION . . . 58

2. SECOND ASSIGNMENT OF ERROR . . . 59

A. Preservation of Error . . . 59
B. Standard of Review . . . 60
C. Argument . . . 60

1. THE REASONS FOR SAME SEX MARRIAGE PROVE TOO MUCH—THEY WOULD APPLY EQUALLY TO POLYGAMY AND INCEST. BRO PLAINTIFFS CANNOT EXPRESS A LOGICALLY CONSISTENT LIMITATION OR MEANS OF REMEDY. . . . 60

2. IF THERE IS A CONSTITUTIONAL PROBLEM WITH MARRIAGE, THIS COURT MUST DECLARE THE MARRIAGE STATUTES ALTOGETHER VOID , BECAUSE THERE IS NO WAY TO DETERMINE THE LEGISLATURE'S INTENT REGARDING SAME SEX MARRIAGE. . . . 62

3. THIRD ASSIGNMENT OF ERROR . . . 65

A. Preservation of Error . . . 65
B. STANDARD OF REVIEW . . . 66

C. ARGUMENT 66

1. THE COUNTY WAS CONSTITUTIONALLY POWERLESS TO CONTRAVENE STATEWIDE STATUTE. 66

a. Background of the Issue 66
b. Article VI, Section 10 Prevents Counties from Declaring Statewide Statutes Unconstitutional. 68
c. Marriage Is a Matter of Statewide Concern. 71
d. The marriage licenses issued in violation of Article VI, Section 10 are void. 71

2. JUDGMENT ON PLAINTIFFS' FOURTH CLAIM SHOULD BE REVERSED BECAUSE THE TRIAL COURT ISSUED A WRIT OF MANDAMUS WITHOUT A HEARING, AND WITHOUT FOLLOWING ANY OF THE PROCEDURES SET FORTH IN ORS 34.105 *ET SEQ*. 72

D. CONCLUSION 75

III. CONCLUSION 75

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION

U.S. Const. Amend XIV 6, 40, 48–58

OREGON CONSTITUTION

Article I, Section 11 17

Article I, Section 20. . . . . *Passim*

Article III, Section 1 63

Article IV, Section 2 25

Article VI, Section 10. . . . . 68, 71

Article VII, Section 1 19

Article XV, Section 5 21

Article XVII, Section 1 25

STATUTES

U.S. STATUTES

1 U.S.C. § 7 52

28 U.S.C. §1257(2) 50

OREGON STATUTES

ORS 34.160 74

ORS 106.010 . . . . . 39,43, 48, 71,75

ORS 106.020 . . . . . 39, 71

ORS 106.030 71

ORS 106.041 71

ORS 106.120 71

ORS 106.165 71

ORS 106.990 71

CASE LAW

US SUPREME COURT

Agostini v. Felton, 521 U.S. 203 (1997) 53

Baker v. Nelson, 409 U.S. 810 (1972) 44, 50, 51, 53

Board of Trustees of the Univ. of Alabama v. Garret, 531 U.S. 356 (2001) 40, 57, 58

Boddie v. Connecticut, 401 U.S. 371 (1971) 52

Central State Univ. v. American Ass'n of Univ. Professors, Central St. Univ. Chapter,

526 U.S. 124 (1999) 57

Federal Communications Comm'n v. Beach Communications, Inc.,

508 U.S. 307 (1993) 58

Griswold v. Connecticut, 381 U.S. 479 (1965) 31, 52

Heller v. Doe, 509 U.S. 312 (1993) 58

Hicks v. Miranda, 422 U.S. 332 (1975) 51, 52

Jackman v. Rosenbaum Co., 260 U.S. 22 (1922) 58

Lawrence v. Texas, 539 U.S. 558 (2003) 52, 61, 62

Loving v. Virginia, 388 U.S. 1 (1967) 52, 54, 56

Mandel v. Bradley, 432 U.S. 173 (1977) 51

Maynard v. Hill, 125 U.S. 190 (1888) 54

Meyer v. Nebraska, 262 U.S. 535 (1923) 52

Murphy v. Ramsey, 114 U.S. 15 (1885) 54

Ohio ex rel. Eaton v. Price, 360 U.S. 246 (1959) 51

Reynolds v. United States, 98 US 145 (1878) 21, 54

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) 53

Skinner v. Oklahoma, 316 U.S. 535 (1942) 52, 58

Turner v. Safley, 482 U.S. 78 (1987) 55,56,57

Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.,

429 U.S. 252 (1977) 40

Washington v. Davis, 426 U.S. 229 (1976) 40

Washington v. Glucksberg, 521 U.S. 702 (1997) 55

Zablocki v. Redhail, 434 U.S. 374 (1978) 54

US Courts of Appeals

Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989) 44

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128 F.3d 289 (6th Cir. 1997) 44

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Lofton v. Sec'y of the Dept. of Children and Fam. Servs., 358 F.3d 804 (11th Cir. 2004) . . 44

McConnell v. Nooner, 547 F.2d 54 (8th Cir. 1976) 52

Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984) 44

Richenberg v. Perry, 97 F.3d 256 (7th Cir. 1996) 44

Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994) 44

Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996) 44

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U.S. DISTRICT COURTS

Adams v. Howerton, 486 F Supp 1119 (C.D. Calif. 1980) 30, 31, 52

In re Kandu, 2004 WL 1854112 (W.D. Wash., Aug. 17, 2004) 52

OREGON SUPREME COURT

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Cooper v. School Dist. 4J, 301 Or 358, 723 P2d 298 (1986) 72

Crocker v. Crocker, 332 Or 42, 22 P3d 759 (2001) 38, 46

Davis v. Campbell, 327 Or 584, 965 P2d 1017 (1998) 14

Delgado v. Souders, 334 Or 122, 46 P3d 729 (2002) 18

Dwyer v. Dwyer, 299 Or 108, 698 P2d 957 (1985) 16, 17

Employment Div. v. Rogue Valley Youth for Christ, 307 Or 490, 770 P2d 588 (1989) 72

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Kirschbaum v. Abraham, 267 Or 353, 355, 517 P2d 272 (1973) 66

LaGrande/Astoria v. PERB, 281 Or 137, 576 P2d 1204 (1978) 69

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Lehman v. Bradbury, 333 Or 231, 242, 37 P3d 989 (2002) 45

Marriage of Crocker, 332 Or 42, 22 P3d 759 (2001) 41

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Multnomah Kennel Club v. Department of Revenue, 295 Or 279, 666 P2d 1327 (1983) . . . 69

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Priest v. Pierce, 314 Or 411, 842 P2d 65 (1992) 15

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105 Or App 364, 804 P2d 1220 (1991) 74

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1287 (1994) 74

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179 Or App 46, 39 P3d 201 (2002) 68

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Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971) 49, 50

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I. STATEMENT OF THE CASE

1. INTRODUCTION AND THIS COURT'S QUESTIONS

State recognition of marriage, as it has been understood for thousands of years of Western history and for the entire history of this Nation and this State—a union between one man and one woman—is not unconstitutional under Article I, Section 20 of the Oregon Constitution.

Indeed, if this Court's historic exceptions doctrine[1] is to be taken seriously, any argument that more "progressive" or "enlightened notions of equality" should dictate this case must be rejected outright. If any historical fact can be known with certainty, it is that the framers of the Oregon Constitution understood and intended marriage to be between one man and one woman. Common sense and this Court's caselaw require that established codifications of traditional marriage are an historic exception to any reading of Article I, Section 20 that would invalidate those laws.

This case arose when certain Multnomah County Commissioners met secretly with members of Basic Rights Oregon—a pro-gay rights special interest group—to plan a way to extend marriage to gay and lesbian couples. Multnomah County, armed only with a legal memorandum from its own attorney and outside counsel, announced without notice or public input on March 2, 2004, that it was to commence issuing marriage licenses to same sex couples the next day. This case was thus set in motion.

In correspondence to the parties before this briefing, this Court stated its premise about Article I, Section 20: "[it] prohibits the enactment of laws that ***grant*** privileges or immunities to any citizens or class of citizens that do not equally belong, on all the same terms, to all citizens." Excerpt of Record-

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[1] Only days ago, this Court affirmed its adherence to the historic inquiry into constitutional provisions. *Yancy v. Shatzer*, 2004 WL 2065843, *4 (Or Sept 16, 2004).

1 (ER-1) at 1 (emphasis in original). This Court then asked four questions that flowed from the premise. Intervenors-Defendants-Appellants, Cross-respondents Defense of Marriage Coalition, Cecil and Nancy Jo Thomas, Dan Mates, and Dick Osbourne (collectively referred to hereinafter as "DOMC Intervenors") will address these questions now in the summary of the arguments and then proceed to the remainder of the Statement of the Case.

1) What attributes of marriage under Oregon law establish that it is a "privilege" or an "immunity" within the meaning of Article I, Section 20?

Short Answer: Marriage grants a right to unmarried people of legal age to enter into a civilly-recognized contract concerning a personal relationship. The only way in which marriage itself could be considered a privilege or immunity is if marriage itself is analytically linked to the statutorily created benefits that have been appended to—but not made a part of it—marriage through the years.

This Court has repeatedly said that the words of the Oregon Constitution have real meaning; they are not to be taken lightly or read subjectively simply in light of, or under pressure from, current political trends. Because Article I, Section 20 cases deal with the provision of benefits by a challenged law, and because marriage has never conferred any legal benefits within itself, it is difficult to state that marriage—standing alone—is a privilege or immunity. Only modern legal accretions to marriage can be said to provide any cognizable benefit. Analytically, marriage is like an old stone wall grown over with the ivy of modern legal benefits—simply because the ivy covers the wall does not mean that the ivy is the wall itself—or the wall the ivy.[2]

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[2] This concept is expanded upon in DOMC Intervenors' First Assignment of Error, Subpart 5. *See*, *infra*, at 46–48.

2A) If Oregon law allows only certain persons to marry, what characteristics of those persons demonstrate that they are a favored "class of citizens" within the meaning of Article I, Section 20 of the Oregon Constitution?

Short Answer: Oregon law does not limit marriage to "certain persons" (at least not any persons represented by BRO Plaintiffs in this case). Marriage is open to all unmarried individuals in Oregon over the age of 17, regardless of gender, race, religion, disability, and—at least on its face—regardless of sexual orientation. The statutory requirements relating to age and marital status are the only characteristics that categorically prevent certain ***individuals*** from marrying. Because individuals of both genders can participate in marriage, what BRO Plaintiffs must contend is that marriage between one man and one woman somehow excludes them as individuals based on their sexual preference. This is where Plaintiffs' argument founders.

The marriage statutes have never required a particular sexual orientation. The ancient requirement of consummation has long since faded from legal relevancy. Because there is no statutory bar on its face to gays and lesbians marrying someone of the opposite gender, BRO Plaintiffs are forced to argue that traditional marriage creates a discriminatory ***impact*** upon homosexuals[3]. Yet a "discriminatory impact" analysis makes no sense under Article I, Section 20, with its concern about intentional favoritism. That is, a broadly inclusive law does not improperly grant a privilege or immunity because some people are more ***likely*** to take advantage of it. To run afoul of Article I, Section 20, a privilege or immunity must by its nature facially exclude some portion of the populace outright from its

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[3] DOMC Intervenors use the term "homosexuals" advisedly. However, the Oregon Court of Appeals' opinion in *Tanner v. OHSU*, 157 Or App 502, 524, 971 P2d 435 (1998), used this specific term in finding that "homosexuals" constitute a "suspect class" under Article I, Section 20 jurisprudence. *Tanner* was a significant factor in the trial court's decision.

protections.[4]

Furthermore—assuming for the sake of argument that Article I, Section 20 somehow provides protection to self-defined pairs of individuals—there are specific biological differences between those couples who as a practical matter will marry under current ORS Chapter 106 and the "class" of couples represented by Plaintiffs. Strictly as a matter of biology, homosexual couples differ from heterosexual couples in two significant and fundamental ways. First, in isolation, all homosexual couples are infertile—that is, they cannot biologically reproduce solely within the relationship. Yet the procreation possibility has always been at least one central rationale for government's interest in promoting and regulating marriage.

The second main practical difference appears after children are born. A basic social consensus has always believed, and more recent social science data strongly suggest, that the optimum environment for child rearing occurs in a stable, opposite sex relationship. To put it more starkly, as a matter of constitutional law under Article I, Section 20, which parent does a child not need, the father or the mother? This is a question that BRO Plaintiffs cannot answer. Same sex couples, no matter how capable or attentive they may be toward the children they incorporate into their lives, physically cannot provide both a mother and a father to a child.

Thus, in these two ways, the Legislature's preference for couples who can independently procreate and thereafter rear children in the legislatively-determined optimal environment is based on actual biological differences between opposite sex couples and same sex couples.[5]

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[4] This concept is expanded upon in DOMC Intervenors' First Assignment of Error, Subpart 3. *See*, *infra*, at 37–43.

[5] This concept is expanded upon in of DOMC Intervenors' First Assignment of Error, Subpart 2. *See*, *infra*, at 27–37.

2B) Does the history of Article I, Section 20, including its predecessors in other states, assist in answering the question of what characteristics define those allowed to marry?

Short Answer: Yes; traditional marriage as understood by the framers is a historic exception to any reading of Article I, Section 20 that would conflict with the traditional practice and codification of marriage. Marriage as a legal institution predates the ratification of the Oregon Constitution (as well as its predecessors), and therefore is exempted from any reading of a constitutional provision that would challenge this most basic societal institution. The "historic exception" doctrine in Oregon constitutional jurisprudence directly addresses situations such as this, where a law as it existed in Oregon's territorial period was then re-adopted after statehood, and is now said to violate a modern interpretation of a constitutional provision. In such instances, the law at issue logically cannot be held unconstitutional.[6]

3) If Oregon marriage laws improperly grant privileges or immunities to certain persons, what is the appropriate remedy and what characteristics, if any, would define the persons to whom the State of Oregon must extend the privileges or immunities of marriage "upon the same terms"?

Short Answer: Assuming statutory recognition of traditional marriage is unconstitutional, it follows that there can be no "defining characteristics" at all to which the marriage statutes can be restricted. Marriage is already available "on the same terms" to every qualified individual (*i.e.* of age and unmarried). To expand a remedy to encompass BRO Plaintiffs, marriage must be made available to all persons who desire to marry other consenting persons, with no restrictions whatsoever—including whether such persons are already married.

BRO Plaintiffs can point to no discernable principle, no logical distinction, that would require

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[6] This concept is expanded upon in DOMC Intervenors' First Assignment of Error, Subpart 1. *See*, *infra*, at 15–26.

same sex marriages but prohibit any other consensual marriages by and between any number of persons. Far from a parade of horribles or a *reductio ad absurdum*, this is the only intellectually honest answer to the Court's question. BRO Plaintiffs have not, and indeed cannot, suggest otherwise. BRO Plaintiffs are quite literally asking this Court to draw an arbitrary line around marriage—one that includes them but inexplicably excludes other "groups" of individuals. Should this Court extend the definition of marriage beyond its legislated limits, the only principled remedy would extend marriage to all consenting pairs—or even larger groups—of individuals.[7]

In fact, in the event the Court feels compelled to grant a remedy to BRO Plaintiffs, the only remedy warranted in the circumstances is the declaration that Oregon's marriage statutes are unconstitutional and therefore void in their entirety. Nothing in the marriage statutes evinces any legislative intent to broaden marriage beyond its statutory limits on individuals of age and marital status, or the limitations on the couples of consanguinity and opposite sexes. This Court is a "law announcing" Court, not a "law creating" Court. It is up to the Legislature, not this Court, to craft a statute that meets Article I, Section 20.[8]

4) Do Oregon's marriage laws <u>deny</u> equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution?

Short Answer: No. The United States Supreme Court has already ruled that limiting marriage to the union of one man and one woman does not violate the equal protection, due process, or privacy protections of the Fourteenth Amendment to the United States Constitution. Nothing in the United

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[7] This concept is expanded upon in DOMC Intervenors' Second Assignment of Error, Subpart 1 of. *See*, *infra*, at 60–62.

[8] This concept is expanded upon in DOMC Intervenors' Second Assignment of Error, Subpart 2. *See*, *infra*, at 62–64.

States Constitution requires redefining the fundamental meaning of marriage that has bridged all cultures and religions for thousands of years.[9]

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2. NATURE OF ACTION OR PROCEEDING; RELIEF SOUGHT

This declaratory relief action arises from Multnomah County's unilateral and secret decision to grant marriage licenses to same-sex couples in clear violation of Oregon law. DOMC Intervenors initially brought suit as plaintiffs to halt Multnomah County's issuing of licenses to same-sex couples. DOMC Intervenors failed to obtain preliminary injunctive relief in that action. In exchange for dismissing that pending litigation, it was agreed that the parties to the new suit would not object to DOMC Intervenors intervening in this litigation.

Because the DOMC Intervenors' original litigation raised issues apart from Article I, Section 20's impact on ORS Chapter 106, BRO Plaintiffs[10] filed the present suit—asking the State to register the same sex marriage licenses already issued—as a means to frame the Article I, Section 20 issue squarely for this Court[11]. DOMC Intervenors raised the declaratory relief claims from their initial

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[9] This concept is expanded upon in DOMC Intervenors' First Assignment of Error, Subpart 5. *See infra*, at 48–58.

[10] Multnomah County below for the most part simply echoed the arguments and joined in the pleadings of the BRO Plaintiffs. For purposes of this briefing, DOMC includes Multnomah County and the arguments and motions it made when referencing "BRO Plaintiffs," unless otherwise stated.

[11] Because of the interconnectedness of issues in this matter, the type of relief sought (*i.e.* the recording of licenses already issued), and the manner in which Multnomah County began issuing marriage licenses, it is logically impossible to present ***only*** the Article I, Section 20 issue. DOMC Intervenors' Third Assignment of Error addresses these additional issues. *See* DOMC Intervenors' Third Assignment of Error, *infra*.

litigation upon intervention in this action.

At the trial court below, DOMC Intervenors sought and were denied summary judgment on their affirmative defenses and counterclaims upholding the constitutionality of marriage. The State Defendants answered and raised affirmative defenses, but did not allege any counterclaims or request affirmative relief. BRO Plaintiffs sought summary judgment for a declaration against the State that marriage as codified in ORS Chapter 106 violated Article I, Section 20 of the Oregon Constitution. The trial court granted partial summary judgment to BRO Plaintiffs, but did not declare marriage unconstitutional, only declaring that the benefits and rights attendant to marriage must be extended to same sex and homosexual couples under Article I, Section 20. Multnomah County had joined in all of BRO Plaintiffs' claims and motions.

The trial court purported to limit the scope of the summary judgment proceedings to the issue of whether ORS Chapter 106 violated Article I, Section 20. However the trial court specifically ruled on BRO Plaintiffs' mandamus claim as well.[12]

DOMC Intervenors seek from this Court a reversal of the decision below, and a holding that traditional, one woman, one man marriage—codified in Oregon law at ORS Chapter 106—is not unconstitutional under any reading of Article I, Section 20. DOMC Intervenors also seek a ruling from this Court voiding the same sex marriage licenses on the grounds that Multnomah County exceeded its constitutional authority.

3. NATURE OF THE JUDGMENT

Hon. Frank L. Bearden, Multnomah County Circuit Court Judge, granted partial summary

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[12] This is discussed in DOMC Intervenors' Third Assignment of Error, *infra*.

judgment to BRO Plaintiffs on their first (declaratory relief) and fourth (mandamus) claims for relief; but also ruled that ORS Chapter 106 did not facially violate Article I, Section 20 of the Oregon Constitution. Still, Judge Bearden found the benefits attendant to marriage under the common law or other statutes must be made available to homosexual couples.[13] *See* E-R 439. Without explaining his reasoning for doing so in light of BRO Plaintiffs's failure to move for relief in mandamus, Judge Bearden ruled that the State Defendants must record the marriage licenses of those same sex couples who had obtained marriage licenses and have solemnized those marriages. E-R 430. In terms of remedy, Judge Bearden further ruled that the Oregon Legislature has 90 days from commencement of its next session to make the benefits attendant to marriage available to homosexual couples, or absent such legislation he would order Multnomah County to issue marriage licenses to same sex couples. E-R 439.

4. STATUTORY BASES FOR APPELLATE JURISDICTION

The statutory basis for appellate jurisdiction is ORS 19.270, which provides in part that, "the Court of Appeals has jurisdiction of the cause when the notice of appeal has been served and filed as provided in ORS 19.240, 19.250 and 19.255." DOMC Intervenors timely filed and served their notice of this cross-appeal, and the Court of Appeals has certified this case to the Supreme Court. This appeal arises from an order granting summary judgment on BRO Plaintiffs' first and fourth claims for relief, and thus this case is properly appealable pursuant to ORS 19.205(2)(c). DOMC Intervenors

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[13] Throughout this brief, DOMC Intervenors wish to emphasize that there is a significant logical distinction between "same sex" couples and "homosexual" couples. Simply put, if "suspect class" determinations are based on ""immutable" characteristics, "suspected of reflecting 'invidious' social or political premises . . . ," *Hewitt v. SAIF*, 294 Or 33, 45, 653 P2d 970 (1982), a same sex pair that is not homosexual would have no logical claim to protection under Article I, Section 20. Judge Bearden's ruling hinges in part on sexual orientation.

have standing to appeal pursuant to ORS 19.245(2)(a). DOMC Intervenors' status as Appellants has been set pursuant to this Court's order of August 20, 2004.

5. Effective Dates for Purposes of Appeal

Judgment was entered on May 18, 2004. DOMC Intervenors' Notice of Appeal was filed on June 7, 2004.

6. Questions Presented on Appeal

1. Is Oregon's statutory codification of marriage unconstitutional under Article I, Section 20 because it does not allow for marriage between persons of the same sex?

2. Is there any logical or legal limiting principle that will limit the extension of marriage benefits short of all persons in all situations, and can this Court itself impose such a remedy consistent with the separation of powers under the Oregon Constitution?

3. Was the mandamus that the trial court issued proper?

7. Concise summary of the arguments

Article I, Section 20 analysis

1A. Assuming that marriage grants impermissible favors to one class of citizens without biological justification, both the institution of marriage itself and at least some of the privileges and benefits attendant to marriage were in existence at the time of the ratification of the Oregon Constitution. Marriage in 1857 excluded same sex or homosexual couples from the institution. Under this Court's precedent, laws that otherwise limit the individual rights recognized by the Oregon Constitution will

survive a constitutional challenge where the limitations represent well-recognized historical exceptions to the unfettered exercise of such individual rights.

1B. Assuming that marriage represents favoritism toward a particular class, the favoritism is based on rational, non-prejudicial reasons that reflect fundamental biological differences between the favored class and the non-favored class.

1C. Marriage is facially neutral, and all unmarried citizens of a certain age have voluntary ***access*** to marriage. Thus, no unconstitutional favoritism is shown by ORS Chapter 106. Article I, Section 20 does not protect the rights of "couples" as discrete legal entities. Individuals of either sex are not excluded from marriage on the basis of their gender, and homosexuals are not a protected class under this Court's jurisprudence. Article I, Section 20 does not apply here because a facially neutral law cannot be said to "favor" one class against another. Discriminatory treatment, not discriminatory impact, is needed to trigger Article I, Section 20 protections.

1D. Homosexuals are not a "suspect class" under this Court's precedent, and the Court of Appeals was incorrect in assigning "suspect class" status to homosexuals in *Tanner v. OHSU*.

1E. Article I, Section 20 does not apply in this case because marriage, in and of itself, does not meet the legal threshold of "privilege" or "immunity."

FOURTEENTH AMENDMENT ANALYSIS:

1F. Under United States Supreme Court precedent, the Fourteenth Amendment does not require extension of marriage rights to gays and lesbians. The Oregon Supreme Court is bound by United States Supreme Court precedent.

REMEDY:

2A. BRO Plaintiffs have proposed no coherent, logical means of limiting marriage to any particular

group of people. Heterosexual same sex unions, polygamy, and adult incestuous relationships would all be warranted and justifiable under the logic advanced by BRO Plaintiffs.

2B. The separation of powers under Article III, Section 1 prohibits one branch of government from performing the acts of another branch. If ORS Chapter 106 is unconstitutional under Article I, Section 20, this Court should allow the Legislative Assembly to craft a replacement consistent with the Oregon Constitution.

County Authority:

3A. Article VI, Section 10 prohibits any county from ruling on the constitutionality of statutes with statewide concern—*e.g.* deciding the marriage statutes are unconstitutional. The trial court erred by requiring the State Defendants to record marriage certificates of the same sex couples, because the marriages are legal nullities. This Court should order the State Defendants to "unregister" the same sex marriage licenses.

Mandamus:

3B. Proper mandamus procedures were wholly lacking in this case, and mandamus cannot issue outside the statutory scheme. The trial court has no authority to issue a writ of mandamus without the relator following the procedures set forth in ORS Chapter 34. Moreover, the court specifically instructed the parties not to brief the issues involved in the mandamus claim or argue that claim at oral argument, yet it issued the peremptory writ contrary to its own instructions. Relief cannot lie for BRO Plaintiffs' mandamus claim.

8. SUMMARY OF FACTS[14]

In January of 2004, BRO staffers met secretly with select members of the Multnomah County Board of Commissioners about extending marriage to same sex couples. D-E-R 18–23, 25–26. Without any notice or hearings, on March 2, 2004, Multnomah County Chairwoman Diane Linn announced that she and three other Multnomah County Commissioners[14] believed that Oregon's marriage statutes were unconstitutional, and that she was issuing a directive to Multnomah County employees to begin issuing marriage licenses to same sex couples at 9:00 a.m. on March 3, 2004. E-R 58. Multnomah County employees did issue marriage licenses to same sex couples beginning on that date. E-R 54. From March 3, 2004 to April 12, 2004—the day Judge Bearden stayed Multnomah County's issuing of same sex marriage licenses—approximately 3,000 marriage licenses were issued to same sex couples, including some of the individual BRO Plaintiffs in this case. E-R 410.

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[14] Because of the secrecy of the relevant discussions and meetings, and because DOMC Intervenors public meetings law challenges have not yielded discovery on the record, DOMC Intervenors offer the facts as best it understands them according to public accounts and partial admissions of certain BRO Plaintiffs and Multnomah County parties, as well as pleadings and memoranda filed on their behalf. Once these secret meetings have been subjected to discovery and depositions, Oregonians may learn more about what public business actually occurred in the back rooms of the Multnomah County Building to bring about this constitutional challenge.

This evidence was not introduced below because the legal issue to which it was relevant was excluded from consideration by order of the trial court. *See* E-R 294–295. The County Commissioners have publicly admitted to these meetings with BRO. *See* DOMC Intervenors' Excerpt of Record (D-E-R) 18–23. DOMC Intervenors ask the Court to take judicial notice of these implicit admissions by Multnomah County Commissioners. *See generally* D-E-R 18–26.

[14] Commissioner Lonnie Roberts was intentionally excluded from these secret meetings because BRO staffers and Multnomah County parties did not think he would agree with their plans, and they were concerned that he might leak the secret, thereby resulting in litigation being brought ***before*** Multnomah County could issue same sex marriage licenses. D-E-R 27–28.

II. ASSIGNMENTS OF ERROR

1. FIRST ASSIGNMENT OF ERROR

The trial court erred in holding that the benefits of marriage must be extended to same sex couples under Article I, Section 20 of the Oregon Constitution.

A. PRESERVATION

By BRO Plaintiffs:

> "[P]laintiffs respectfully move for an order granting partial summary judgment in their favor on plaintiffs' first claim for relief[.]"

BRO Plaintiffs' Motion for Partial Summary Judgment, April 5, 2004 at 2.

By Intervenor-Plaintiff Multnomah County:

> "Multnomah County respectfully moves the court for an order granting partial summary judgment for plaintiffs' First [*sic*] claim for relief and dismissing the Counterclaims of [DOMC Intervenors.]"

Multnomah County's Motion for Summary Judgment, April 5, 2004, at 2.

Ruling of the Trial Court in favor of BRO Plaintiffs:

> "On plaintiffs' and intervenor-plaintiff's First Claim for relief, the Court hereby declares that, to the extent that ORS Chapter 106 acts as a bar to the rights and privileges guaranteed by Article I, Section 20 of the Oregon Constitution, that portion of ORS Chapter 106 is unconstitutional."

Hon. Frank Bearden, Revised Limited Judgment, May 18, 2004 at 4.

B. STANDARD OF REVIEW

> "The parties do not dispute the material facts. Therefore, we must determine whether the undisputed facts entitle defendant to judgment as a matter of law. *Lane Transit District v. Lane County*, 327 Or 161, 167, 957 P2d 1217 (1998)."

Davis v. Campbell, 327 Or 584, 587, 965 P2d 1017 (1998)

C. ARGUMENTS

Marriage is simply not unconstitutional. It was not unconstitutional at the time of the framing of the Oregon Constitution, and it has not somehow become unconstitutional in the intervening years. Even if marriage's limitation to opposite sex couples could be said to present constitutional problems, this limitation is justified in light of specific biological differences between opposite sex couples and same sex couples. Because homosexuality is not a suspect class, and because neither gender is excluded from marriage, a rational basis is all that is required to justify the marriage statutes. The bare right to enter into a contract, standing alone, is not a privilege or immunity sufficient to trigger constitutional invalidation. Homosexuals are not a suspect class under this Court's precedent. For all of these reasons, the marriage statutes are not unconstitutional under Article I, Section 20 of the Oregon Constitution. The Fourteenth Amendment to the United States Constitution does not require the extension of marriage to homosexual couples.

1. MARRIAGE CONSTITUTES AN HISTORICAL EXCEPTION TO ANY ABSOLUTIST OR HYPER-TECHNICAL READING OF ARTICLE I, SECTION 20 THAT WOULD SUGGEST MARRIAGE MUST ENCOMPASS SAME-SEX UNIONS.

a. Introduction: The Forest & the Trees.

In setting forth their Privileges and Immunities argument BRO Plaintiffs struggle mightily with the meaning of Article I, Section 20 of the Oregon Constitution and its caselaw. BRO Plaintiffs fail to see the constitutional forest for the trees. To conform the ancient institution of marriage to the mores of the immediate moment, BRO Plaintiffs utterly ignore some very basic concepts in Oregon constitutional jurisprudence, concepts articulated repeatedly over the last twenty years by this Court in its "historical exceptions" doctrine.

b. Framer Intent in Oregon Constitutional Law: Still The Goal.

This Court has stated and restated that, when it comes to understanding key provisions of the Constitution, its job is to understand the intent of the framers. "As a preliminary matter, we note that, when construing provisions of the Oregon Constitution, it has long been the practice of this Court to ascertain and give effect the intent of the framers . . . and of the people who adopted it." *Stranahan v. Fred Meyer*, 331 Or 38, 54-55, 11 P3d 228 (2000) (internal quotation marks omitted), *citing Priest v. Pierce*, 314 Or 411, 415-16, 842 P2d 65 (1992). *See Yancy v. Shatzer*, ___P3d___, 2004 WL 2065843, *4 (Or, September 16, 2004) (citing *Stranahan*). As caselaw shows, this search for original intent seems to apply to the whole of the Oregon Constitution.

This Court has repeatedly noted that, even when constitutional phrases appear to be plain and uncompromising, there may be "clear historical exceptions" to those ringing words. In the case of free speech for example, this Court in *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982), first noted that speech such as perjury, fraud, verbal theft, and solicitation were obviously never intended to be included in the protections of Article I, Section 8. These forms of speech are "clear historical exceptions" to the broad grant of rights in Article I, Section 8:

> This [constitutional provision] forecloses the enactment of any law written in terms directed to the substance of any 'opinion' or any 'subject' of communication, ***unless the scope of the restraint is wholly confined within some historic exception that was well established when the first American guarantees of freedom of expression were adopted, and that the guarantees then or in 1859 demonstrably were not intended to reach.*** Examples are perjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud and their contemporary variants.

293 Or at 412 (Emphasis added). In *Robertson*, this Court in 1982 found that then-ORS 163.275 (making it a crime to compel or induce another person to engage in conduct from which he has a legal

right to abstain) was a clear historical exception to Article I, Section 8: "The historic exception is found in the long established laws against blackmail and other forms of extortion. On historic grounds alone, we have no doubt that these or their contemporary equivalents survived Article I, Section 8[.]" 293 Or at 421–22. That this Court struck the statute down for vagueness did not alter its historical analysis.

Likewise, in *State v. Henry*, 302 Or 510, 732 P2d 9 (1987), this Court decided that the obscenity statutes did ***not*** fall with any historical exception to Article I, Section 8, concluding that "restrictions on sexually explicit or obscene expressions were not well-established at the time the early freedoms of expression were adopted . . . . The pejorative label of 'obscenity' has not described any single type of impropriety through the years." 302 Or at 520.

Another early example from this Court's historical exceptions doctrine, *Dwyer v. Dwyer*, 299 Or 108, 698 P2d 957 (1985), held that the husband in a divorce case was not entitled to a jury trial in a criminal contempt proceeding arising out of his failure to pay child support. Despite the fact that Article I, Section 11 by its terms appears to be absolute—"in all criminal prosecutions the accused shall have the right to a public trial by an impartial jury."—this Court held no jury trial was required. *Dwyer*, 299 Or at 116. *See* Or Const Art I, § 11. How can this be? This Court held that "clear historical exceptions" existing at the time of the framing demonstrated that, despite the apparently absolute constitutional language, "the jury trial guarantee in Article I, Section 11 demonstrably was not intended to reach punishment for indirect criminal contempt." 299 Or 114–15.

Yet another early historical exceptions case was *State ex rel Hathaway v. Hart*, 300 Or 231, 708 P2d 1137 (1985). In *Hart*, this Court found, as in *Dwyer*, that despite the broad language of Article I, Section 11's guarantee of a jury trial, the defendant in a criminal proceeding for violating a restraining order was not entitled to one. Significantly, this Court was not slowed down by the fact that

the framers "could not have known about" modern day restraining orders: "We may use the historical record for analogies to restraining orders[,]" [finding the Act was] "analogous to traditional injunctions prohibiting spouses from harassing each other during a pending divorce suit[.]" *Hart*, 300 Or at 240-241. This Court concluded in short order that "it was firmly established in England and in the United States that contempts of court were disposed of without jury trials," *id.* at 241, and that "the framers of the state constitution would have understood proceedings such as the one at issue here as an exception to the coverage of Article I, Section 11. Therefore, defendant was not and is not entitled to a jury trial." *Id.* at 241-242.

In *Molodyh v. Truck Insurance Exchange*, 304 Or 290, 744 P2d 992 (1987), this Court found that an insured in an action on a fire insurance policy was entitled to a jury trial (unless the plaintiff had voluntarily waived it through an arbitration clause). Nonetheless, this Court noted numerous examples where, despite the plain reading of Article I, Section 17's guarantee of a jury trial in civil cases—"in all civil cases the right of trial by jury shall remain inviolate"—a jury trial was ***not*** guaranteed, again because of the historical exceptions. *Molodyh*, 304 Or 295–96. For example, in civil cases under certain dollar limits no jury trial attaches: "this Court also has stated that a jury trial is guaranteed only in those classes of cases ***in which the right was customary at the time the constitution was adopted*** or in cases of like nature." *Id.* at 295 (emphasis added).

A jury trial case of more recent vintage is *Delgado v. Souders*, 334 Or 122, 46 P3d 729 (2002), in which this Court held that a defendant in an action under the anti-stalking statute did not have a constitutional right to trial by a jury despite Article I, Section 11. In reviewing the relevant history, this Court analogized the stalking statutes to those existing at the time of the framing, including the 1855 statues providing for proceedings to prevent the commission of crimes. 334 Or at 140-141. This Court

concluded that "in light of the foregoing, we conclude that the procedure set out in ORS 30.866 for obtaining an SPO fall within a historical exception to Article I, Section 11. . . accordingly, the defendant was not entitled to the constitutional safeguard set out in that provision, such as the right to a jury trial." *Id.* at 141.[15]

Most recently—only days ago—this Court again returned to the well of history in examining the scope of the judicial power under Article VII, Section 1. In *Yancy v. Shatzer*, ___P3d___, 2004 WL 2065843, this Court found that "the judicial power under the Oregon Constitution does not extend to moot cases that are 'capable of repetition, yet evading review.'" *Yancy v. Shatzer*, 2004 WL 2065843, *10. In *Yancy*, this Court first examined the effect of the 1910 amendments to Article VII, Section 1, and finding no evidence of a desire on the part of voters to alter the scope of the courts' original jurisdiction over moot cases, examined the scope of a courts' jurisdiction in 1857. *Yancy v. Shatzer*, 2004 WL 2065843, *4 ("Because we conclude that the 1910 voters did not intend to change

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[15] In a recent case from the Court of Appeals, it was held that a criminal defendant could be prosecuted for promoting unlawful public sex and prostitution under ORS 167.062, since statutes governing such offenses are wholly contained within historical exceptions to Article I, Section 8. *See State v. Ciancanelli*, 181 Or App 1, 9–16, 45 P3d 451 (2002) (discussing the history of governmental regulation of public nudity and public displays of sexual conduct and concluding that): "we. . . do not hesitate to conclude that the framers in mid-nineteenth century Oregon understood that the state had the authority to regulate public sexual conduct. . . ." *Id.* at 15. Significantly, the Court of Appeals was not troubled by the fact that it had "failed to report any statutes that directly parrot the language of ORS 167.062. . . .," since:

> "we do not read *Robertson* to require such a historical 'smoking gun.' To the contrary, the Oregon Supreme Court emphasized that a historical exception does not consist of a particular statutory prototype, but instead of a well established principle of law ***evidenced by***, among other things, statutes and caselaw from the relevant time."

Id. at 15-16, *citing Robertson*, 293 Or at 434. *Ciancanelli* further noted that, in *Robertson* this Court canvassed a wide array of historical sources; in *Henry*, this Court did the same. This Court "followed the same analytical approach, examining English and American precedents from the 17th to the 19th centuries to determine what the framers most likely intended. . . ." 181 Or App at 15-16.

the meaning or scope of 'judicial power' in Article VII (Amended), section 1, from what it was understood to include in 1857, we must inquire into the meaning and scope of 'judicial power' when Article VII (Original) of the Oregon Constitution was adopted in 1857."). Justice Balmer's dissent does not disagree with this underlying methodology, it only counsels that where a provision is amended, the provision takes on the legal meaning of the terms at the time of the amendment. *Yancy v. Shatzer*, 2004 WL 2065843, *14 (Balmer, J., *dissenting*). Plainly, the historical exceptions doctrine is not limited to only free speech and jury trial provisions.[16]

In short, the historical exceptions doctrine recognizes that in those situations where 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. Significantly, because BRO Plaintiffs demanded only marriage, and not the benefits and rights appended to it, the trial court's avoidance of the historical exceptions doctrine was in error.

c. Marriage, as Recognized Continuously in Statutes and Common Law since Before Statehood, Is a Historic Exception to Article I, Section 20.

If anything is a "clear historical exception" to a constitutional text, it is the traditional notion that marriage is between one man and one woman. This idea existed in the common law for hundreds of years and in the Oregon territorial statutes since well before and at the time of statehood. Marriage indeed is a clear historical exception to Article I, Section 20.

Furthermore, it simply cannot be argued that the framers ever would have thought that limiting marriage to one man and one woman could have possibly contradicted the lofty words of Article I,

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[16] *See also State v. Slowikowski*, 307 Or 19, 27, 761 P 2d 1315 (1988) (although not decided on historical exception grounds, this Court conducted an historical exception inquiry into whether Article I, Section 9 (search and seizure) permitted drug dogs, stating "there is an historical exception for such use of [contraband sniffing] dogs, *i.e.*, such a use would not be a search").

Section 20—any more than limiting marriage to those who are not of close blood kin, or to those who are at least of the age of consent, or to those not already married would violate the provision.

Prior to, during, and after the adoption of the Oregon Constitution, marriage was understood to be defined—or restricted—by the following requirements: a union of one man and one woman, at least of the age of consent, outside of certain degrees of kinship, and unmarried. Statutes pertaining to marriage predated the actual adoption of the Oregon Constitution. In fact, as the Attorney General pointed out in his March 12, 2004, Opinion, "Section 6 of an Act Relating to Marriage and Divorce, enacted by the Territorial Assembly on January 17, 1854, is the direct precursor to ORS 106.150." E-R 76 n2. Like the current statute, Section 6 of the Territorial Statute refers to "husband" and "wife." Likewise, the 1863 Act, which replaced the Territorial Statute, referred to "husband and wife". *Id.* Section 13 of the 1863 Act, according to the Attorney General, "reinforces that the parties to an 1863 marriage could not have been two persons of the same sex, as it required parental consent for a license if the ***female*** was under the age of 18 or the ***male*** was younger than 21." *Id.* The Attorney General's footnote on history concludes that "successor statutory provisions, also containing express recognition that the marital relationship is one of 'husband and wife,' had been carried forward without interruption right up until the present versions of ORS 106.150, 106.041, and 106.020. *See* 1921 Oregon Laws, Section 9720-9724; 1940 Oregon Compiled Laws Annotated, Section 63-101 through 63-105." *Id.* It is simply beyond question that the Oregon marriage statutes do now and have always contemplated that marriage was between one man and one woman[17].

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[17] Another significant historical milestone was the 1878 federal polygamy case, *Reynolds v. United States*, 98 US 145 (1878), in which the US Supreme Court rejected the claim of a Latter Day Saints defendant for a religious freedom right to polygamy, noting that the common law had always outlawed it. *Id.* at 165. "Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized actions, a contract, and usually regulated by law. Upon it society may be said to be built,

Not only the Oregon Territorial Statutes, but the Constitution itself assumes that marriage is between a man and a woman. *See* Article XV, Section 5 ("the 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*** separate property") (emphasis added).

The debate surrounding the adoption of this provision reveals not only that marriage was only to be between one man and one woman, but that the framers assumed that the public purpose of marriage had to do with protecting and preserving the family unit. The debates of September 22, 1857, are the best example. The discussion on whether to strike or pass Article XV, Section 5 (D-E-R 16–17) is particularly relevant:

> "Mr. Deady was in favor of striking out [the provision]. He would not make two persons of the husband of wife—it only tended to family alienation and jars.
>
> "Mr. Williams supported the motion to strike out. In this age of woman's rights and insane theories, our legislation should be of such to unite the family circle, and make husband and wife what they should be—bone of one bone, and flesh of one flesh. . . . Mr. Logan opposed striking out. . . if [the husband] was prudent and thrifty [the wife] would give him control of her property. And if he was not, it was better that she should have the power to preserve her property to support herself and educate her children. He had never heard of any divorces growing out of any conflicting interests in land claims. Mr. Kelsay had heard of such divorces and had known them too, he was for striking out. The wife was amply provided for without this. This would make the husband simply a boarder at his wife's establishment."

Cary, THE OREGON CONSTITUTION AND PROCEEDING AND IN DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857 (Salem, Oregon: State Printing Department, 1926) at 368–369.

This constitutional debate shows several things relevant to the current case. First, the framers

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and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal." *Id.*

understood and assumed that marriage was between one unmarried man and one unmarried woman. Second, they assumed that their constitutional goal "should be such as to . . . make husband and wife what they should be—bone of one bone and flesh of one flesh." Moreover, their concern for the effect of the amendment was whether it would "unite the family circle," or whether it would encourage marital tension and divorce. These latter two concerns are particularly important to understand the public purpose of marriage as including a concern for the traditional family unit and procreation and nurture of children.[18]

Of course, not just American, but English legal precedent and commentary well established that marriage has always been considered between one man and one woman. *See* William Blackstone, *4* COMMENTARIES ON THE LAWS OF ENGLAND, 163 (describing polygamy as a felonious offense: "for polygamy can never been endured under any rational civil establishment, whatever the specious reasons may be urged for it by the Eastern nations. . . ."). In Book 1, Chapter 15, Blackstone refers to marriage as "the reciprocal duties of husband and wife," continuing that "in general, all persons are able to contract themselves in marriage, unless they labor under some particular disabilities and incapacities. . . .these disabilities are of two sorts . . . first, such as are canonical . . . of this nature are pre-contract, consanguinity, or relation by blood; and affinity, relation by marriage, and some particular corporal infirmities. In these canonical disabilities are either grounded upon the express words of the divine law, or are consequences plainly deducable from thence." As this Court has explained, *Blackstone's Commentaries* "became one of the principle means of the colonists' information about the state of English law in general." *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 98, 23 P3d 333 (2001). *See also*, *State v. Ciancanelli*, 181 Or App at 9–10 n7 ("the *Commentaries* were not merely an

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[18] *See* Section II.C.2, *infra*, at .

approach to the study of law; for most lawyers they constituted all there was of the law[.] In view of the scarcity of law books during the earliest years of the Republic and the limitations of life on the frontier, it is not surprising that Blackstone's convenient work became the bible of American lawyers.").

Thus Blackstone makes clear several principles of marriage: first, though the general rule is that all persons are able to marry, there are a number of exceptions, and they are unambiguous. Marriage is limited to a man and a woman; marriage is limited to those who are not already married; marriage is limited by degrees of consanguinity or relation by blood; it is limited to those who can consent. In short, marriage is legitimately defined by the state, and some distinctions are inherent and necessary for its public purpose.

From these historical sources it must be concluded that the marriage statutes in Oregon law were, and are, historical exceptions to any provision in the Constitution which would tend to call them into question, including Article I, Section 20. The territorial statutes, Blackstone, the Constitution itself and the constitutional debates all make clear that marriage has always been defined as it currently is in ORS Chapter 106, and that the framers would have intended it to survive the enactment of Article I, Section 20, or any contrary reading of that provision.

d. Why Sexual Orientation Is Different than Race.

"Well," BRO Plaintiffs will undoubtedly say, "if you want to talk about history, let us be fair: the framers never would have thought that the racist sentiments ensconced in the Oregon territorial statutes were unconstitutional either. That does not mean that those ideas are constitutionally acceptable." But the constitutional and historical difference between the two scenarios is palpable. We fought the bloodiest war in this country's history, and enacted three major federal constitutional

amendments and several revisionary state constitutional amendments, to reach a constitutional consensus on race. We had a constitutional dialogue in this country on race, and we have decided that our constitutions are color-blind. That it took 100 years and dozens of court decisions to enforce this constitutional mandate does not change the historical and constitutional analysis. We have had the constitutional debate on race: Race no longer matters. Both the state and federal constitutions reflect that. We have never had such a constitutional dialogue on questions relating to sexual orientation. That is the difference.

e. Constitutional Change: Two Methods, Only One of Which Is Valid.

We are at a crossroad. By any intellectually honest reckoning of the historic exceptions doctrine—repeatedly affirmed by this Court, and as Oregon law now stands—the situation is clear. The marriage statutes do not allow same-sex marriage and the Oregon Constitution does not require it.

That leaves the question: if advocates for same-sex marriage such as Plaintiffs want to change that fact, as they clearly do, then how should that properly be done? The designers of our constitutional republic and our state drew up a simple plan: if the citizens want to amend the Constitution, there is a defined way to do so. Initially, it was from the Legislature (which was required to consider the question in two separate sessions) to the people. *See* former Or Const Art XVII, § 1 (1901 and earlier). Since the early Twentieth Century, the process has been through a constitutional revision or convention, or through a ballot measure initiated or referred by the Legislature, directly to the voters. Or Const Art IV, § 2. This is the only method allowed by the Constitution for amending it to add new rights.

This method is arduous and difficult, and takes time to build a civic consensus. No doubt the framers intended it that way. It requires advocates of a constitutional change to convince a majority of their fellow citizens that our common life would be well-served by the change. But then, of course, there

is another way to "amend" our constitutions, federal or state. Surely it is this idea on which BRO Plaintiffs staked their carefully planned surprise reversal of longstanding practice. They are banking on the Oregon courts to create a constitutional right under Article I, Section 20 for same-sex couples to marry. One cannot help but conclude that BRO Plaintiffs had no confidence that the Oregon electorate would agree with their ideas. Perhaps they think the People not fair enough, or wise enough. But this subtly elitist view is not the view that shaped our constitutional democracy.

Witness how hard at the national level the early constitutionalists worked to convince the people of the wisdom and security of the new federal constitution. The *Federalist Papers*, that great treatise on the American Constitution, is evidence of that political and intellectual struggle. The framers of the federal constitution, their intellectual ancestors, and the framers of the Oregon Constitution, knew something that BRO Plaintiffs have forgotten, or never believed. They knew what Jefferson knew, what Lincoln knew. "I know of no safer repository of political power but in the people," Jefferson said. "And if we think the people not enlightened enough to hold it, the remedy is not to take it from them, but to educate them." *Letter from Thomas Jefferson to William Charles Jarris (Sept. 28, 1820)*, in THE WRITINGS OF THOMAS JEFFERSON 177 (H.A. Washington ed., 1854).

BRO Plaintiffs have chosen to circumvent the process of public debate, deliberation and vote. They ask this Court to "declare it to be so" when what they need to do is explain to the voters "why it ***should*** be so." Plaintiffs would have this Court ignore the profound wisdom of the framers. They would ask this Court to ignore the entire historical exceptions jurisprudence of this Court. BRO Plaintiffs would have this Court find against historical fact that the framers of the Oregon Constitution intended for Article I, Section 20 to supplant traditional notions of marriage with the radically redefined notion that marriage is open to all persons without regard to distinction of any kind. In short, BRO

Plaintiffs ask this Court to say that the framers would have intended to throw out the most fundamental societal family unit at the time they wrote Article I, Section 20. Such a conclusion defies history, defies common sense, defies logic, and defies the constitutional framework for amending our charter document. It should be rejected.

2. *Fundamental Biological Differences Warrant the Legislative Preference for Traditional Marriage.*

Article I, Section 20 prohibits the granting of exclusive privileges or immunities to both "individual citizens" and "classes of citizens." *State v. Clark*, 291 Or 231, 240-241, 630 P2d 810 (1981).[19] However, even assuming that Oregon's marriage laws represent favoritism to heterosexual individuals over homosexual individuals,[20] and assuming that there is some suspect classification that is being harmed as a result,[21] there are nonetheless "intrinsic differences" between heterosexual and homosexual couples which justify the favoritism. *See Hewitt v. SAIF*, 294 Or 33, 49, 653 P2d 970 (1982). Accordingly, ORS Chapter 106 is constitutional as written.

Not all legislation that discriminates against a suspect class is impermissible under Article I, Section 20. *Hewitt* noted that laws based on gender must be "based on intrinsic differences between the sexes." 294 Or at 49. A distinction made by statute, even one involving a "suspect class," may be

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[19] Although the language of Article I, Section 20 only addresses the "granting" of privileges or immunities, the clause came ordinarily to "be invoked by persons who wanted a privilege or immunity for themselves rather than to withdraw it from others. . . ." *Clark*, 291 Or at 237. Thus, the Court soon held that the provision's "protective effect" extended "to rights against adverse discrimination as well as against favoritism. . . ." *Id.*

[20] As demonstrated in Section II.1.C.3., *infra*, it does not.

[21] As demonstrated is Section II.1.C.4 and II.1.C.5, *infra*, it does not.

justified by specific biological differences between the distinguished classes. *See Hewitt v. SAIF*, 294 Or at 49 (class distinctions legitimate if "based on intrinsic [biological] differences between the sexes"). Simply put, the Legislature may pass a law that excludes a certain group from some privilege or immunity so long as it is not simply extrapolating laws from prejudices. The grant of spousal benefits to widows but not to widowers was ruled unconstitutional in *Hewitt* because the statute assumed "women . . . to be dependent on men more often than the reverse . . . [and] [t]he assumption of female dependency is an archaic and overbroad generalization." *Hewitt*, 294 Or at 46–47 (citation and internal quotation marks omitted).

In this case, for Plaintiffs to prevail, they would need to prove that statutory marriage represents the codification of a specific prejudice ***against homosexual unions***—not merely a preference and encouragement for traditional marriage—and that this specific prejudice ***in particular*** motivated the passage of the statute. In *Hewitt*, there was no reason other than a woman's supposed dependency to limit survivor benefits to widows. Therefore, because of the presumption of constitutionality of statutes, not only do BRO Plaintiffs need to show that marriage codifies a specific prejudice against gays and lesbians, but they also need to show that ***no other reason could exist*** for the exclusion of same sex pairs from marriage. *See State v. Smyth*, 286 Or 293, 296, 593 P2d1166 (1979) ("statutes will not be construed to violate constitutional prohibitions unless no other construction is possible"). This they cannot do. Ultimately, in determining whether ORS Chapter 106 makes legitimate exclusions, the question is whether a rational Legislature could decide that marriage should be exclusively between opposite sex pairs based on genuine biological distinctions and on an interest in the procreation and nurturing of children, apart from prejudice against gays and lesbians.

Indeed, numerous historical and sociological justifications exist for a rational Legislature to limit

marriage to only opposite sex couples. Indeed, "[b]y nature citizens are divided into the two great classes of men and women, and the recognition of this classification by laws having for their object the promoting of the general welfare and good morals does not constitute an unjust discrimination." *State v. Hunter*, 208 Or 282, 300 P2d 455 (1956), *quoting State v. Baker*, 50 Or 381, 385, 92 P. 1076 (1907).

The traditional man-woman, husband-wife, father-mother unit has always been regarded as the "gold-standard" for family relationships in our society and culture. The man-woman relational unit is the only procreative relationship and it is the best relationship in which to raise healthy, well-adjusted children. The Legislature had compelling—certainly rational—reasons for preferring the traditional man-woman procreative family unit over same sex homosexual relationships. In the words of *Hewitt*, there exist "specific biological differences" between same sex couples and opposite sex couples in reproduction, in child rearing, historically, physically, in the moral traditions of this country, and even in regard to intra-relationship fidelity.

a. Procreation

Same sex relationships are not equal to traditional marriage reproductively. One hundred percent of same sex couples are sterile *as a couple*. Neither partner in a male same sex couple can produce a child without a surrogate mother. Neither female in a same sex couple can produce a child without a sperm donor. In either case, if a partner in a same sex relationship produces a child, it is not genetic procreation *by the two partners*. Natural procreation is always the result of sexual intercourse between a physically healthy man and a woman. The fact that some married couples cannot reproduce is an exception, not the general rule. The married couple still fits within the prevailing paradigm for procreation of sexual intercourse between a man and a woman. The inability to reproduce does not

make the relationship the equivalent of a same sex relationship.

In THE CASE FOR SAME SEX MARRIAGE, William Eskridge, Jr. acknowledges the impact the inability to procreate has on the so-called "family" relationships of same sex couples:

> One feature of our experience has been an emphasis on "families we choose," anthropologist Kath Weston's felicitous phrase. Such families are fluid alliances independent of the ties imposed by blood and by law. Often estranged from blood kin, openly gay people are more prone to rely on current as well as former lovers, close friends, and neighbors as their social and emotional support system. Include children in this fluid network and the complexity becomes more pronounced. Because same sex couples cannot have children through their own efforts, a third party must be involved: a former different-sex spouse, a sperm donor, a surrogate mother, a parent or agency offering a child for adoption. The family of choice can and often does include a relationship with this third party. Gay and lesbian couples are pioneering novel family configurations, and gay marriage would not seriously obstruct the creation of the larger families we choose.

William Eskridge, Jr., THE CASE FOR SAME SEX MARRIAGE 81 (1996) (footnote omitted). While not all married couples reproduce, reproduction without the intervention of a third party is a normal experience for the average married couple, and something that strengthens and deepens the marital bond.

Several courts have recognized this indisputable difference between same sex and opposite sex couples. In *Singer v. Hara*, 522 P2d 1187, 1195 (Wash. Ct. App 1974), the court specifically pointed to reproductive capacity as a reason for the institution of marriage: "marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race. Further, it is apparent that no same sex couple offers the possibility of the birth of children by their union." Similarly, in a federal case involving a claim for recognition of same sex marriage for immigration purposes, the court pointed to procreation as the source of the state's interest in marriage and the reason why the "legal concept and definition of marriage" precludes same sex couples. *Adams*

v. *Howerton*, 486 F Supp 1119, 1124 (C.D. Calif. 1980), *aff'd*, 673 F2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982).

The reason for this emphasis is that the inherent difference between men and women is abundantly clear in the reality of reproduction. A sexual relationship between a man and a woman can naturally (even if contrary to the intention of the participants) lead to the conception of a child. A same sex relationship never can. *Singer v. Hara*, 522 P2d 1187, 1195 (Wash. Ct. App 1974) ("[I]t is apparent that no same sex couple offers the possibility of the birth of children by their union. Thus the refusal of the state to authorize same sex marriage results from such impossibility of reproduction rather than from invidious discrimination 'on account of sex.'")

BRO Plaintiffs seek to obscure this reality by pointing to a decreasing frequency of marriage and procreation; then they make a leap in logic to claim that this lessens the difference between same and opposite sex couples. But exceptions to the general legislative rule do not change the rule. *Singer,* 522 P2d at 1195. The biological reality that the two kinds of couples are not similarly situated in terms of procreative capacity, and upon which statutory distinctions are made, cannot be altered by assisted reproductive technology or changing sexual mores. Nor is the relevance of this difference defeated by the fact that opposite sex couples are licensed to marry even if not capable or intending to have children (since the effort to determine an opposite sex couple's fertility would surely raise other constitutional concerns). *Adams v. Howerton*, 486 F Supp. 1119, 1124-1125 (C.D. Calif. 1980), *citing Griswold v. Connecticut*, 381 U.S. 479 (1965). *See generally,* Lynn D. Wardle, *"Multiply and Replenish": Considering Same-sex Marriage in Light of State Interests in Marital Procreation* 24 HARV. J. L. & PUB. POL'Y 771, 800-812 (2001).

b. Child Rearing

A rational Legislature can decide—without resort to prejudice against gays—that the optimal environment for raising children is in a home comprised of the child's biological mother and father, who are married.

> Under every standard—educational achievement, drug use, criminal activity, physical and emotional health, social adjustment and adult earnings—children of intact marriages have fewer problems than children of broken families. . . . Not only do children need two parents; it also seems that ideally a child should have both a mother and a father.

George W. Dent, Jr., *The Defense of Traditional Marriage* 15 JOURNAL OF LAW & POLITICS 581, 594-95 (1999).

Clinical studies[22] observe that the triad of mother-father-child is necessary and desirable for the growth of a healthy child. "'Early triangulation' serves especially to consolidate both the self-representation and the parental representation." Richard N. Atkins, *Discovering Daddy: The Mother's Role*, in FATHER AND CHILD 139, 144 (Stanley H. Cath, et al., eds.,1982). The forward to FATHER AND CHILD notes the increased awareness of the importance of the role of both mothers and fathers in child rearing: "Our sensitivities and instruments have become honed, attuned to the role a man comes to play during the early years in modulating the intensity of the mother-child tie, inviting

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[22] Both sides in this dispute have relied and will rely on research from the social sciences. *See* E-R335–362 (Dr. Satinover); E-R 443–473 (Dr. Stacy). While DOMC Intervenors believe both the methodology and the conclusions of the research we cite are more sound than that relied on by BRO Plaintiffs, we acknowledge that by their very nature such data and studies are complex, often contradictory, and—most importantly for present purposes—inconclusive, largely by reason of accuracy of the data and the short time frames available. But surely this very problem illustrates the shortfalls of BRO Plaintiffs' case: the asked the trial court, and now this Court, to redefine society's most fundamental social and family unit based on ***affidavits*** from selected social scientists and from wholly inconclusive studies!

Thus is the radical social experiment BRO Plaintiffs ask this Court to sanction. Surely if separation of powers means anything in such factual chaos, this Court must defer to legislative determinations and policy choices.

that child to become a separate individual in an ever-widening world. . . . Researchers have become more aware of the subtle exchanges of identity taking place and of the mother's and father's part in facilitating development. . . ." John Munder Ross, *Preface* xvii-xviii, FATHER AND CHILD. Dr. Alfred A. Messer, a psychiatrist at Northside Hospital in Atlanta, Georgia, also notes the importance of both mothers and fathers as follows: "Children recognize the difference between maleness and femaleness as early as 14 months of age." Alfred A. Messer, *Boys' Father Hunger: The Missing Father Syndrome*, 23 MEDICAL ASPECTS OF HUMAN SEXUALITY 44, 44 (January 1989). Boys establish their physical and gender role identity between the ages of 18 to 36 months. "If the young boy is deprived of his father's presence, the result can be deeply traumatic[.]" *Id.* at 45.

Dozens of same sex parenting studies have purported to find that children raised by same sex couples do as well as other children. However, as one mostly favorable review of the same sex parenting research reports, all of these studies have uniform defects:

> there are ***no studies of child development based on random, representative samples of such families***. Most studies rely on small-scale, snowball and convenience samples drawn primarily from personal and community networks or agencies. Most research to date has been conducted on white lesbian mothers who are comparatively educated, mature, and reside in relatively progressive urban centers, most often in California or the Northeastern states.

Judith Stacey & Timothy Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 American Soc. Rev. 159, 166 (2001) (emphasis added);[23] *see also* Robert Lerner & Althea Nagai, NO BASIS: WHAT THE STUDIES *DON'T* TELL US ABOUT SAME SEX PARENTING 3 (2001) (review of homosexual parenting studies "found at least one fatal research flaw" in each one, and thus, "no generalizations can reliably be made based on any of these studies").

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[23] The authors blame these defects on "heterosexism," and do not question the over-all conclusion that the sexual orientation of a parent is irrelevant. *Id.* at 167, 179.

A rational, non-prejudicial legislature could be troubled by studies showing that children raised by a single mother, particularly a divorced mother, have poorer physical health,[24] poorer mental health,[25] a greater likelihood of substance abuse,[26] a higher risk of suicide,[27] and a higher likelihood of committing a crime that leads to incarceration.[28] This is the group of children to which the same sex parenting studies compare children raised in homosexual homes. As one advocate for homosexual parenting acknowledges, "most of the research compares development of children with custodial lesbian mothers to that of children with custodial heterosexual mothers." Charlotte J. Paterson, *Family Relationships of Lesbians and Gay Men*, 62 Journal of Marriage and the Family 1052, 1059 (2000). This is because "it has been widely believed that children living in families headed by divorced but heterosexual mothers provide the best comparison group."[29] Since the pro-same-sex parenting studies

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[24] Ronald Angel & Jacqueline Worobey, *Single Motherhood and Children's Health*, 29 JOURNAL OF HEALTH AND SOC. BEHAVIOR 38, 48-49 (1988).

[25] Ollie Lundberg, *The Impact of Childhood Living Conditions on Illness and Mortality in Adulthood*, 36 SOCIAL SCIENCE AND MEDICINE 1047, 1050, Table 3 (1993); Ronald L. Simons, et al., *Explaining the Higher Incidence of Adjustment Problems of Children of Divorce*, 61 JOURNAL OF MARRIAGE AND THE FAMILY 1020, 1028 (1999); Alan Booth & Paul R. Amato, *Parental Predivorce Relations and Offspring Postdivorce Well-Being*, 63 JOURNAL OF MARRIAGE AND THE FAMILY 197, 205 (2001).

[26] Robert L. Flewelling & Karl E. Bauman, *Family Structure as a Predictor of Initial Substance Use and Sexual Intercourse in Early Adolescence*, 52 JOURNAL OF MARRIAGE AND THE FAMILY 171, 175 & Table 2 (1990).

[27] David M. Cutler, Edward L. Glaeser & Karen Norberg, *Explaining the Rise in Youth Suicide*, Working Paper 7713 at 32, National Bureau of Economic Research (May 2000) (citing impact of divorce).

[28] Linda J. Waite & Maggie Gallagher, THE CASE FOR MARRIAGE 134 (2000).

[29] As Maggie Gallagher, co-author of THE CASE FOR MARRIAGE, observes: "If the problem with same sex couples is not sexual orientation *per se*, but the negative effects of fatherlessness and/or motherlessness on children's well-being, it is hard to imagine a scholarly focus better designed to obscure the evidence." Maggie Gallagher, *Why Supporting Marriage Makes Business Sense* 10

find children raised by homo-sexuals do as well as, but not significantly better than, those raised by divorced heterosexual mothers, policy makers would not be irrational to conclude that children raised by same sex parents do not do as well as children raised by their own married mother and father.[30]

The fact that some single parents, blended families, and same sex couples raise healthy children does not negate the legislative assumption that children have the best chances of developing fully in a home where both their mother and father are present. *See generally,* Wardle, 24 HARV. J. L. & PUB. POL'Y at 804. Same sex couples who have children through artificial means automatically deprive the children of the opportunity to be raised by both biological parents. "Even with natural reproduction, death, divorce or abandonment may deprive a child of one or both parents. But unlike natural reproduction, . . . same-sex marriage guarantee[s] that a child will not have both a mother and a father." Dent, 15 JOURNAL OF LAW & POLITICS at 634–35. Thus, same sex couples and married parents are not similarly situated regarding child rearing because a same sex couple can never provide a child with the advantages of being raised by both biological parents. At the very least, such a conclusion on a matter of fundamental familial and social importance belongs to the Legislature, and not to a group of partisans using selective research in the rarified atmosphere of this State's highest courtroom.

c. Historical Status

(Corporate Resource Council 2002), available at www.corporateresourcecouncil.org/white_papers.html.

[30] In reality, the same sex parenting studies show a significant difference in outcome between children raised by heterosexual mothers and those raised by lesbians. Stacey and Biblarz, themselves proponents of same sex parenting, challenge the intellectual honesty of the reports of "no differences." Stacey & Biblarz at 178. They observe that "[o]nly a crude theory of cultural indoctrination that posited the absolute impotence of parents might predict such an outcome, and the remarkable variability of gender configurations documented in the anthropological record readily undermines such a theory." *Id*. at 177. Instead of "no differences," as reported by most studies, some of the studies clearly show a difference when it comes to sexuality.

Any mention of history, of tradition, or of respect and deference to either, will no doubt be greeted with disdain and rolling of the eyes by BRO Plaintiffs and other same sex marriage advocates, and be dismissed as the product of "less enlightened" times. Yet undoubtedly, experience has revealed the frequent folly of enlightenment arrogance in such matters as political systems, natural science, philosophy, theology, economics, and the social sciences. Indeed, in the law generally, and in constitutional law in particular, we stand on the shoulders of those who came before us. This of course is the reason behind the foundational legal doctrine of *stare decisis*. Simply because tradition has at times been badly distorted for oppressive purposes does not mean it is not still deserving of great deference—any more than the doctrine of *stare decisis* is abrogated simply because some cases are eventually overruled. Tradition is the democracy of our wise and hallowed ancestors, and only fools pay it no homage.

Same sex relationships have not historically had the status as marriage. "The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis." *Baker*, 191 N.W.2d at 186. Throughout history, nearly every civilization has affirmed that concept, and has recognized that same sex relationships are a departure from the norm. *See* Peter Lubin and Dwight Duncan, *Follow the Footnote or The Advocate as Historian of Same sex Marriage*, 47 CATH. U.L. REV. 1271, 1324 (1998) (a critique of THE CASE FOR SAME SEX MARRIAGE). The only historical cultures that supposedly accepted same sex relationships were those without momentum. *See* THE CASE FOR SAME SEX MARRIAGE, pp. 15-50.

Even Classical Greece did not view homosexual ***sex*** as acceptable. In pre-Christian, Classical Greece, where homosexual behavior was allegedly prevalent, Plato described homosexual behavior

as "contrary to nature" and "a crime caused by failure to control the desire for pleasure." Plato, *Laws* 636a–c (quoted in K.J. Dover, GREEK HOMOSEXUALITY 165 (1978)). In fact, most ancient Greek philosophers approved of homosexual "romance," but condemned homosexual contact. Finnis, *Law, Morality, and "Sexual Orientation*," 9 Notre Dame J.L. Ethics & Pub. Pol'y 11, 17–18 (1995) (emphasis added).

No major civilization has ever given legal recognition to same sex relationships as being the equivalent of marriage.[31] The basic meaning of the English term "marriage" has meant the union of a man and a woman for some 700 years. *See* MERRIAM WEBSTER'S COLLEGIATE DICTIONARY—TENTH EDITION 713 (definition of "marriage"). No major world religion has ever extended "marriage" rights to same sex couples. "An examination of the official or historic teachings of Christianity, Judaism, Islam, Hinduism and Buddhism reveals overwhelming support for the view of marriage as the union of men and women, and virtually no official endorsements of the idea of same sex 'marriage.' Representations to the contrary may reflect the views of particular individuals, or of interest groups within religions, but they do not represent the official views of these religions."*World Religions and Same Sex Marriage, A Research Summary from the Marriage Law Project*, 1 (July 2002).[32] Instead, history has associated prevalent homosexuality with the decline of civilizations. WILL DURRANT, CAESAR AND CHRIST 89, 94, 167-68, 199, 237, 266, 289, 290, 399, 666-667 (1952).

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[31] Notwithstanding the behavior of one or two Roman emperors, not even William Eskridge claims that Roman law recognized homosexual marriage. THE CASE FOR SAME SEX MARRIAGE at 23.

[32] Available at http://www.marriagewatch.org/publications/wrr.pdf.

3. *Marriage Does Not Trigger Article I, Section 20 Protections Because Its Statutes Are Not Facially Exclusionary, and Only Facially Exclusionary Laws Rightly Apply in a Favoritism Analysis.*

In order to apply Article I, Section 20 to Oregon's marriage statutes there must be some type of privilege or immunity deliberately offered to a specific class of citizens that is denied to another class of citizens. There is no such favoritism in marriage; it is facially available to all unmarried, Oregonians of age on the same terms. Under logic and precedent, this type of discriminatory ***impact*** based on a class' perceived disincentives does not trigger Article I, Section 20's anti-favoritism protections.

a. BRO Plaintiffs May Take Advantage of Marriage as it Currently Exists If They So Desire, Because Marriage Is Available to All Unmarried Individuals of Requisite Age, Irrespective of the Individual's Gender or Sexual Orientation.

The "class" of citizens not allowed to marry is created by the marriage statutes themselves and does not hinge on any trait inherent in those excluded. BRO Plaintiffs do not conform to any class excluded from marriage. Thus, Article I, Section 20 does not apply in this case, because BRO Plaintiffs may avail themselves of marriage on the same terms as all other Oregonians by voluntary choice. If an individual can take advantage of a law's benefits by her own voluntary action, the law is not impermissible favoritism.

Article I, Section 20 is only triggered when a citizen or "class of citizens" is granted a privilege or immunity from which the rest of the population is excluded. Or Const Art. I, § 20. As this Court has repeatedly explained, "[t]he original target of this constitutional prohibition was abuse of governmental authority to provide special privileges or immunities ***for*** favored individuals or classes, not discrimination ***against*** disfavored ones." *Hale v. Port of Portland*, 308 Or 508, 524-25, 783 P2d 506, 515-16 (1989) (emphasis in original) *citing State v. Savage*, 96 Or 53, 59, 184 P 56 (1920).

Accord Crocker v. Crocker, 332 Or 42, 54, 22 P3d 759, 765-66 (2001) ("The equal privileges and immunities clause scrutinizes benefits in the form of privileges and immunities given to a particular class, rather than discrimination against a particular class") *citing and quoting Hale*, 308 Or 508, 524-25, 783 P2d 506, 515-16 (1989); *City of Klamath Falls v. Winters*, 289 Or 757, 619 P2d 217 (1980) ("its language reflects early egalitarian objections to favoritism and special privileges for a few ***rather than*** the concern of the Reconstruction Congress about ***discrimination against disfavored individuals or groups***") (emphasis added).[33] *State v. Clark*, 291 Or 231, 235-241, 630 P2d 810 (1981) (announcing change in analysis under Article I, Section 20 from discrimination inquiry to favoritism inquiry).

Marriage does not exclude any group in which BRO Plaintiffs can claim membership. As is evident from a cursory examination of the marriage statutes, homosexuals and members of either gender (the classes claimed by BRO Plaintiffs) are not categorically excluded from marriage. The only class marriage creates is those who can marry and those who cannot— and neither of those classes hinge on the inherent characteristics of any BRO Plaintiff.[34]

The statutes that determine who is excluded from marriage, ORS 106.010 and ORS 106.020, only prohibit categorically from the institution individuals who are under 17 and individuals already married. *See* ORS 106.010; ORS 106.020(1). ORS Chapter 106 makes no mention anywhere of

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[33] Article I, Section 20 is in this sense the converse of the Fourteenth Amendment's Equal Protection Clause. *Crocker*, 332 Or at 54, 22 P3d at 766 *citing Savage*, 96 Or at 59, 184 P. 567.

[34] Marriage is restricted by age, a true and suspect class for Article I, Section 20 purposes. *E.g. Moccio v. Department of Human Resources, Adult and Family Services Div.*, 103 Or App 207, 214, 796 P2d 1233 (Or.App,1990) ("a suspect class [is] one characterized by age, gender, color, creed, ethnic background or national origin."). Of course, BRO Plaintiffs make no argument that they are excluded from marriage by virtue of their age.

individual gender or sexual orientation. All persons in the state can marry except those limited by age and marital status. *See* Figure 1, *opposite*. There are limitations on ***whom*** an individual may consensually marry, such as consanguinity limitations and the requirement that the spouse be of the opposite sex, but these limitations are not statutory limitations on which individuals have ***access*** to marriage.

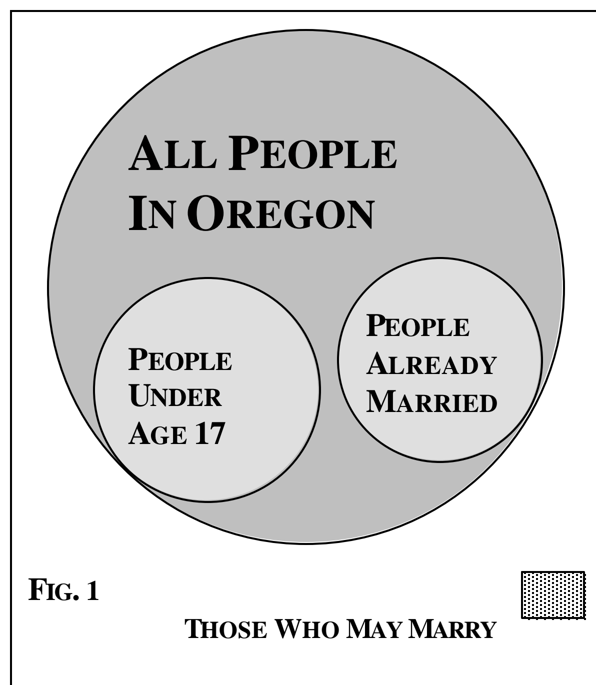

FIG. 1

Simply put, the class of those categorically not allowed to marry does not hinge on any intrinsic characteristic other than marital status and age of consent. Marriage is therefore not impermissible "class legislation" under the Article I, Section 20 analysis advanced by this Court on several occasions. *See State v. Clark*, 291 Or 231; *Jarvill v. City of Eugene*, 289 Or 157; *Greist v. Phillips*, 322 Or 281, 292, 906 P2d 789, 795 (1995); *State ex. rel. Huddleston v. Sawyer*, 324 Or 597, 610, 932 P2d 1145, 1153 (1997).

For BRO Plaintiffs' claim to trigger Article I, Section 20, they must prove not a violation of their individual right to access marriage, or even their would-be partners' absolute right to marry, but rather a right to marry belonging to the ***couple***. Article I, Section 20 does not recognize or contemplate the rights of a couple ***as a couple***.[35] Quite simply, BRO Plaintiffs are not denied access to marriage "on the same terms" as all others. Rather, they are denied access to marriage ***on their own terms***. The

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[35] BRO Plaintiffs styled their pleadings to list certain Plaintiffs as couples, but this does not transform a case of individual constitutional rights into a case of "couple's collective constitutional rights"—a right never-before recognized in American jurisprudence.

Oregon Constitution does not reach so far.

b. Discriminatory Impact Does Not Trigger Article I, Section 20's Protections.

Because Article I, Section 20 forbids favoritism, a discriminatory impact analysis such as that suggested by the trial court and BRO Plaintiffs is historically inconsistent with this Court's precedent, and logically inconsistent with a favoritism test.

A law can discriminate against or disfavor a group in two ways—directly or incidentally. In relation to the Fourteenth Amendment to the United States Constitution direct discrimination is usually termed "disparate treatment" and the indirect discrimination is termed "disparate impact." *E.g., Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 372-373 (2001); *Washington v. Davis*, 426 U.S. 229, 239 (1976); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). In the case of disparate treatment, the law itself excludes one class on its face. Marriage does this in regards to age: those under 17 without exception cannot marry in Oregon.

In the case of discriminatory impact, a law places a disproportionate ***burden*** on a particular class. As illustrated above, gays and lesbians are technically ***able*** to marry according to the terms of ORS Chapter 106. According to BRO Plaintiffs, their unwillingness to enter into a marriage contract with a partner of the opposite sex gives marriage a discriminatory ***impact***, and thus makes traditional marriage unconstitutional.

But for a law to violate Article I, Section 20, it must discriminate against a suspect class by its plain terms—it must exclude a class on its face or it must be enacted with the specific intent of excluding a particular class. *See*, *e.g.*, *In re Marriage of Crocker*, 332 Or 42, 22 P3d 759 (2001) (law violated Article I, Section 20 by excluding class on the face of the law). In *Clark* the court noted that "terms 'class' and 'classification' are invoked . . . to refer to a law's ***disparate treatment*** of persons or

groups by virtue of characteristics which they have apart from the law in question." *Clark*, 291 Or at 241 (emphasis added).

At trial, Judge Bearden relied on *Zockert v. Fanning*, 310 Or 514, 800 P2d 773 (1990), for the proposition that Article I, Section 20 covers instances of discriminatory impact. E-R 437. It was error for Judge Bearden to rely on *Zockert* in that regard. *Zockert* differs fundamentally from this case. In *Zockert*, this Court found that members ***within*** a single class—indigent parents —were being treated differently in factually similar circumstances. *See Zockert*, 310 Or at 523 ("Parenthood, a personal characteristic, identifies each and every one. Parents are entitled to be treated upon the same terms, equally, under Article I, section 20"). This Court held that differing ***treatment within a class*** of similarly situated individuals violated Article I, Section 20. *Zockert*, 310 Or at 523–4. The discriminatory treatment in *Zockert* was found in the very words of the statute—it gave an indigent parent an attorney only in juvenile court parental right termination proceedings while failing to provide one to a parent in contested adoption proceedings (a statutorily distinct, but functionally equivalent situation). The statute thus impermissibly created a privilege that was extended by its express terms to less than all members of the class.

Here, in stark contrast to *Zockert*, BRO Plaintiffs are not claiming they are in the same class as those who can marry; indeed, BRO Plaintiffs claim that homosexuals are ***excluded*** from marriage. Alternatively, BRO Plaintiffs claim they are excluded from marriage based on gender. As is seen directly below, however, any arguable disparate impact on the basis of gender comes not from gender as such, but instead the BRO Plaintiffs' self-declared sexual orientation. Ultimately, the marriage laws do not facially exclude the classes in which BRO Plaintiffs claim membership (gender, sexual orientation), nor do the statutes discriminate within a class. Therefore, Article I, Section 20 does not

apply to marriage in the way BRO Plaintiffs wish.

To complete this analysis, the class which is ostensibly excluded from marriage (and to which BRO Plaintiffs belong) must be clearly delineated. BRO Plaintiffs have argued that marriage favors classes of citizens on the basis of either gender or sexual orientation. Gender is a suspect class under this Court's precedent; homosexuality is a suspect class under the precedent of the Court of Appeals. *See Hewitt v. SAIF*, 294 Or 33, 49, 653 P2d 970 (1982) (gender is suspect class); *Tanner v. OHSU*, 157 Or App 502, 524 ("homosexuality" is suspect class).[36] Judge Bearden at summary judgment ruled that marriage impermissibly favored those whose gender was the not same as their prospective spouse's, and that marriage impermissibly favored heterosexuals over homosexuals. E-R 435, 437.

Looking first to whether marriage discriminates on the basis of gender, it is apparent from the statutes that marriage does not exclude either sex from marrying. *See* ORS 106.010. Nothing inherent to maleness or femaleness makes it impossible for men or women to marry in general. It is not the gender of any BRO Plaintiffs, but rather ***the gender of the person that Plaintiff wishes to marry*** that is the restriction; but this again assumes incorrectly that a couple has rights ***as a couple***. To take the example of *Zockert*, a member of the class of indigent parents in a contested adoption proceeding was treated differently in a juvenile court parental termination proceeding. Here, a woman who wishes to marry may do so irrespective of ***her*** gender—all women have the right to marry "on the same terms." It is only the prospective partner's gender that governs the individual's access to marriage. Succinctly and plainly, marriage does not exclude an entire class nor discriminate within a class on the

[36] DOMC Intervenors discuss the appropriateness of suspect class designation in respect to homosexuality in Subsection 4 of this section, *infra*.

basis of ***that individual class member's*** gender.

Instead, marriage necessarily excludes those who wish to marry someone of their own sex.[37] Yet the trial court's reliance on *Zockert* falls apart if this is the case. BRO Plaintiffs claim that homosexuals are of a different class from those whom have access to marriage. If true, this is not a case like *Zockert* where members of the same class are treated differently in the same situation. BRO Plaintiffs cannot have it both ways—either they are treated differently from members of the same gender, which is plainly not the case; or they are excluded from marriage as a class of homosexuals and *Zockert* does not apply. Either this case is like *Zockert* and a "discriminatory impact within a class analysis" applies, or gays and lesbians are a class distinct from heterosexuals who can make use of marriage, and this case is unlike *Zockert*. In any event, Oregon law does not allow for a discriminatory impact analysis where there is a disproportionate burden on a ***separate*** class.

Indeed, no Oregon case has ever explicitly used a disparate impact analysis such as that advanced by BRO Plaintiffs and the trial court—*i.e.* a disparate impact to a separate class. In the final analysis, *Zockert* was not about disparate impact ***to*** a class, but instead disparate treatment ***within*** a class. BRO Plaintiffs have no claim that they are unconstitutionally denied access to marriage on the basis of any class affiliation.

4. Homosexuals Do Not Form a "Suspect Class" for Purposes of Article I, Section 20 Analysis.

This Court has never held that homosexuality represents a "suspect class" for purposes of

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[37] BRO Plaintiffs presume, and the trial court agreed, that only homosexually-oriented people would desire to wed someone of the same sex.

Article I, Section 20 analysis.[38] The primary basis for the trial court's ruling that gays and lesbians deserve suspect class treatment—and thus increasing the Article I, Section 20 scrutiny of the marriage statutes beyond a rational basis review—was the Oregon Court of Appeals' ruling in *Tanner v. OHSU*, 157 Or App 502. DOMC Intervenors here assert error in the trial court's adhering to the *Tanner* standard created by the Court of Appeals, assigning suspect class status for "characteristics . . . historically regarded as defining distinct, socially-recognized groups that have been the subject of adverse social or political stereotyping or prejudice." *See Tanner v. OHSU*, 157 Or App at 522.[39]

This *Tanner* test, protecting "distinct, socially-recognized groups . . . subject to adverse social or political stereotyping," is an unwarranted and impermissible departure from this Court's suspect class precedent announced in *Hewitt* and other cases. *See, e.g.*, *Greist v. Phillips*, 322 Or at 300 (race, sex and alienage), *State v. Buchholz*, 309 Or 442, 446, 788 P2d998 (1990) (religious affiliation); *Salem College & Academy, Inc. v. Employment Div*., 298 Or 471, 695 P2d25 (1985) (race and religion). Where the Court of Appeals restricts, adds to, or otherwise diverges from the standards and tests announced by this Court, it commits error. *See Lehman v. Bradbury*, 333 Or 231, 242, 37 P3d

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[38] In addition to the United States Supreme Court's dismissal of the appeal in dismissed the appeal in *Baker v. Nelson*, 409 U.S. 810 (1972), the federal courts of appeal in every circuit have consistently and uniformly rejected suspect class status for gays and lesbians. *See Lofton v. Sec'y of the Dept. of Children and Fam. Servs.*, 358 F.3d 804, 818 and n. 16 (11th Cir. 2004); *Equality Found. of Greater Cincinati, Inc. v. City of Cincinati*, 128 F.3d 289 (6th Cir. 1997); *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126 (9th Cir. 1997); *Richenberg v. Perry*, 97 F.3d 256 (7th Cir. 1996); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989); *Town of Ball v. Rapides Parish Police Jury*, 746 F.2d 1049 (5th Cir. 1984); *Rich v. Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984).

[39] In briefs to be filed later, Amici will address the status of homosexuals as a protected class under the *Hewitt* standard of "immutable" characteristics, "suspected of reflecting 'invidious' social or political premises[.]" 294 Or at 45.

989 (2002) ("nothing in this court's opinion in *Armatta* or in any other case applying Article XVII, section 1, requires that, for two or more constitutional changes permissibly to be made by one proposed amendment, a vote for one change must 'necessarily imply' a vote for the other. The Court of Appeals erred in creating that unnecessarily restrictive application of the *Armatta* test.").

Simply put, the trial court relied on *Tanner* in finding unconstitutional discrimination, and *Tanner* was wrongly decided by the Court of Appeals because it deviated from the suspect class analysis found in this Court's precedent. Therefore, the trial court's ruling on the basis of homosexuals' suspect class status—even if required of the trial court by the deference it must give to decisions of the Court of Appeals—was ultimately in error.

So too—like BRO Plaintiffs here—the Court of Appeals in *Tanner* erred by relying on *Zockert v. Fanning*, 310 Or 514, for the dubious proposition that even unintended favoritism outside of a class triggers Article I, Section 20. 157 Or App at 524. The Court of Appeals in *Tanner* ignored the patent fact that the statutory scheme at issue in *Zockert* was "facially" exclusionary and thus involved intentional favoritism. *See discussion*, *supra*, at 40–43. The *Tanner* panel failed to recognize that only disparate treatment within a class, not disparate impact outside of one, constitute impermissible favoritism.

Because homosexuals are not properly a suspect class under this Court's precedent, the marriage statutes are only subject to a rational basis review. A class with characteristics that exist apart from the law in question is referred to as a "true class" within Article I, Section 20 jurisprudence. *Hale*, 308 Or at 526. *Accord Clark*, 291 Or at 240-41. Homosexuality is certainly a "true class." However, as noted above, homosexuality is not a ***suspect class*** under this Court's precedent. Assuming for argument that the "true class" of homosexuals is excluded from marriage, a rational basis is all that is

required to uphold the marriage statutes. *See Jensen v. Whitlow*, 334 Or at 423–24 (law distinguishing on basis of public employment only requires rational basis to sustain); *Crocker*, 332 Or at 55 ("When distinctions are based on personal characteristics that are not immutable, this court reviews the classification for whether the legislature had a rational basis for making the distinction"); *Seto*, 311 Or at 466–67. Any of the reasons cited as legitimate biological differences in Subsection 2, *supra* at 27–37, more than suffice to provide a rational basis for any possible exclusion of homosexuals from marriage.

5. ***MARRIAGE ITSELF IS NOT A "PRIVILEGE" OR "IMMUNITY" BY ESTABLISHED LEGAL DEFINITIONS OF THOSE TERMS.***

If BRO Plaintiffs could adequately express what it is intrinsic to the statutory scheme of marriage that is itself a privilege or immunity, then this issue need not detain the court. To date, however, they have been unable to do so.

The only privilege that the marriage statutes themselves set out is the right to enter into a personal contract. All other benefits of marriage come from other statutory and common law sources. In the course of this litigation, BRO Plaintiffs have continuously insisted on, and the trial court acquiesced to, using "marriage" as a convenient shorthand to describe "500 rights, benefits, and responsibilities that marriage ***triggers***." E-R 433 (emphasis added). Because Article I, Section 20 only protects against monopolistic[40] or exclusive grants of "privileges and immunities," the failure of BRO Plaintiffs to articulate any significant privilege or immunity ***internal to marriage*** appears fatal to their claims. Further, because the trial court acceded to this characterization of marriage *qua* its attendant

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[40] *See White v. Holman*, 44 Or 180, 193–94, 74 P. 933 (1904) (monopoly on sailors' boarding houses unconstitutional).

benefits, the trial court's ruling was in error. *See* E-R 433 (noting "the legal hurdles and the emotional upheaval that the plaintiff couples have encountered because of their inability to access the benefits and protections that are ***contingent on*** marriage") (emphasis added).

This Court has noted the standard for determining in the first instance whether Article I, Section 20 applies:

> "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 (1985), *quoting State v. Freeland*, 295 Or 367, 377 (1983) (quotation marks omitted). However, BRO Plaintiffs and the trial court failed to ever articulate what aspect of marriage itself—statutorily—meets the "some advantage" standard for a privilege or immunity under Article I, Section 20. In isolation, a marriage contract itself does not grant "some advantage"—or any advantage—to the contracting parties. There may be "some advantage" in a marriage contract standing alone, but it is for BRO Plaintiffs to allege and prove it. They have not done so.

All previous Article I, Section 20 cases have dealt with specific and tangible rights granted ***within the specific statute challenged***. In *Freeland*, this Court stated that "preliminary hearings were an important privilege to which one accused of crime is entitled upon the same terms as others." *Freeland*, 295 Or 371, *discussing Clark*, 291 Or at 241. *See, e.g., Jensen v. Whitlow*, 334 Or 412, 51 P3d 599 (2002) (immunity from suit in tort); *Hewitt*, 294 Or 33 (survivorship benefits); *Hale v. Port of Portland*, 308 Or 508, 524 (ability to recover against government); *Huckaba v. Johnson*, 281 Or 23, 573 P2d 305 (1978) (tax benefit); *Anderson v. Gladden*, 234 Or 614, 383 P2d 986

(1963) (right to jury of one's own race); *State v. Pyle*, 226 Or 485, 492, 360 P2d626 (1961) (special weight limits for log trucks); *Mendiola v. Graham*, 139 Or 592, 10 P2d 911 (1932) (grazing rights); *In re Oregon Tunnel Dist. No. 1*, 120 Or 594, 253 P 1 (1927) (right to vote); *State v. Savage*, 96 Or 53 (right to catch and sell crab beyond county borders); *Northwest Advancement, Inc. v. State, Bureau of Labor, Wage and Hour Div.*, 96 Or App 133, 772 P2d 934 (1989) (exemption from government regulation); *Hoffman v. Highway Division of Dept. of Transp.*, 23 Or App 497, 543 P2d 50 (1975) (compensation for removal of roadside signs). In all of these cases, the privilege or immunity at issue was conferred by the challenged law.

In ORS Chapter 106, the only thing allowed by terms of the statute is the ability to contract for marriage. *See* ORS 106.010. Nothing within ORS Chapter 106 itself attaches any benefits, rights, or responsibilities to that contract. Here, BRO Plaintiffs use fuzzy thinking to make "marriage" a shorthand for something else they want—legal benefits from other statutes, social acceptance, economic advantage, community recognition. But these things are not found in ORS Chapter 106. Without a significant, independent privilege or immunity stemming directly from marriage articulated in this case, Article I, Section 20 cannot begin to apply.

6. OREGON'S MARRIAGE LAWS SATISFY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

BRO Plaintiffs did not request relief below on Fourteenth Amendment grounds. An issue not raised below cannot be addressed for the first time on appeal. *Stephens v. Bohlman*, 314 Or 344, 351 n7, 838 P2d600 (1992) (issue not raised below or preserved for appeal will not be considered). BRO Plaintiffs did not raise this issue; this Court specifically inquired about the Fourteenth Amendment in its

August 20, 2004 letter. Yet even if the Fourteenth Amendment is legitimately under review in this case, it does not establish a marriage right for homosexuals.

a. The United States Supreme Court Considered and Rejected an Equal Protection Claim

The United States Supreme Court decided the merits of a federal equal protection challenge to marriage laws in 1972 when it summarily dismissed the appeal in *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972). As Justice Kennard of the California Supreme Court recently noted in regard to *Baker*, it "is a decision . . . binding on all other courts and public officials, that a state law restricting marriage to opposite-sex couples does ***not*** violate the federal Constitution's guarantees of equal protection and due process of law." *Lockyer v. City and County of San Francisco*, 33 Cal. 4th 1055, 1126 (2004) (Kennard, J., concurring in part and dissenting in part) (emphasis original).[41] Justice Kennard further pointed out that "[u]ntil the United States Supreme Court says otherwise, which it has not yet done, *Baker v. Nelson* defines federal constitutional law on the question whether a state may deny same-sex couples the right to marry." *Id.* at 1127.

In *Baker v. Nelson* the United States Supreme Court considered and rejected the claims by two men that Minnesota's exclusion of same-sex couples from marriage violated the Ninth and Fourteenth Amendments to the United States Constitution. The Court's action upheld the Minnesota Supreme Court's ruling that there is no fundamental right to same-sex "marriage" under the Ninth

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[41] The majority in *Lockyear* found it unnecessary to rely upon *Baker* to rule that San Francisco had no authority to issue marriage licenses to same-sex couples because no court has ruled that a law limiting marriage to opposite-sex couples violates the California or federal Constitution. *Id.* at 1102, 1103 and n.33. Accordingly, the claim by San Francisco's mayor that federal law required him to order the issuing of marriage licenses to same-sex couples was meritless.

Amendment or the Due Process Clause of the Fourteenth Amendment, and that excluding same-sex couples from marriage does not constitute irrational or invidious discrimination under the Equal Protection Clause of the Fourteenth Amendment. *See Baker*, 191 N.W.2d at 186-87. The Minnesota Supreme Court had ruled that the state's definition of marriage "does not offend the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution." *Id.* at 187.

Prior to 1988, plaintiffs like those in *Baker* had an automatic right to Supreme Court review "[b]y appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity." 28 U.S.C. § 1257(2) (as amended July 29, 1970, Pub. L. 91-358, 84 Stat. 590). On direct appeal, the Supreme Court "dismissed for want of a substantial federal question." *Baker*, 409 U.S. at 810. The United States Supreme Court's dismissal of the *Baker* appeal for want of a substantial federal question was a decision ***on the merits*** that is binding on all other courts considering the same issues:

> Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. ***They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions***.

Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam) (emphasis added).[42] The Supreme Court ruled in *Mandel* that a three-judge district court panel erred in assuming that a summary affirmance by the Court necessarily adopts the reasoning of the opinion below. *Id.* at 176. However, the Court reiterated its prior holding "that lower courts are bound by summary actions on the merits by this

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[42] The elimination of the Court's appellate jurisdiction in 1988 did not change the applicability of this rule to current cases. 16B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 4014 (2003) ("Abolition of the appeal jurisdiction does not change this rule. Lower courts must continue to honor it").

Court," (quoting *Hicks v. Miranda*, 422 U.S. 332, 344 (1975)), and clarified that the precedential value extends to "the precise issues presented and necessarily decided[.]" *Mandel*, 432 U.S. at 176.[43]

The Jurisdictional Statement in the appeal from the Minnesota Supreme Court's rejection of the claims of a right to same-sex "marriage" raised the issues of whether excluding same-sex couples from marriage:

> deprives appellants of liberty and property in violation of the due process and equal protection clauses [and] . . . constitutes an unwarranted invasion of the privacy in violation of the Ninth and Fourteenth Amendments.

Jurisdictional Statement, *Baker v. Nelson*, U.S. S. Ct. no. 71-1027 at 11, 18 (Feb. 11, 1972) D–E–R 11, 15. The appellants directly raised a claim of a fundamental right to marry "fully protected by the due process and equal protection clauses of the Fourteenth Amendment." *Id.* at 11 (citing *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Meyer v. Nebraska*, 262 U.S. 535 (1923)). The Supreme Court's dismissal of the appeal for want of a substantial federal question was a rejection of the merits of these claims. Accordingly, there is no right to same-sex "marriage" in the Equal Protection Clause of the Fourteenth Amendments to the United States Constitution. Courts are "not free to disregard this pronouncement." *Hicks*, 422 U.S. at 344.

Justice Kennard's discussion of *Baker v. Nelson* in her *Lockyer* concurrence is consistent with

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[43] In *Hicks*, the Court ruled that "(v)otes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case . . . ." *Hicks*, 422 U.S. at 344 (quoting Justice Brennan in *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959); also citing R. Stern & E. Gressman, *Supreme Court Practice* 197 (4th ed. 1969) ("The Court is, however, deciding a case on the merits, when it dismisses for want of a substantial question"); C. Wright, *Law of Federal Courts* 495 (2d ed. 1970) ("Summary disposition of an appeal, however, either by affirmance or by dismissal for want of a substantial federal question, is a disposition on the merits").

every published decision that has addressed *Baker*'s precedential value.[44] *See McConnell v. Nooner*, 547 F.2d 54, 56 (8th Cir. 1976) ("the Supreme Court's dismissal of the [*Baker*] appeal for want of a substantial federal question constitutes an adjudication of the merits which is binding on lower federal courts"); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980) (Supreme Court's dismissal of *Baker* appeal was "an important adjudication on the merits"), *aff'd on other grounds*, 673 F.2d 1036, 1039 n.2 (9th Cir.) (noting that the Supreme Court's dismissal of the *Baker* appeal "operates as a decision on the merits"), *cert. denied*, 458 U.S. 1111 (1982); *In re Cooper*, 187 A.D.2d 128, 134 (N.Y. 1993) (dismissal in *Baker* "is a holding that the constitutional challenge was considered and rejected") (quoting trial court opinion with approval).

Although the recent decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), "represents a significant shift in the high court's view of constitutional protections for same-sex relationships," there have been no U.S. Supreme Court decisions that "undermine the authority of *Baker v. Nelson* to such a degree that a lower federal or state court . . . could disregard it." *Lockyer*, 33 Cal. 4th at 1127. *Cf. Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions"); *Agostini v. Felton*, 521 U.S. 203, 207 (1997) ("The Court neither acknowledges nor holds that other courts should ever conclude that its more recent cases have, by implication, overruled an earlier precedent").

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[44] A recent unreported bankruptcy court decision, *In re Kandu*, 2004 WL 1854112 (W.D. Wash., Aug. 17, 2004), held that *Baker* was not binding precedent for analyzing a federal statute. *Id.* at *8. Nevertheless, *Kandu* rejected a federal constitutional challenge to the definition of marriage in 1 U.S.C. § 7, as the union of a man and a woman for purposes of all federal laws.

b. There Is No Fundamental Right to Same-sex Marriage

In the unlikely event that this Court finds *Baker* for some reason not binding, Oregon's marriage laws would not violate the Equal Protection Clause of the Fourteenth Amendment even without *Baker v. Nelson*. The English term "marriage," when referring to a social or legal status, has meant the union of a husband and wife, a man and a woman, since at least the Fourteenth Century. *See* MERRIAM WEBSTER'S COLLEGIATE DICTIONARY—TENTH EDITION 713 (definition of "marriage"). The fundamental right to marry has always meant the right to enter a legal union between a man and a woman.

After a significant, decades-long controversy over polygamy, Congress enacted laws in the late Nineteenth Century that were designed to prevent any territory from becoming a state unless it prohibited polygamy. These acts included laws making polygamy a crime in the U.S. territories, and prohibiting polygamists from voting in territorial elections. The Supreme Court upheld these laws based upon the historical meaning of marriage in England and the colonies. *See Reynolds v. United States*, 98 U.S. 145, 166 (1878) (upholding criminal conviction for polygamy against First Amendment challenge); *Murphy v. Ramsey*, 114 U.S. 15, 44-45 (1885) (upholding law prohibiting polygamists from voting). The Court clearly defined marriage in *Murphy*:

> [C]ertainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the coordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of *one man and one woman* in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.

Id. at 45 (emphasis added). This was the legal context of the famous description of the importance of marriage in *Maynard v. Hill*, 125 U.S. 190, 205 (1888), where the Court described marriage "as

creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution . . . ." The *Maynard* Court further described marriage as "the foundation of the family and of society, without which there would be neither civilization nor progress." *Id*. at 211. The *Maynard* description of the importance of marriage, in turn, has been cited in cases articulating the fundamental right to marry such as *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (invalidating law prohibiting Caucasians from marrying African-Americans), and *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (invalidating law prohibiting marriage for individuals who failed to pay child support).

It would be disingenuous to claim that when the United States Supreme Court referred to the fundamental right to marry in cases such as *Loving* or *Zablocki* that the Court was referring only to a right to enter a legal status rather than a right to enter a legal union of a man and a woman. As the Massachusetts Supreme Judicial Court recognized, same-sex couples cannot be given the right to "marriage" without redefining the term. *Goodridge v. Department of Pub. Health*, 440 Mass. 309, 337 (2003) ("our decision today marks a significant change to the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries"). It is noteworthy that the Massachusetts Supreme Judicial Court did not rule that same-sex "marriage" is a federal fundamental right.

The Supreme Court has held that a right cannot be deemed "fundamental" unless it is "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). The Court has further held that in determining whether

a right is fundamental, it must be carefully described. *Id.* at 721.[45] The Court in *Glucksberg* rejected the more broadly defined "right to die" proposed by the plaintiffs therein, and defined the right at issue more "carefully" as the "right to commit suicide."

While the Plaintiffs in this case are demanding the right to marriage, that cannot qualify as their "carefully described" right within the meaning of *Glucksberg* because they do not seek to enter into that right as it has been defined—a legal union with a member of the opposite sex. It is indisputable that there is no deeply rooted history or tradition of same-sex "marriage" in the United States.

Plaintiffs' claims are not like those in *Loving*, *Zablocki* or *Turner v. Safley*, 482 U.S. 78 (1987). In *Loving*, the couple had entered a marriage, a union of a man and a woman. Unlike the new right claimed in this litigation, marriages between persons of different races were recognized historically, and were even defined as "mixed marriages"—that is, the union of a man and a woman of different races—by 1829. *See* MERRIAM WEBSTER'S COLLEGIATE DICTIONARY—TENTH EDITION 746 (definition of "mixed marriage" dated 1829). The Virginia law at issue in *Loving* was not enacted until 1924, only 34 years before the *Loving* couple were married.[46] *Loving*, 388 U.S. at 2, 6. Thus, rather than thousands of years of excluding such marriages, there was only a relatively short time frame of racial prejudice prohibiting them. Most significantly for any comparison between *Loving* and plaintiffs, three federal constitutional amendments were ratified to expressly ensure racial equality: the Thirteenth, Fourteenth, and Fifteenth Amendments. The 1924 "Racial Integrity Act" that was specifically designed

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[45] In *Glucksberg*, the Court was discussing fundamental rights under the Due Process Clause. A right certainly cannot be deemed fundamental for equal protection purposes if it is not fundamental for due process purposes.

[46] In addition, the law did not prevent all interracial marriages; it rendered void only those between Caucasians and "colored" persons. *Loving*, 388 U.S. at 5 n.3. A "colored" person was any "person in whom there is ascertainable any Negro blood." *Id.* at n.4.

to promote white supremacy could not stand up in the face of specific constitutional amendments favoring racial equality. *See Loving*, 388 U.S. at 11.

The facts of *Zablocki* are similarly unhelpful to Plaintiffs. The plaintiff there wished to enter a marriage, a union of a man and a woman, but Wisconsin law prohibited the marriage because the plaintiff was delinquent in making child support payments. *Zablocki*, 434 U.S. at 378. The U.S. Supreme Court unsurprisingly held that Wisconsin could not put financial hurdles in front of the fundamental right to marry. Requiring Wisconsin to permit men with unpaid financial obligations to marry did not change the meaning of marriage. Finally, the class of inmates in *Turner* did not seek to redefine "marriage," or seek a new kind of "marriage," but sought the right to enter a legal union of a man and a woman while in prison, perhaps even a marriage between inmates in the same prison. The Court held that the prison could place limitations on such marriages, but could not exclude them altogether. *Turner*, 482 U.S. at 96. The Court simply held that inmates retained the fundamental right to marry while in prison. *Id*. at 95.

c. Plaintiffs Are Not Denied Equal Protection of the Laws

In view of the meaning of marriage, Plaintiffs cannot validly claim that they are excluded from marriage on the basis of sex or sexual orientation. As with the Article I, Section 20 analysis, it is the availability of the right on equal terms that is relevant for an equal protection analysis, not the equal use of the right. Plaintiffs are not seeking to lift a barrier to marriage, like in *Loving*, *Zablocki*, or *Turner*; they are seeking to change its very essence.

As set forth in Subsection 2 above, *supra* at 27–37, same-sex couples are not "similarly situated" physiologically with opposite-sex couples. The differences between same-sex couples and opposite-sex couples, along with same-sex couples' inability to "marry" without redefining the term,

easily provides a rational basis for Oregon's marriage laws, and likely even a compelling interest. Those biological differences also justify extending certain benefits to married couples to channel procreation and child rearing into marriage. Thus, the marriage laws do not violate the Equal Protection Clause because "a classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between disparity of treatment and some legitimate governmental purpose." *Central State U. v. American Ass'n of U. Professors, Central St. U. Chapter*, 526 U.S. 124, 127-28 (1999) (citations and internal quotation marks omitted).

Under rational-basis review, "the burden is upon the challenging party to negative any reasonably conceivable state of facts that could provide a rational basis for the classification." *Board of Trustees of the U. of Alabama v. Garret*, 531 U.S. 356, 367 (2001) (citations and internal quotation marks omitted). The Plaintiffs cannot possibly meet that burden. The fact that some opposite-sex couples who cannot procreate are permitted to marry does not invalidate the state's legitimate interest in trying to encourage procreation in marriage. "A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." *Heller v. Doe*, 509 U.S. 312, 321 (1993) (citation and internal quotation marks omitted). Moreover, the state need not provide any empirical evidence that the marriage laws have successfully furthered a public interest. *Federal Communications Comm'n v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993). It only needs a reasonably conceivable basis for granting a legal status to opposite-sex couples that is not given to same-sex couples. *Garret*, 531 U.S. at 367. The State's interest in procreation within the stability of marriage provides that reasonably conceivable basis.

The U.S. Supreme Court has held that "[t]he Constitution does not require things which are

different in fact or opinion to be treated in law as if they were the same." *Skinner v. Oklahoma*, 316 U.S. 535, 540 (1942). Plaintiffs cannot establish that they are similarly situated with opposite-sex couples who wish to marry. Thus, Plaintiffs' desire to enter into a same-sex legal union sets them apart in fact and opinion from the historic understanding of the institution of marriage. This distinction alone makes Plaintiffs sufficiently dissimilar to those who wish to enter marriage to eliminate any equal protection concerns. Justice Holmes cogently observed in *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922), that "[i]f a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it . . . ." (Quoted in *Glucksberg*, 521 U.S. at 723.) The concept of marriage as the union of a man and a woman has been practiced by common consent for far more than 200 years.

D. CONCLUSION

Marriage is simply not unconstitutional. The historical exceptions doctrine exempts marriage from an overly literal reading of Article I, Section 20. The specific biological differences between same sex couples and opposite sex couples serve as a legitimate basis for differing treatment, if any. The facial neutrality of the marriage statutes also serve to exempt marriage from Article I, Section 20's application, and because homosexuals are not a suspect class under this court's precedent, a disparate impact analysis cannot operate. The basic ability to contract in marriage is, standing alone, an insufficient basis for triggering the protections of Article I, Section 20. Finally, the United States Supreme Court has stated that there is no federal right to same sex marriage.

2. SECOND ASSIGNMENT OF ERROR

The trial court erred in crafting a remedy that extends the benefits of marriage to same sex couples.

A. PRESERVATION OF ERROR

By BRO Plaintiffs:

> "[P]laintiffs respectfully move for an order granting partial summary judgment in their favor on plaintiffs' first claim for relief[.]"

BRO Plaintiffs' Motion for Partial Summary Judgment, April 5, 2004 at 2.

By Intervenor-Plaintiff Multnomah County:

> "Multnomah County respectfully moves the court for an order granting partial summary judgment for plaintiffs' First [*sic*] claim for relief and dismissing the Counterclaims of [DOMC Intervenors.]"

Multnomah County's Motion for Summary Judgment, April 5, 2004, at 2.

Ruling of the Trial Court in favor of BRO Plaintiffs:

> "The Court will allow the legislature until ninety days after the commencement of the next regular or special session, whichever comes first, to produce legislation that would balance the substantive rights of same-sex domestic partners with those of opposite-sex marriage [*sic*] couples or the County will be required to issue marriage licenses to same-sex couples[.]"

Hon. Frank Bearden, Revised Limited Judgment, May 18, 2004, E-R 425.

B. STANDARD OF REVIEW

An action at law is reviewed for errors of law. *E.g. State ex rel. Curry v. Thompson*, 156 Or App 537, 541, 967 P2d522 (1998).

C. ARGUMENT

The trial court erred in crafting a remedy that did not simply declare the marriage statutes

unconstitutional. The courts have no authority to craft legislation.

1. The Reasons for Same Sex Marriage Prove Too Much—They Would Apply Equally to Polygamy and Incest. BRO Plaintiffs Cannot Express a Logically Consistent Limitation or Means of Remedy.

Any conclusion that homosexual same-sex marriage is mandated by Article I, Section 20 must logically apply with equal force to mandated polygamy and other alternatives to one-man, one-woman marriage. If there is not sufficient justification for preserving traditional marriage, then what justification could there be to deny marriage to other sets of consenting persons?

Indeed, ties between legalization of gay marriage and the drive for plural marriages are real. Academics favorably disposed toward normalizing gay relationships have discussed the connection between normalizing same sex relationships and increasing acceptance for polyandry (multiple partner relationships). *See* Maura I. Strassberg, *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 Capital U. L. Rev. 439 (2003) (discussing, but not deciding, whether same-sex "marriage" leads to polyamory); David. L. Chambers, Essay, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 Mich. L. Rev. 447, 490-91 (1996) (citation omitted) ("If the law of marriage can be seen as facilitating the opportunities of two people to live an emotional life that they find satisfying— rather than as imposing a view of proper relationships— the law ought to be able to achieve the same for units of more than two."); Larry A. Hickman, *Making the Family Functional: The Case For Same-Sex Marriage, in Same-Sex Marriage: The Moral and Legal Debate*, at 192 (Robert M. Baird & Stuart E. Rosenbaum eds., Prometheus Books 1997) ("[W]e as a society should begin to offer legal recognition to marriages between gay men, between lesbians, among certain polygamous and polyandrous groups, and even

among small associations of elderly men and women insofar as those small associations perform certain functions."); Mary Coombs, *Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage*, 8 UCLA Women's L.J. 219, 265 (1998) (citations omitted) ("Marriage has been recognized as a fundamental right under the Constitution. . . . A rule limiting marriage to those whose sex/gender status is unambiguous would be the most extreme form of deprivation of the right to marry. Rules proscribing incest, polygamy, or gay marriage deny the affected persons the right to marry particular other persons."). University of Michigan Law Professor David Chambers put it succinctly by arguing that "supporters of gay marriage are simply wrong to claim that gay peoples' need for a union with another person of the same sex is more compelling than the needs of others who already have a spouse and who want to add a second or a third." David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 Hofstra L. Rev. 53, 79 (1997).

The way from same sex marriage to these other logically consistent demands is assuredly not a slippery slope, but rather a well-mapped path of stepping stones.[47]

There is no remedy for BRO Plaintiffs' claims that does not logically include polygamy and

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[47] This path has already begun undertaken in reality. In Utah, polygamist Tom Green who claims five wives, is citing *Lawrence v. Texas* as the legal authority for his appeal. *See Pamela Manson, "Appeals Seek Polygamy Right: Green, Holm Challenge Convictions Based on Sodomy Ruling: Polygamists Challenge Convictions," Salt Lake City Tribune* 15 December 2003, C1. In January 2004, a Salt Lake City civil rights attorney filed a federal lawsuit on behalf of another couple wanting to engage in legal polygamy. *Alexandria Sage, "Utah Polygamy Ban Is Challenged: U.S. Supreme Court's Sodomy Ruling Is Cited*," Associated Press 26 January 2004. The asserted justification for this claim was likewise the Supreme Court's ruling in *Lawrence*. The ACLU in Utah has actually suggested that in responding to these claims the state will "have to step up to prove that a polygamous relationship is detrimental to society." *Id*. The ACLU went on to further claim that the nuclear family "may not be necessarily the best model." *Id*. Justice Scalia of the United States Supreme Court warned of the likelihood that such claims would surface in his dissent in *Lawrence*. 539 U.S.558, ___, 123 S.Ct. 2472, 2498 (2003) (Scalia, J., dissenting). It took less than six months for Justice Scalia's prediction to become reality.

other such dubious relationships. Historically, the definition of marriage has rested on a foundation of tradition, legal precedent, and the overwhelming support of the People. But once gay marriage has been mandated by the courts without a societal consensus—as BRO Plaintiffs seek—it will be supported by nothing more substantial than the varying opinions of judges. The only traditional prohibitions related to marriage that might be expected to survive would be those designed to protect those who lack capacity or who are non-consenting. This conclusion shows the basic problem with BRO Plaintiffs's approach; once pure logic and not a constitutional consensus drives the process, there simply is no acceptable or practical limiting principle.

2. IF THERE IS A CONSTITUTIONAL PROBLEM WITH MARRIAGE, THIS COURT MUST DECLARE THE MARRIAGE STATUTES ALTOGETHER VOID , BECAUSE THERE IS NO WAY TO DETERMINE THE LEGISLATURE'S INTENT REGARDING SAME SEX MARRIAGE.

There can be no principled argument that the Legislature would wish to include homosexual couples within the marriage statutes. This Court is not equipped or empowered to craft legislation. *Wickman v. Housing Authority of Portland*, 196 Or 100, 119, 247 P2d630 (1952) ("It is not for this court to legislate, but rather to interpret. If it is desirable that . . . quasi-municipal corporations be subjected to tort liability, the remedy lies in the legislative assembly; not in the courts."). Each branch of government in Oregon is limited to its sphere of authority. Or Const Art. III, § 1. ("The powers of the Government shall be divided into three seperate [*sic*] departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.").

The only remedy explicitly authorized to the court in the event of an unconstitutional statute is

to void the legislative enactment. *McIntire v. Forbes*, 322 Or 426, 446, 909 P2d846 (1996) ("The court is obliged to consider and to remedy violations of Article IV, section 20. In this case, we hold that SB 1156 violates Article IV, section 20, of the Oregon Constitution. That being so, and consistent with the limited grant of jurisdiction in this case, we hold that sections 1 to 17 of SB 1156 are void."). This Court is simply not allowed to rewrite statutes at will. *See, e.g., Hunter v. City of Eugene*, 309 Or 298, 787 P2d881 (1990) (creation of private right of action for constitutional violations was for Legislature to create); *Peterson v. Culp*, 255 Or 269, 465 P2d876 (1970) (changes to contributory negligence doctrine must come from Legislature). *In re Frazier's Estate*, 180 Or 232 (1947) (change in adoption statutes must come from Legislature).

This Court has, in the past however, decided to expand the scope of statutes on its own accord. *See Hewitt v. SAIF*, 294 Or 33, 51–52. In *Hewitt*, this Court was faced with the invalidation of survivor benefits to widows or the expansion of benefits to widowers. *Id.* Consulting legislative history, the *Hewitt* court determined that the Legislature would have preferred to extend benefits to surviving men rather than eliminate benefits to all survivors. *Id.* at 52–53. The methodology of this Court in so doing presumed knowledge of the intent of the Legislature. *Id.* at 52 ("we first examine the legislative purpose in providing benefits under the challenged statute; we then resolve what the legislature would have done if faced with the invalid statute."). The *Hewitt* court was able to find legislative intent by noting that the constitutionality of the statute was discussed in legislative committee, and the statute passed with specific doubts outstanding on its constitutionality in order to provide benefits to widowers. *Id.* at 48–49.[48]

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[48] The legislative history of the survivorship statutes was shown in *Hewitt* as such:

"While the Committee's reasons for the ultimate rejection of gender neutral

In establishing this "legislative intent" test, the *Hewitt* court distinguished *Pavlicek v. SIAC*, 235 Or 490, 385 P2d159 (1963), which stated that the determination of whether an unconstitutional provision was severable from the statutory scheme depended on whether "the challenged sections are so essential to the legislative intent that without them the statute would not have been enacted." *Pavlicek*, 235 Or at 493–94; *Hewitt*, 294 Or at 53 n17. Importantly, *Hewitt* did not replace the *Pavlicek* test.

In this case, there is simply no evidence that the territorial Legislature of Oregon would have extended marriage to homosexuals rather than abolish civil marriage altogether. Given one appellate judge's opinion of the framers relied on by BRO Plaintiffs below, such a proposition is dubious at best. *See Cox ex rel. Cox v. State*, 191 Or App 1, 6–7, 80 P3d 514 (2003) (Schuman, J., concurring) ("The framers revealed their understanding (or ***mis*** understanding) of equality clearly and often") (emphasis in original). Nor can this Court know the minds of current Oregonians or their elected representatives on this matter. For this Court to rewrite a centuries-old law runs wholly counter to the separation of powers outlined in Article III, Section 1 of the Oregon Constitution.

> amendments to ORS 656.226 are open to conjecture, its perception of the purpose of ORS 656.226 is clear. The committee recognized the statute as one designed primarily to ensure entitlement to benefits for the worker's family unit, not the adult partner alone. A concern with the welfare of workers' children dominated the debates. The Committee was aware that throughout the workers compensation statutes, illegitimate as well as legitimate children enjoy equal entitlement to benefits. ORS 656.005(6). Significantly, the Committee rejected a proposal that ORS 656.226 be deleted in its entirety, desiring instead to ensure that eligible children receive the additional benefits available to the family through application of ORS 656.226."

Hewitt, 294 Or at 49.

3. THIRD ASSIGNMENT OF ERROR

The trial court erred in ordering the State to register legally invalid marriage licenses.

A. PRESERVATION OF ERROR

By BRO Plaintiffs and Multnomah County:

> BRO Plaintiffs and Multnomah County did not move for summary judgment on their Fourth Claims for Relief in Mandamus.[49]

The Trial Court's ruling in favor of BRO Plaintiffs:

> "On plaintiffs' and intervenor-plaintiff's Fourth Claim for Relief, in the alternative to plaintiffs' and intervenor-plaintiff's Second and Third Claims for Relief, the Court hereby issues a writ of mandamus, ordering Defendant Woodward, within thirty days of the judgment entered in this case, to record the marriages of same sex couples licensed and solemnized in Oregon."

Hon. Frank Bearden, Revised Limited Judgment, May 18, 2004, E-R 424.

Objection by DOMC Intervenors:

> "An ORCP 67B judgment should not be entered at this time based on this Court's April 20, 2004 Opinion and Order . . . because the "county authority" issue is integral to the overall appellate review of this case . . . , [and] there remain affirmative defenses to Plaintiffs' claims [*i.e.* mandamus was improper] that are as yet unaddressed[.]"

DOMC Intervenors' Objection to Entry of ORCP 67B Judgement, April 27, 2004, E-R 412.

B. STANDARD OF REVIEW

"[A] mandamus proceeding is an action at law or in the nature of a law action. . . . In reviewing the judgment in an action we are bound by the findings of the trial court if they are supported by the

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[49] The trial court's grant of a peremptory writ of mandamus in favor of BRO Plaintiffs on their fourth claim for relief came without any prior proceedings on that claim, without a motion, without briefing, and without oral argument. ORAP 5.45(4)(b) permits discretionary review of "error of law apparent on the face of the record."

evidence." *Kirschbaum v. Abraham*, 267 Or 353, 355, 517 P2d272 (1973). An action at law is reviewed for errors of law. *E.g. State ex rel. Curry v. Thompson*, 156 Or App 537, 541, 967 P2d522 (1998).

C. ARGUMENT

DOMC Intervenors seek reversal of the trial court's writ of mandamus ordering the State defendants to record the marriage certificates of same sex marriages. Reversal is required for two independently sufficient reasons: (1) Article VI, Section 10 prevents Multnomah County from ignoring Oregon's statewide marriage statutes; and (2) neither BRO plaintiffs nor the County proceeded on this claim, so it was not ripe for decision.

1. THE COUNTY WAS CONSTITUTIONALLY POWERLESS TO CONTRAVENE STATEWIDE STATUTE.

a. Background of the Issue

The trial court ignored DOMC Interveners' second affirmative defense and counterclaim asserting that Article VI, Section 10 invalidated the already-issued same sex marriage licenses. In fact, in the face of requests for clarification, Judge Bearden's May 12, 2004 letter to counsel stated:

> "The problem is the status of the already issued marriage licenses. Those licenses ***were not properly issued if you consider the statute's clear intent*** that only opposite-sex couples can marry in the state of Oregon. ***They were properly issued if the appellate courts agree with my ruling*** that issuing marriage licenses to opposite-sex (sic) couples is the only way to meet the constitutional mandate and the legislature fails to provide an alternative."

D-E-R 2 (emphasis added). Neither this letter nor the trial court's opinion and order acknowledge

DOMC Intervenors' pending second affirmative defense and counterclaim.[50] E-R 423–424, 427–442; D-E-R 1–2. *See* E-R 189–190 (DOMC Intervenors second affirmative defense). By ignoring the effect of Article VI, Section 10 on BRO Plaintiffs' mandamus claim, the court simply ignored the fundamental question of the validity of the marriage licenses issued to same sex couples. The licenses are invalid regardless.

As the California Supreme Court recently decided in *Lockyer v. City and County of San Francisco*, 33 Cal 4th 1055, 2004 Cal. Lexis 7238 (8/12/2004), the conclusion that the Mayor of San Francisco is without authority under California law to issue marriage licenses to same sex couples did not turn on whether that state's marriage statutes are constitutional. Rather, deciding whether the mayor could act contrary to state law was such an important separation of powers issue that the court decided it first. It expressly reserved decision on whether the marriage statutes themselves are constitutional for later. 33 Cal 4th at 1069, 1081.

Although in this case, the petition for a writ of mandamus was not properly presented, briefed, or argued below, *see* argument, *infra,* by issuing the writ, the trial court put that claim and all the defenses associated with it at issue on this appeal. Thus, it is appropriate this court decide the county's authority to issue the licenses now. Lack of a decision here will unnecessarily extend the existing uncertainty concerning all manner of issues and decisions that turn on the existence or nonexistence of the marriage status. This Court has the discretion to decide this issue now. *Carlile v. Frost*, 326 Or 607, 617, 956 P2d 202 (1998).

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[50] DOMC Intervenors' Second Affirmative Defense and Counterclaim directly raises the issue that the county lacked authority under Article VI, section 10 to issue the marriage licenses. Its cross-motion for summary judgment was pending before the trial court when the court granted judgment on BRO plaintiffs' mandamus claim.

b. Article VI, Section 10 Prevents Counties from Declaring Statewide Statutes Unconstitutional.

Oregon's counties are not independent fiefdoms that can decide which state statutes they deign to obey. In 1958, Article VI, section 10 was added to the Constitution, allowing counties to enact home rule charters establishing their form of county government. A home rule county has authority only "over matters of county concern." Or Const Art VI, § 10. The "General Grant of Powers" in Multnomah County's home rule charter parallels Article VI, section 10. MCHRC § 2.10 ("the county shall have authority over matters of county concern").[51] As case law has made clear, this means that Multnomah County has no authority to ignore statutes having statewide reach, even assuming it has constitutional concerns.

Article VI, section 10 divides the competing realms of state and local authority into three categories along a continuum. First, home rule counties enjoy near plenary authority over matters pertaining to their "form" of local government—the number of commissioners, when they meet, etc. *See Heinig v. City of Milwaukie,* 231 Or 473, 479, 373 P2d 6809 (1962) (Legislature cannot act on matters of purely local concern unless a state interest at large is also involved). Second, counties have been allowed some coextensive jurisdiction with the state to act with respect to matters of specific local concern that are of statewide concern as well. *See Haley v. City of Troutdale*, 281 Or 203, 576 P2d 1238 (1978) (local building codes that are stricter than, and not inconsistent with, statewide codes are

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[51] Before 1958, all counties were strictly limited to the powers granted them directly by statute. Counties without home rule charters were statutorily impeded in the same manner until 1973. *See, e.g., GTE Northwest v. Oregon Public Utility Commission,* 179 Or App 46, 50, 39 P3d 201 (2002) ("Under then-existing law, a county was presumed to be unable to take any given action unless it could find a specific, enumerated power somewhere in the statutory framework that bestowed the specific power. Otherwise, counties were limited to the exercise of specifically delineated powers that the legislature conferred by statute.").

not preempted).

Third, and most importantly for purposes of this appeal, Article VI section 10 also *acts as a strict limitation* of county authority: it deprives counties from asserting any authority over subject matter where statewide legislation evidences the intent to regulate the subject matter uniformly. *See Seto v. Tri-County Metropolitan Transp. Dist.,* 311 Or 456, 465, 814 P2d 1060 (1991) (state statute enacted to speed up siting procedure for light rail project was "geared primarily to accomplishing legitimate state economic, social and regulatory objectives," and any contrary policies preferred by local authorities must give way). *See also LaGrande/Astoria v. PERB,* 281 Or 137, 576 P2d 1204 (1978), *aff on rehearing* 284 Or 173, 586 P2d 765 (1978) (statutes requiring all police officers and firemen to be brought within the PERS system unless their employers provided them with equal or better retirement benefits not an unconstitutional alteration of cities' mode of government). In *LaGrande/Astoria*, this Court noted:

> "a general law addressed primarily to substantive social, economic, or other regulatory objectives of the state prevails over contrary policies preferred by some local governments if is clearly intended to do so, unless the law is shown to be ***irreconcilable with the local government's freedom to choose its own political form***."

281 Or at 156 (emphasis added). In more direct language, a county must obey any state statute that is not tied solely to the way it operates. *See also City of Roseburg v. Roseburg City Firefighters,* 292 Or 266, 639 P2d 90 (1981) (Public Employee Collective Bargaining Act is a general law addressed to substantive social, economic and other objectives of the state not affecting municipality's freedom to choose its own political form, so it controls over conflicting municipal ordinance); *Multnomah Kennel Club v. Department of Revenue*, 295 Or 279, 666 P2d 1327 (1983) (municipality is not preempted from imposing a business income tax on pari-mutuel racing

establishments to raise revenue).[52]

Nothing in Article VI, Section 10 limits the prohibition on the exercise of county authority in matters of statewide concern to the county's legislative acts. By its terms, that section prohibits *any* assertion of authority over areas of statewide concern. It would be incongruous for Article VI, Section 10 to forbid ordinances that contradict state laws while allowing counties to accomplish the same result by executive announcement. Multnomah County's assertion that the marriage statutes are unconstitutional is an example of just such a forbidden assertion of authority.

When viewed in the abstract, Article VI, Section 10 is quite unremarkable—local government units cannot create local law that operates contrary to established state law. Multnomah County has argued from the outset that it is not acting contrary to state law, but that it is simply correctly interpreting state law that has been, in its opinion, misinterpreted since the enactment of the Constitution in 1859. This argument does no more than to beg the question whether the County can ignore state law. Article VI, section 10 provides the answer: an emphatic no. Any local interpretation of a statewide statutory scheme that fundamentally changes the way that set of laws is implemented locally is an "exercise of authority" over a matter of statewide concern prohibited by Article VI, section 10.

c. Marriage Is a Matter of Statewide Concern.

There can be no doubt Oregon's marriage statutes are comprehensive, statewide in application,

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[52] The Oregon Court of Appeals has spoken often on this Court's Article VI, Section 10 jurisprudence to the same effect. *E.g. State v. Lagsdon*, 165 Or App 28, 995 P2d 1178, *rev den* 330 Or 362 (2000) (local ordinance that purported to restrict the authority of all police officers to conduct searches was beyond the county's authority to enact); *Buchanan v. Wood,* 79 Or App 722, 720 P2d 1285 (1985), *rev den* 302 Or 158 (1986) (statute creating position of District Court Clerk preempted a county charter amendment regarding the same position as a county office); *City of Banks v. Washington County*, 29 Or App 495, 564 P2d 720 (1977) (county tax assessment ordinance unconstitutional in light of Legislature's clear intent that all tax assessment must be part of a uniform system of taxation).

and are not matters "of county concern" as that term is used in Article VI, section 10. They create a uniform system of regulation of marriage throughout the state. *See* ORS 106.010 (statewide limitations on the ages of those who may marry); ORS 106.020 (degrees of consanguinity); ORS 106.030 (what marriages are voidable); ORS 106.041 (what is required to be included in the marriage license and application form); ORS 106.120 (who is authorized to solemnize marriages); ORS 106.165 (the form of marriage certificates; ORS 106.990 (criminal penalties for county clerk who issues licenses in violation of statutory requirements and persons who unlawfully officiate at marriage ceremonies). *C.f., Lockyer v. City and County of San Francisco,* 33 Cal 4th at 1079-80 (after reviewing the comprehensive set of statutes regulating marriage in California, concluding, "there can be no question but that marriage is a matter of 'statewide concern' rather than a 'municipal affair'.").

Therefore, Multnomah County Commissioners were not free to simply pronounce, *ipse dixit,* that based on months of secret meetings and an overnight decision, marriage means something different in Multnomah County than everywhere else in Oregon. Any action to challenge the constitutionality of the marriage statutes must be done in a way that is designed to lead to a statewide decision, either through legislative action, through the initiative process, or through the state courts.

d. The marriage licenses issued in violation of Article VI, Section 10 are void.

When an official lacks authority to take an action, but purports to do so anyway, the action is void. *State ex rel Huddleston v. Sawyer*, 324 Or 597, 615, 932 P2d 1145 (1997) (quoting *State v. Leathers,* 271 Or 236, 240, 531 P2d 901 (1975)); *Spady v. Graves,* 307 Or 483, 489, 770 P2d 53 (1989). *See also Pense v. McCall*, 243 Or 383, 393 413 P. 2d 722 (1966) (Secretary of State's acceptance of political candidate's declaration of candidacy a nullity when candidate was already registered in another race). The result of Multnomah County's rogue action is that the same sex licenses

are invalid.

Multnomah County acted beyond its constitutional bounds of authority, requiring its *ultra vires* actions be declared void. *C.f. Lockyer v. City and County of San Francisco*, 33 Cal 4th 1055. Because county officials cannot substitute their own constitutional opinions for the clear meaning of statewide statutes of general applicability, the court should reverse and remand for entry of judgment vacating the court's writ of mandamus and entering judgment ordering Defendant Woodward to unregister the void same-sex marriages.[53]

2. *JUDGMENT ON PLAINTIFFS' FOURTH CLAIM SHOULD BE REVERSED BECAUSE THE TRIAL COURT ISSUED A WRIT OF MANDAMUS WITHOUT A HEARING, AND WITHOUT FOLLOWING ANY OF THE PROCEDURES SET FORTH IN ORS 34.105 ET SEQ.*

The trial court issued a writ of mandamus that followed none of the statutory requirements or procedure, never existed as a writ, was never briefed or argued. Mandamus is a creature of statute. The procedures for obtaining and enforcing a writ of mandamus from the trial court are set forth in ORS 34.105 through 34.240. BRO plaintiffs followed none of them.

The first problem, obvious from simply reading the chronology of the pleadings contained in that judgment, is that neither BRO Plaintiffs nor Multnomah County moved for summary judgment on their fourth claim. Rather, BRO Plaintiffs (collectively including the County) moved ***only*** for partial summary judgment on their first claim, for a declaration the marriage statutes violate Article I, section

[53] Because Multnomah County is a county and not a part of a coequal branch of state government, the limited rule allowing state agencies to address the constitutionality of state statutes does not apply in this case. *See Cooper v. School Dist. 4J*, 301 Or 358, 364, 723 P2d 298 (1986) (Superintendent of Public Instruction authorized to evaluate constitutionality of statutes); *Employment Div. v. Rogue Valley Youth for Christ*, 307 Or 490, 495, 770 P2d 588 (1989) (Director of the Employment Department had authority to declare a provision of the Employment Act unconstitutional); *Newport Church of the Nazarene v. Hensley*, 335 Or 1, 56 P3d 386 (2002). Because state agencies are not covered by Article VI, Section 10, this exception is wholly inapposite here.

20 of the Constitution.

Second, BRO Plaintiffs did not follow any of the required procedures to obtain and serve an alternative writ and the trial court never held a show cause hearing on the issues and defenses raised on that claim. Succinctly, the trial court utterly ignored every requirement of ORS Chapter 34. As a result, the fourth claim was never presented for decision.

Further, Judge Bearden had told the parties during the summary judgment briefing process, in an April 13, 2004 letter to counsel, that he would not decide any issue other than the constitutionality of the marriage statutes. His letter states, "all other issues will be separated and dealt with later if need be."[54] E-R 295; E-R 423.

Heedless of any of these significant errors in the procedural posture of the mandamus claim, the trial court *sua sponte* granted the writ of mandamus requiring the state to register the marriages. E-R 439–441. This neither proper, nor supported by law, nor fair; it is profound error.

Although we have found no decision of this court on point, the Court of Appeals has decided the result of a trial court's issuance of a writ of mandamus without a hearing on one occasion.[55] The

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[54] As the Revised Limited Judgment recites, DOMC Intervenors and the State Defendants did brief the so-called "county authority" issue in connection with their cross motions for summary judgment, but in light of the court's April 13th letter directing the parties to limit their further efforts to the sole issue of the constitutionality of the marriage statutes, this issue received no attention on reply briefing or at oral argument. The court's decision to resolve plaintiffs' fourth claim *sua sponte,* contrary to its own instructions, came as a complete surprise. *See* E-R 294–295; E-R 423–425. DOMC Intervenors' arguments in their memorandum in support of their motion for summary judgment on their counterclaim, asserting lack of county authority to issue the licenses, were not addressed at oral argument, in the court's opinion and order, its judgment, or in the court's subsequent correspondence to counsel. In short, the court's grant of the writ came *despite* its stated intent to postpone consideration of that claim.

[55] In the analogous context of summary judgment proceedings, the Court of Appeals has held no less than five times that it is error for a trial court to grant summary judgment *sua sponte. See Advance Resorts of America, Inc. v. City of Wheeler*, 141 Or App 166, 180, 917 P2d 61, *rev den*, 324 Or 322, 927 P2d 598 (1996); *Francis v. Eoff Electric Co.*, 127 Or App 632, 638-39, 873 P2d

appellate court said it was error for the trial court to issue a peremptory writ without first conducting a hearing concerning a previously issued alternative writ. *Wallace v. Board of County Commissioners of Klamath County,* 105 Or App 364, 368, 804 P2d 1220 (1991). Here, too, the court issued a peremptory writ without any hearing or application whatsoever, without first even issuing the requested alternative writ.[56]

Not only is it plain error to proceed in a mandamus action without requiring the proponent to follow any of the procedures of the mandamus statutes, the court could not issue a peremptory writ in the first instance (that is, proceed without a trial on all the issues presented by the alternative writ and the answer to it, which is essentially what the court did) unless "the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it." ORS 34.160.

Whatever may be said about the merits of registering the same sex marriages, it cannot be argued the right to have them registered is clear in the law. Not only has the right to same sex marriage never been declared a constitutional right by this Court or the Court of Appeals, the county's action in issuing the licenses for such marriages absent a prior judicial declaration that the Constitution requires it was *ultra vires* under Article VI, section 10 of the Oregon Constitution, as is explained, *supra*. Thus, BRO plaintiffs had no right to a writ requiring their marriages to be registered.

D. CONCLUSION

111, *rev den*, 319 Or 625, 879 P2d 1287 (1994); *Harbert v. Riverplace Assocs.* 114 Or App 80, 834 P2d 476 (1992); *Hendgen v. Forest Grove Community Hospital,* 98 Or App 675, 780 P2d 779 (1989); *Industrial Underwriters v. JKS,* 90 Or App 189; 750 P2d 1216; 1988

[56] Failing to obtain a final stay of this part of the judgment, the State defendants promptly registered the marriage certificates as ordered. That act does not moot this issue, because the state can unregister the marriages just as quickly as it registered them.

The licenses issued by Multnomah County to same sex couples are void because the County lacks authority to decide the constitutionality of ORS 106.010 on its own and because proper mandamus procedures were not followed. An order should be directed to the State to unregister the same sex marriages as void.

III. CONCLUSION

For the foregoing reasons, the ruling of the trial court should be reversed.

RESPECTFULLY SUBMITTED this 20th day of September, 2004.

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