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3  
4 IN THE CIRCUIT COURT OF THE STATE OF OREGON  
5 FOR THE COUNTY OF MULTNOMAH

6 MARY LI and REBECCA KENNEDY;  
7 STEPHEN KNOX, M.D., and ERIC  
8 WARSHAW, M.D.; KELLY BURKE and  
9 DOLORES DOYLE; DONNA POTTER and  
10 PAMELA MOEN; DOMINICK VETRI and  
11 DOUGLAS DEWITT; SALLY SHEKLOW and  
12 ENID LEFTON; IRENE FARRERA and NINA  
13 KORJAN; WALTER FRANKEL and CURTIS  
14 KIEFER; JULIE WILLIAMS and COLEEN  
15 BELISLE; BASIC RIGHTS OREGON; and  
16 AMERICAN CIVIL LIBERTIES UNION OF  
17 OREGON,

Plaintiffs,

18 and

19 MULTNOMAH COUNTY,

Intervenor-Plaintiff,

20 vs.

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

Defendants,

27 and

28 DEFENSE OF MARRIAGE COALITION,  
29 CECIL MICHAEL THOMAS, NANCY JO  
30 THOMAS, DAN MATES, and DICK  
31 OSBORNE,

Intervenors-Defendants.

No. 0403-03057

**PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

**(ORAL ARGUMENT  
REQUESTED)**

1     **I.     INTRODUCTION**

2             The State<sup>1</sup> concedes that the Court is bound by the analytical framework set forth  
3     in Tanner v. Oregon Health Scis. Univ., 157 Or App 502, 971 P2d 435 (1998). (Defs’  
4     Memo of Law in Support of Mot for Summ J (“Defs’ Mot for Summ J”) at 13.) Thus, the  
5     State concedes that ORS 106.010 discriminates based on sexual orientation, that sexual  
6     orientation is a true class, and that sexual orientation is a suspect class. (*Id.*) The State  
7     contests only whether marriage in and of itself is a privilege for purposes of Article I,  
8     section 20, and whether the exclusion of same-sex couples from marriage is justified by a  
9     genuine difference between same-sex couples and different-sex couples.<sup>2</sup> In addition, the  
10    State proposes that, in the event the Court grants plaintiffs’ motion for partial summary  
11    judgment, the appropriate remedy is for the Court to order intervenor-plaintiff  
12    Multnomah County (“the County”) to reinstate unconstitutional practices while the  
13    Governor and the Department of Justice petition the legislature for remedial legislation.  
14    For the reasons that follow, the arguments set forth by the State must fail.

15    **I.     ARGUMENT**

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

18           In questioning whether marriage in and of itself is a privilege for purposes of  
19    Article I, section 20, the State does nothing more than make an equivocal assertion: “And  
20    if the only issue is the license itself – i.e., if all of the benefits and protections incident to  
21    marriage are ignored – the court could find that this alone is not a constitutionally-

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22           <sup>1</sup> In this filing, plaintiffs refer to defendants collectively as “the State.”

23           <sup>2</sup> The State is silent with respect to whether the exclusion of same-sex couples  
24    from marriage discriminates impermissibly based on gender, an analysis that relies not on  
25    the Oregon Court of Appeals’ analysis in Tanner, but rather on the Oregon Supreme  
26    Court’s analysis in Hewitt v. State Accident Ins. Fund Corp., 294 Or 33, 653 P2d 970  
   (1982). The Attorney General himself, however, has conceded that the exclusion of  
   same-sex couples from marriage likely discriminates impermissibly based on gender.  
   (Stipulated Facts (“Stip I”), Ex 5.)

1 protected 'privilege' or 'immunity' within the meaning of Article I, section 20 \* \* \* ."  
2 (Defs' Mot for Summ J at 14.) The State offers no support for its assertion that marriage  
3 in and of itself is not a privilege for purposes of Article I, section 20. To the contrary, the  
4 State observes that the Massachusetts Supreme Judicial Court recently held that "denying  
5 a [marriage] license by itself results in an unconstitutional 'stigma of exclusion.'" (Id.  
6 n75 (quoting Opinions of the Justices, 802 NE2d 565, 570 (Mass 2004) (emphasis  
7 added).)

8         Significantly, the State fails to discuss or even cite Oregon case law that sets forth  
9 the definition of the term "privilege." As the Attorney General himself has confirmed,  
10 such case law makes clear that "[t]he Oregon Supreme Court has indicated that the denial  
11 of 'some advantage' to which a person otherwise would be entitled is sufficient to  
12 implicate Article I, section 20. That language suggests that even a slight advantage might  
13 constitute a 'privilege' or 'immunity' for this purpose." 49 Or Op Att'y Gen 112 at \*6  
14 (Aug 26, 1998) (citing City of Salem v. Bruner, 299 Or 262, 702 P2d 70 (1985))  
15 (emphasis added); see also David Schuman, The Right to "Equal Privileges and  
16 Immunities: A State's Version of "Equal Protection," 13 Vt L Rev 221, 230 (1988)  
17 ("'Potential' advantages, 'whether or not they are advantageous in a particular instance,'  
18 are sufficient.").

19         There is no question that marriage in and of itself confers more than a slight  
20 advantage. Indeed, it confers a significant advantage. The State has admitted that, when  
21 two people enter into a marriage, they express their commitment in a way that is  
22 universally honored as a commitment of the highest order. (Answer ¶ 5; see also Am  
23 Answer in Intervention ¶ 4.) The State has further admitted that, when two people enter  
24 into a marriage, they and their children are assured uniform recognition as a family unit.  
25 (Id.) Thus, the State cannot dispute that a marriage in and of itself confers social  
26 recognition upon the two people who enter into the marriage as well as their children.

1 Such social recognition is perhaps the most significant advantage that marriage confers.  
2 (See also Defs' Mot for Summ J at 8 ("Marriage 'is an association that promotes a way of  
3 life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not  
4 commercial or social projects.'") (quoting Griswold v. Connecticut, 381 US 479, 486  
5 (1965)).)

6 Plaintiffs' declarations bear out this proposition. For example, although plaintiffs  
7 Frankel and Kiefer had lived with and cared for Kiefer's mother for thirteen years,  
8 hospital personnel did not readily recognize Frankel as a member of Kiefer's mother's  
9 family when he sought to visit her in the intensive care unit as she was dying. (Frankel  
10 Decl ¶ 9.) Hospital personnel did not readily recognize Frankel as a member of Kiefer's  
11 mother's family because Frankel and Kiefer are not married. (Id.) The fact that hospital  
12 personnel did not readily recognize Frankel as a member of Kiefer's mother's family  
13 exacerbated Frankel and Kiefer's distress during a time of family crisis. (Id.)

14 Because it confers the significant advantage of social recognition upon the two  
15 people who enter into a marriage as well as their children, marriage in and of itself is a  
16 privilege for purposes of Article I, section 20.

17 **B. The exclusion of same-sex couples from marriage is not justified by**  
18 **any genuine difference between same-sex couples and different-sex**  
**couples.**

19 In questioning whether the exclusion of same-sex couples from marriage  
20 is justified by a genuine difference between same-sex couples and different-sex couples,  
21 the State again does nothing more than make an equivocal assertion: "As applied to the  
22 marriage license itself, an Oregon court could follow \* \* \* \* what [Standhardt v. Superior  
23 Ct., 77 P3d 451, 463-64 (Ariz Ct App 2003)] found to be the state's 'legitimate interest in  
24 encouraging procreation and child rearing within the marital relationship.' \* \* \* [A]n  
25 Oregon court could reach a similar conclusion" to that of a dissenting opinion in  
26 Goodridge v. Department of Public Health, 798 NE2d 941, 1001-02 (Mass 2003) (Cordy,

J, dissenting), i.e., “limiting marriage to opposite sex couples serves ‘the state’s interest in promoting and supporting heterosexual marriage as the social institution that it has determined best normalizes, stabilizes, and links the acts of procreation and child rearing.’” (Defs’ Mot for Summ J at 14.) The State again fails to discuss or even acknowledge its own laws, policies, and practices. Instead, the State relies exclusively on the case law of other states and, in doing so, acknowledges that “the majority opinion in [Goodridge] – and other courts – disagree with [this] approach.”<sup>3</sup> (Id.) The State’s own laws, policies, and practices preclude the State from arguing that it excludes same-sex couples from marriage either (1) to encourage different-sex couples to bring children into their families via procreative sexual intercourse or (2) to discourage same-sex couples from bringing children into their families at all.

**Procreation.** Excluding same-sex couples from marriage does not encourage different-sex couples to bring children into their families via procreative sexual intercourse. There is simply no link between the two. Different-sex couples will continue to bring children into their families via procreative sexual intercourse regardless of whether same-sex couples are permitted to marry.

Moreover, the State’s own laws, policies, and practices preclude the State from arguing that it prefers couples to bring children into their families via procreative sexual intercourse over other means (e.g., adoption, artificial insemination). The State’s own laws, policies, and practices make clear that the State values equally children who are brought into their families via procreative sexual intercourse and children who are brought into their families by other means. See, e.g., ORS 109.050. Like different-sex couples, same-sex couples bring children into their families by means other than

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<sup>3</sup> Moreover, the State fails to acknowledge that, unlike Oregon case law, the case law of the states on which it relies applies rational basis review, not an exacting scrutiny, to sexual orientation discrimination.

1 procreative sexual intercourse. (Johnson Decl ¶ 6; see also Li Decl ¶¶ 11-12 (one child);  
2 Knox Decl ¶¶ 11-15 (three children); Burke Decl ¶¶ 10-12 (one child); Potter Decl ¶¶ 7,  
3 13-14 (two children).) As the Attorney General himself has confirmed, “Oregon law  
4 does not disadvantage those children in any way of which we are aware, except by virtue  
5 of the marriage statutes.” (Stip I, Ex 5 at 9.)

6 More to the point, the State has conceded that its interest in marriage is not to  
7 ensure that couples bring children into their families via procreative sexual intercourse.  
8 As the Attorney General himself has confirmed, “people who wish to get married in  
9 Oregon need not promise to have children.” (Id.; see also Pls’ Memo of Law in Support  
10 of Mot for Partial Summ J at 4.)

11 Thus, the Court cannot permissibly conclude that any difference between same-  
12 sex couples and different-sex couples concerning procreation is a relevant difference  
13 justifying the exclusion of same-sex couples from marriage.

14 **Parenting.** The State’s own laws, policies, and practices preclude the State from  
15 arguing that its interest in marriage is to discourage same-sex couples from bringing  
16 children into their families at all. The State has stipulated that it actively endorses  
17 parenting by same-sex couples and parenting by different-sex couples on equal terms.  
18 (Stipulated Facts Between Pls and Defs (“Stip II”) ¶¶ 1-2.) As the Attorney General  
19 himself has confirmed, “same-sex couples can adopt children” in Oregon. (Stip I, Ex 5  
20 at 9; see also Stip II ¶ 2; Johnson Decl ¶¶ 9-10; Li Decl ¶¶ 11-12 (one child); Knox Decl  
21 ¶¶ 11-15 (three children); Burke Decl ¶¶ 10-12 (one child); Potter Decl ¶¶ 7, 13-14 (two  
22 children).) Moreover, the State has stipulated that, following either a joint adoption by a  
23 lesbian or gay couple or a second-parent adoption by a lesbian or gay partner, it issues a  
24 birth certificate for the child on which the same-sex parents are denominated “parent”  
25 and “parent” instead of the standard “mother” and “father.” (Stip II ¶ 1; see also Johnson  
26 Decl ¶ 11; Li Decl ¶ 13; Knox Decl ¶¶ 13-15; Burke Decl ¶ 13; Potter Decl ¶ 14.) The

1 State has further stipulated that it places children with foster parents whom it knows to be  
2 lesbian or gay. (Stip II ¶ 2.) The State goes so far as to recruit foster parents whom it  
3 knows to be lesbian or gay. (See Croteau Decl.) In addition, in child custody and child  
4 visitation disputes, the sexual orientation of a parent has long been deemed by state  
5 courts to be irrelevant for purposes of determining the best interests of a child. In re  
6 Marriage of Ashling, 42 Or App 47, 599 P2d 475 (1979); see also Johnson Decl ¶ 8.  
7 These are only some of the ways in which the State has actively endorsed parenting by  
8 same-sex couples and parenting by different-sex couples on equal terms. See also, e.g.,  
9 OAR 839-009-0210 (parental leave for state employees).

10 Thus, the Court cannot permissibly conclude that any difference between same-  
11 sex couples and different-sex couples concerning parenting is a relevant difference  
12 justifying the exclusion of same-sex couples from marriage. Indeed, as the  
13 Massachusetts Supreme Judicial Court concluded in Goodridge, “[e]xcluding same-sex  
14 couples from civil marriage will not make children of opposite-sex marriages more  
15 secure, but it does prevent children of same-sex couples from enjoying the immeasurable  
16 advantages that flow from the assurance of a stable family structure in which children  
17 will be reared, educated, and socialized.” Goodridge, 798 NE2d at 964 (quotation and  
18 footnote omitted). As plaintiffs’ declarations make clear, same-sex couples are raising  
19 children regardless of their exclusion from marriage. Permitting same-sex couples to  
20 marry would serve only to enhance the welfare of their children.

21 **C. The State’s proposed legislative relief is an impermissible and**  
22 **inappropriate remedy for the constitutional violation here.**

23 The State fundamentally misapprehends the range of permissible and appropriate  
24 remedies for the constitutional violation here that are available to the Court. There is  
25 only one – permitting same-sex couples to marry. And it is one that does not involve the  
26 Court abdicating its responsibility to the legislature.

1           **Remedies law.** The State concedes that Oregon remedies law contemplates only  
2 two permissible remedies for a violation of Article I, section 20. Specifically, the State  
3 concedes that “finding an Article I, section 20 violation ‘leaves an issue whether to strike  
4 down the special privilege or to extend it beyond the favored class.’” (Defs’ Mot for  
5 Summ J at 17 (quoting Hale v. Port of Portland, 308 Or 508, 525, 783 P2d 506 (1989)).)  
6 The majority opinion in Hewitt confirms this fundamental rule: “Where a statute is  
7 defective because of underinclusion there exist two remedial alternatives: a court may  
8 either declare [the statute] a nullity and order that its benefits not extend to the class that  
9 the legislature intended to benefit, or it may extend the coverage of the statute to include  
10 those who are aggrieved by exclusion.” Hewitt, 294 Or at 52 (quoting Welsh v. United  
11 States, 398 US 333, 361 (1970)); see also Employment Div. v. Rogue Valley Youth for  
12 Christ, 307 Or 490, 497, 770 P2d 588 (1989) (“If the legislature’s distinction between  
13 churches and other religious organizations will not withstand scrutiny, which of the  
14 following would it have chosen – complete exemption of all churches and religious  
15 organizations, in order to save the clearly expressed exemption for churches; or  
16 exemption for neither, in order to save Oregon’s eligibility for tax credits under FUTA? \*  
17 \* \* Although the answer is by no means obvious, we believe that the legislature would  
18 have chosen to include all religious organizations in the unemployment compensation  
19 program. ORS 657.030(2) expresses a clear intention that the requirements of FUTA be  
20 met. We find no similar clear expression of preference for an exclusion for churches, no  
21 matter what the consequences.”).

22           The State appears to rely on the dissenting opinion in Hewitt to support its  
23 assertion that its proposed legislative relief is a third permissible remedy for a violation of  
24 Article I, section 20. To the contrary, the dissenting opinion in Hewitt argues that there is  
25 only one permissible remedy for a violation of Article I, section 20 – nullifying the  
26 privilege: “If we do nothing but discharge our constitutionally-appointed task and nullify



1 the offending statute, the legislature, when it convenes in January, 1983, will undoubtedly  
2 consider the problem.” Id. at 55 (Peterson, J, dissenting). Thus, the State offers no  
3 support for its assertion that Oregon remedies law permits the Court to abdicate its  
4 responsibility to the legislature.

5 Of the two permissible remedies for the constitutional violation here, the State  
6 concedes that nullifying the privilege is not an appropriate remedy: “It seems unlikely  
7 that the legislature would have eliminated ‘marriage’ altogether. Thus, judicial  
8 nullification of the marriage license statute is not an acceptable remedy because that  
9 would mean that nobody could get a marriage license in Oregon until the legislature  
10 acts.” (Defs’ Mot for Summ J at 18-19 (emphasis in original).) This leaves as the only  
11 permissible and appropriate remedy permitting same-sex couples to marry.

12 The State raises a number of academic considerations in support of its assertion  
13 that its proposed legislative relief is permissible and appropriate. None, however,  
14 suggests a different conclusion.

15 The State argues that the Court should abdicate its responsibility to the legislature  
16 in light of “the uncertainty and the disruption to state laws and programs that hinge on  
17 defining who is ‘married’ and who is not.” (Id. at 20.) This is an illusory concern. From  
18 an administrative standpoint, the change in law and policy would be a simple one.  
19 County clerks would need only to begin issuing marriage licenses to same-sex couples  
20 and different-sex couples on equal terms. Similarly, state agencies would need only to  
21 begin recognizing same-sex spouses and different-sex spouses on equal terms. Indeed, it  
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1 is difficult to conceive of a more straightforward institutional reform case.<sup>4</sup> To the extent  
2 that marriage equality for same-sex couples to marry would require any adjustment in  
3 law or policy, it would require only an adjustment in terminology as opposed to an  
4 adjustment in substance.<sup>5</sup> Any adjustment in law or policy therefore need not delay  
5 marriage equality for same-sex couples.

6 The State also argues that its proposed legislative relief is appropriate in light of  
7 the “significant questions of public policy” that are raised by this action with respect to  
8 which “the legislature might [take] a variety of approaches.” (Defs’ Mot for Summ J at  
9 16, 19.) But, in this regard, this case is no different from any other case of constitutional  
10 magnitude. As the majority opinion in Hewitt notes, “[t]he dissent suggests alternate  
11 remedies the legislature may choose were we to invalidate the statute. Those remedies  
12 are no less available to the legislature by the extension of the statute to the excluded  
13 males should it decide to amend the law.” Hewitt, 294 Or at 53 n18. The same is true  
14 here. In other words, following a ruling mandating marriage equality for same-sex  
15 couples, the legislature would remain free to alter the institution of marriage, although,  
16 consistent with the equality mandate of the Oregon constitution, the legislature would be  
17 required to do so for both same-sex couples and different-sex couples.

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19 <sup>4</sup> To the extent that the State is concerned with uncertainty and disruption that  
20 may result from societal prejudice, the Court may not defer the constitutional guarantee  
21 of equal privileges and immunities to accommodate such prejudice. See, e.g., Palmore v.  
22 Sidoti, 466 US 429, 433 (1984) (“The [federal] Constitution cannot control such  
23 prejudices, but neither can it tolerate them. Private biases may be outside the reach of the  
24 law, but the law cannot, directly or indirectly, give them effect.”).

25 <sup>5</sup> For example, the State could easily revise marriage licenses and marriage  
26 certificates to provide for two “spouses” instead of a “husband” and a “wife.” Indeed, the  
State has demonstrated the ease with which it could do so in light of its revision of birth  
certificates to provide for two “parents” instead of a “mother” and a “father.” (See Stip II  
at ¶ 1.) Beyond such ministerial changes, no “disruption” would follow from a ruling  
mandating marriage equality for same-sex couples.

1 Finally, the State attempts to wrap its argument in separation-of-powers concerns.  
2 In doing so, however, the State succeeds only in generating such concerns. The  
3 constitutional role of the judiciary in this case is not “to provide the legal framework for a  
4 remedy that is crafted by the legislature in the first instance.” (Defs’ Mot for Summ J at  
5 16.) The constitutional role of the judiciary in this case is to provide a remedy for the  
6 constitutional violation here. The Court should not accede to the State’s suggestion that  
7 it abdicate its core function to the legislature. See State ex rel. Bushman v. Vandenberg,  
8 203 Or 326, 334-35, 280 P2d 344 (1955) (“Not only does Art. III, § 1 of the constitution  
9 prohibit the legislature from exercising the functions and powers of the judiciary, but  
10 under the principle of the separation of powers the legislature is likewise prohibited from  
11 ‘unduly burdening or interfering with the judicial department in its exercise  
12 thereof.’ \* \* \* ‘The judicial power thus conferred is generally held to include not merely  
13 that of deciding cases but also incidental powers necessary to the effective performance  
14 of that primary function.’”) (quotations omitted.)

15 Thus, under Oregon remedies law, there is only one permissible and appropriate  
16 remedy for the constitutional violation here – permitting same-sex couples to marry.

17 **Constitutional law.** Compounding its violation of Oregon remedies law, the  
18 State’s proposed legislative relief is constitutionally impermissible. The Court may not  
19 permit the legislature to exclude same-sex couples from the institution of marriage and  
20 relegate them to a “civil union” institution.

21 First and foremost, a “civil union” is not equal to a marriage as a matter of fact.  
22 The State has admitted that a marriage in and of itself confers social recognition upon the  
23 two people who enter into the marriage as well as their children. (Answer ¶ 5; see also  
24 Am Answer in Intervention ¶ 4.) A “civil union” does not confer comparable social  
25 recognition. See Opinion of the Justices, 802 NE2d at 580 (“If \* \* \* the proponents of  
26 the bill believe that no message is conveyed by eschewing the word ‘marriage’ and

1 replacing it with ‘civil union’ for same-sex ‘spouses,’ we doubt that the attempt to  
2 circumvent the court’s decision in Goodridge would be so purposeful.”). Thus, a “civil  
3 union” institution is not equal to the institution of marriage.<sup>6</sup>

4 But, even if a “civil union” did confer comparable social recognition, the fact that  
5 it is a “separate but equal” institution is enough to render it constitutionally infirm.

6 Article I, section 20 demands that such segregation be justified by a genuine difference  
7 between same-sex couples and different-sex couples. Tanner, 157 Or App at 523. There  
8 is no such justification. Indeed, there is no justification whatsoever. Segregation for its  
9 own sake is “palpably arbitrary” and therefore impermissible under any level of scrutiny.  
10 City of Klamath Falls v. Winters, 289 Or 757, 776, 619 P2d 217 (1980).

11 In constitutional jurisprudence, it is axiomatic that “separate but equal” is not  
12 equal because it “stigmatiz[es] members of the disfavored group as ‘innately inferior’ and  
13 therefore less worthy participants in the political community.” Heckler v. Mathews, 465  
14 US 728, 739 (1984). Most famously, in Brown v. Board of Educ., 347 US 483 (1954),  
15 the United States Supreme Court held that “separate educational facilities are inherently  
16 unequal.” Id. at 495 (emphasis added). The Court recognized the intrinsic harm of  
17 racially segregated educational facilities: “To separate [African-Americans] from others  
18 of similar age and qualifications solely because of their race generates a feeling of  
19 inferiority as to their status in the community that may affect their hearts and minds in a  
20 way unlikely ever to be undone.” Id. at 494. Similarly, in United States v. Virginia, 518  
21 US 515 (1996), the Court held unconstitutional the relegation of women to a “parallel”  
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23 <sup>6</sup> Because the State advocates for a remedy identical to the one in Vermont, the  
24 amicus brief filed in Opinions of the Justices that details the failings of the remedy in  
25 Vermont is instructive. It focuses on the fact that (1) civil unions face greater obstacles  
26 to portability, (2) couples joined in civil union are severely disadvantaged with respect to  
federal benefits, and (3) many private parties attach their own benefits to marriage as  
defined by statute. See  
[http://glad.org/marriage/Advisory\\_Opinion\\_Brief\\_Civil\\_Unions.pdf](http://glad.org/marriage/Advisory_Opinion_Brief_Civil_Unions.pdf).

1 military academy. Significantly, the Court fashioned its remedy by reference to the  
2 following fundamental principle:

3 “A remedial decree, this Court has said, must closely fit the  
4 constitutional violation; it must be shaped to place persons  
5 unconstitutionally denied an opportunity or advantage in  
6 “the position they would have occupied in the absence of  
7 [discrimination].” \* \* \* A proper remedy for an  
8 unconstitutional exclusion, we have explained, aims to  
9 “eliminate [so far as possible] the discriminatory effects of  
10 the past” and to “bar like discrimination in the future.”

11 Id. at 547 (quotations omitted). In light of this fundamental principle, the Court  
12 held that integration was the only appropriate remedy, noting that “[t]here is no reason to  
13 believe that the admission of women capable of all the activities required of VMI cadets  
14 would destroy the Institute rather than enhance its capacity to serve the ‘more perfect  
15 Union.’” Id. at 558. These are but a few of the celebrated cases that flatly reject the  
16 proposition that “separate but equal” is equal.

17 The constitutional imperative to redress the stigmatization of a disfavored class  
18 with a badge of inferiority that precludes full participation in civil life applies with equal  
19 force where lesbian and gay couples are the disfavored class. In Lawrence v. Texas, 123  
20 S Ct 2472 (2003), the United States Supreme Court held unconstitutional a law  
21 criminalizing same-sex intimate relationships. In doing so, the Court emphasized the  
22 “stigma” on lesbian and gay couples imposed by the law, which “demeaned the lives of  
23 homosexual persons” and denied them “dignity.” Id. at 2478, 2482. The Court noted  
24 that such stigma was “an invitation to subject homosexual persons to discrimination both  
25 in the public and the private spheres.” Id. at 2482. Such case law confirms that there is  
26 no exception to the axiom that “separate but equal” is not equal where lesbian and gay  
couples are concerned. See also Opinions of the Justices, 802 NE2d 565 (Mass 2004);  
Barbeau v. Attorney Gen. of Canada, 2003 BCCA 251 (British Columbia Court of  
Appeal); Halpern v. Toronto, 172 OAC 276 (2003) (Ontario Court of Appeal).

Oregon courts have made clear that “separate but equal” public accommodations for African-Americans are unacceptable in its legal tradition. King v. Greyhound Lines, Inc., 61 Or App 197, 656 P2d 349 (1982). Oregon courts have also made clear that “parallel” institutions for women are similarly unacceptable. Lahmann v. Grand Aerie of Fraternal Order of Eagles, 180 Or App 420, 43 P3d 1130 (2002). And yet the State has asked the Court to sanction a “separate but equal” institution for same-sex couples. This the Court cannot do under established Oregon law. Oregon remedies law does not permit the proposed process, and Oregon constitutional law does not permit the proposed outcome. Thus, there is only one permissible and appropriate remedy for the constitutional violation here – permitting same-sex couples to marry.

**D. The Court may issue a certifiable and appealable interlocutory ruling on the constitutional question without reaching the county authority question.<sup>7</sup>**

The State may attempt to argue that the Court may not issue a certifiable and appealable interlocutory ruling on the constitutional question (i.e., whether the State may exclude same-sex couples from marriage) without reaching the county authority question (i.e., whether the County may issue marriage licenses to same-sex couples). Any such argument must fail.

It matters neither how the Court decides the constitutional question nor how the Court remedies the constitutional violation. Under any scenario, the Court may issue a certifiable and appealable interlocutory ruling on the constitutional question without reaching the county authority question. Whether the County would continue to issue marriage licenses to same-sex couples following an interlocutory ruling on the

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<sup>7</sup> Plaintiffs have filed motions to preserve their ability to argue the county authority question in a manner consistent with the agreement reached by the parties to this action. (Pls’ R 21 E Mot to Strike and Mot for Stay or Extension of Time and Continuance Under ORCP 15 D and 47 F.)

1 constitutional question is speculative. Regardless, whether the County would have the  
2 authority to do so is an entirely separable question. Thus, there is no merit to the  
3 argument that the Court may not issue a certifiable and appealable interlocutory ruling on  
4 the constitutional question without reaching the county authority question.

### 5 III. CONCLUSION

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

10 DATED this 12th day of April, 2004.

11  
12 By:



13 Lynn R. Nakamoto

14 OSB #88087

(503) 295-3085

15 Cooperating Counsel for the ACLU

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## ATTORNEY CERTIFICATE OF SERVICE

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

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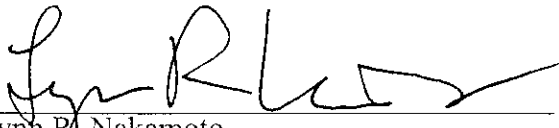
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DATED this 12th day of April, 2004.

  
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