

1
2
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
ENID LEFTON; IRENE FARRERA and NINA
KORICAN; WALTER FRANKEL and CURTIS
KIEFER; JULIE WILLIAMS and COLEEN
BELISLE; BASIC RIGHTS OREGON; and
AMERICAN CIVIL LIBERTIES UNION OF
OREGON,

Plaintiffs,

12 and

13
14 MULTNOMAH COUNTY,

Intervenor-Plaintiff,

15
16 vs.

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

22 Defendants,

23 and

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

26 Intervenor-Defendants.

No. 0403-03057

**PLAINTIFFS' COMBINED
REPLY IN SUPPORT OF THEIR
MOTION FOR PARTIAL
SUMMARY JUDGMENT**

1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6

- I. The exclusion of same-sex couples from marriage violates Article I, section 20.**
 - A. The State offers no meaningful counterargument.**
 - 1. Marriage is a privilege for purposes of Article I, section 20.**

- I. The exclusion of same-sex couples from marriage violates Article I, section 20.**
 - A. The State offers no meaningful counterargument.**
 - 1. Marriage is a privilege for purposes of Article I, section 20.**

1. **Marriage is a privilege for purposes of Article I, section 20.**

The State merely admonishes the Court to “carefully analyze whether there is a constitutionally-protected ‘privilege’ at issue in this case, and if so, [to] define the scope of that privilege in determining whether Oregon’s marriage laws violate Article I, section 20.” (Def’s Resp to Cross-Mots for Partial Summ J at 7-8.) No response is necessary.

Remedies law. Hewitt v. State Accident Ins. Fund Corp., 294 Or 33, 653 P2d 970 (1982), makes clear that, where there is a violation of Article I, section 20, a court may either extend or nullify the privilege at issue. It has no other option. See also Hale v. Port of Portland, 308 Or 508, 525, 783 P2d 506 (1989); Employment Div. v. Rogue Valley Youth for Christ, 307 Or 490, 497, 770 P2d 588 (1989).

1 The State’s attempt to distinguish Hewitt is disingenuous. In response to plaintiffs’
2 argument, the State vigorously protests that the extension of the privilege at issue in Hewitt
3 “does not mean that extending the privilege at issue is the required remedy in every Article I,
4 section 20 case.” (Defs’ Resp to Cross-Mots for Partial Summ J at 8 (emphasis in original).)
5 Plaintiffs, however, have never suggested that Hewitt requires a court to extend the privilege
6 at issue to remedy every Article I section 20 violation. Rather, plaintiffs have simply
7 reported what the State has willfully ignored: Hewitt requires a court either to extend or to
8 nullify the privilege at issue to remedy every Article I, section 20 violation. Hewitt, 294 Or
9 at 52. The State has cited no Oregon case law to the contrary.

10 In addition, the State describes the remedies question in Hewitt as “an ‘either/or’
11 choice: either males received the same workers’ compensation benefits that the State
12 afforded to females, or neither gender receive[d] those benefits.” (Defs’ Resp to Cross-Mots
13 for Partial Summ J at 8.) The State then asserts that the remedies question in this case is not
14 “a simple ‘either/or’ choice, comparable to the remedy at issue in Hewitt.” (Id. at 9.) The
15 State, however, fails to articulate a meaningful distinction. The remedies question in this
16 case is indeed an “either/or choice” comparable to the remedies question in Hewitt: Either
17 same-sex couples are permitted to marry to the same extent that different-sex couples are
18 permitted to marry, or neither same-sex couples nor different-sex couples are permitted to
19 marry.

20 It is irrelevant that, if confronted with a ruling that the exclusion of same-sex couples
21 from marriage is unconstitutional, the legislature might respond by “eliminat[ing] or
22 reduc[ing] the legal benefits currently provided to married persons,” “extending some
23 benefits to same-sex couples and eliminating other benefits altogether,” or adopting a
24 “Vermont ‘civil union’ statute.” (Defs’ Memo of Law in Support of Mot for Summ J at 19.)
25 It is always the case that, if confronted with a ruling that the exclusion of a class from a
26 privilege is unconstitutional, the legislature might respond in various ways. Indeed, it is a

1 consideration for which the Oregon Supreme Court expressly accounted in Hewitt: “The
2 dissent suggests alternate remedies the legislature may choose were we to invalidate the
3 statute. Those remedies are no less available to the legislature by the extension of the statute
4 to the excluded males should it decide to amend the law.” Hewitt, 294 Or at 53 n18; see also
5 id. at 55-56 (Peterson, J, dissenting) (enumerating various ways in which the legislature
6 might have responded). Thus, in Hewitt, it was irrelevant that the legislature might have
7 responded by eliminating or reducing the survivor benefits at issue, or by adopting a scheme
8 in which surviving male partners were paid in cash but female surviving partners were paid
9 with food, clothing, and shelter vouchers of purportedly “equal” value. The same is true
10 here. Although the legislature might respond to a ruling in this case by eliminating or
11 reducing benefits conditioned on marriage, or by creating a system in which different-sex
12 couples enter into a marriage but same-sex couples enter into a “civil union” or some other
13 institution of purportedly “equal” benefit, such hypothetical legislative responses do not
14 permit the Court to disregard Oregon remedies law.

15 The State does not dispute that nullifying Oregon marriage laws for different-sex
16 couples would be an inappropriate remedy.¹ (See Defs’ Memo of Law in Support of Mot for
17 Summ J at 18-19.) It follows that extending Oregon marriage laws to same-sex couples
18 would be the appropriate remedy.

20 ¹ The State’s conclusion is not undermined by the fact that “[t]here is no evidence in
21 any legislative record indicating what the legislature would have done if it [were] known that
22 the policy choice in defining ‘marriage’ * * * resulted in an unconstitutional denial of
23 privileges to same-sex couples.” (Defs’ Resp to Cross-Mots for Partial Summ J at 8.) Hewitt
24 is instructive in this regard, too. In Hewitt, the Court extended the privilege at issue “in the
25 very manner that the legislature rejected in 1973.” Hewitt, 294 Or at 55 (Peterson, J,
26 dissenting). It did so “because even though the classification [was] unconstitutional the
underlying purpose of the statute remain[ed] valid.” Id. at 53. Here, extending Oregon
marriage laws to same-sex couples does not defeat their purpose. To the contrary, it
advances their purpose. (See Intervenor-Defs’ Memo of Law in Support of Mot for Partial
Summ J at 9 (explaining that the framers of the Oregon constitution themselves “assumed
that the public purpose of marriage had to do with protecting and preserving the family
unit”).)

1 **Constitutional law.** Moreover, Oregon constitutional law makes clear that the
2 legislature may not create a system in which different-sex couples enter into a marriage but
3 same-sex couples enter into a “civil union” or some other institution. It follows that the
4 Court may not fashion a remedy that permits the legislature to do so.

5 The State’s only response is that the Court cannot assess the constitutionality of a
6 system in which different-sex couples enter into a marriage but same-sex couples enter into a
7 “civil union” or some other institution until the system is created. This is incorrect. The
8 State falsely presumes that such a system could ever be constitutional. To the contrary, such
9 a system could never be constitutional.

10 A “civil union” is not equal to a marriage as a matter of fact because it does not
11 provide all of the tangible and intangible benefits of a marriage.² Perhaps most significantly,
12 a marriage provides a ready means by which others may recognize a couple and their
13 children as a family unit, but a “civil union” does not. (See Answer ¶ 5; Am Answer in
14 Intervention ¶ 4.) In other words, a civil union is less universally honored and therefore less
15 socially valuable than a marriage.

16 Moreover, even if a “civil union” were to provide all of the tangible and intangible
17 benefits of a marriage, it would constitute a “separate but equal” institution – anathema in
18 constitutional jurisprudence. The Court need not wait to see “whether remedial legislation
19 might be unconstitutionally ‘stigmatizing.’” (Defs’ Resp to Cross-Mots for Partial Summ J
20 at 10.) Such legislation is always unconstitutionally stigmatizing. Brown v. Board of Educ.,
21 347 US 483, 495 (1954) (holding that separate institutions are “inherently unequal”)
22 (emphasis added); see also Opinions of the Justices, 802 NE2d 565 (Mass 2004) (holding
23

24 ² See http://glad.org/marriage/Advisory_Opinion_Brief_Civil_Unions.pdf (amicus
25 brief filed in Opinions of the Justices 802 NE2d 565 (Mass 2004), detailing the failings of the
26 remedy that was fashioned in Baker v. State, 744 A2d 864 (Vt 1999), e.g., “civil unions” face
greater obstacles to portability, couples joined in “civil unions” are disadvantaged with
respect to federal benefits, many private parties attach their own benefits to marriage as
defined by statute).

1 that a “separate but equal” institution for same-sex couples is unconstitutional); Barbeau v.
2 Attorney General of Canada, 2003 BCCA 251 (British Columbia Court of Appeal) (same);
3 Halpern v. Toronto, 172 OAC 276 (2003) (Ontario Court of Appeal) (same); State v. Linde,
4 179 Or App 553, 556, 41 P3d 440 (2002) (recognizing stigma as an injury).

5 Accordingly, the Court may not fashion a remedy that permits the legislature to create
6 a system in which different-sex couples enter into a marriage but same-sex couples enter into
7 a “civil union” or some other institution.

8 **B. Intervenor-defendants offer no meaningful counterargument.**

9 **1. The judicial branch has an essential role in ensuring equality of**
10 **privileges and immunities for disfavored classes.**

11 A common thread running throughout intervenors-defendants’ argument is their
12 assertion that the judicial branch has no role in ensuring equality of privileges and
13 immunities for disfavored classes. Intervenor-defendants assert that equality of privileges
14 and immunities for disfavored classes may be ensured only through long and arduous
15 majoritarian processes. In effect, they assert that, where disfavored classes experience
16 discrimination at the hands of their own government, they must wait until times change to the
17 point that they are no longer disfavored before they may seek judicial recourse (recourse for
18 which they will no longer have any need). Intervenor-defendants’ assertion disregards the
19 most basic concepts of law and government.

20 Article I, section 20 is intended as a check on the tyranny of minorities by the
21 majority. The very purpose of Article I, section 20 is to ensure that disfavored classes may
22 seek judicial recourse where majoritarian processes fail to ensure equality of privileges and
23 immunities. Statements of the framers of the Oregon constitution confirm this purpose:

24 “Delazon Smith argued in favor of the bill: ‘The history of the
25 world teaches us that the majority may become fractious in
26 their spirit and trample upon the rights of the minority; that
through the madness of party spirit they may infringe upon the
rights of individual citizens. Then, if the individual is to be
protected in this point in which he is endangered, there must be

1 restrictions put into the constitution. The people must say we
2 will limit ourselves in certain principles.””

3 David Schuman, The Creation of the Oregon Constitution, 74 Or L Rev 611, 625 (1995)
4 (quotation omitted). By suggesting that equality of privileges and immunities for disfavored
5 classes may be ensured only through long and arduous majoritarian processes, intervenors-
6 defendants turn Article I, section 20 on its head.

7 Moreover, under the Oregon constitution, the role of the judicial branch is to serve as
8 a check on the other branches of government. See Art. III, § 1 (providing for separation of
9 powers among the branches of government). Indeed, it is where majoritarian processes fail
10 to ensure equality of privileges and immunities for disfavored classes that the judicial branch
11 performs one its most important functions. If, as intervenors-defendants suggest, protecting
12 the rights of minorities constitutes a “revolution,” then it is a “revolution” that the judicial
13 branch by its very nature effects every day. (Cf. Intervenor-Defs’ Resp to Mots for Partial
14 Summ J at 4.)

15 Intervenor-defendants’ assertion is no more than disingenuous rhetoric. The judicial
16 branch has an essential role in ensuring equality of privileges and immunities for disfavored
17 classes.

18 **2. Marriage is a privilege for purposes of Article I, section 20.**

19 According to the Oregon Supreme Court, “[w]henever a person is denied some
20 advantage to which he or she would be entitled but for a choice made by a government
21 authority, article I, section 20 requires that the government decision to offer or deny the
22 advantage be made by permissible criteria and consistently applied.” City of Salem v.
23 Bruner, 299 Or 262, 268-69, 702 P2d 70 (1985) (quotation omitted) (emphasis added). Here,
24 plaintiffs are denied significant advantage because they are not permitted to marry.
25 Therefore, they may seek judicial recourse under Article I, section 20.
26

Intervenors-defendants do not contest that plaintiffs are denied hundreds of rights, responsibilities, benefits, and obligations because they are not permitted to marry. (See Intervenors-Defs' Resp to Mots for Partial Summ J at 10.) Nonetheless, intervenors-defendants urge the Court to turn a blind eye to this significant advantage merely because these rights, responsibilities, benefits, and obligations are codified in a chapter of the Oregon statutory code other than chapter 106. But, regardless of where these rights, responsibilities, benefits, and obligations are codified, the fact remains that plaintiffs are denied this significant advantage because they are not permitted to marry. This is enough to trigger an Article I, section 20 analysis.³

In addition, plaintiffs are denied the most ready means by which others may recognize them and their children as family units because they are not permitted to marry.⁴ (See Am Answer in Intervention ¶ 4; see also Opinion of the Justices, 802 NE2d at 580 (“If * * * the proponents of the bill believe that no message is conveyed by eschewing the word ‘marriage’ and replacing it with ‘civil union’ for same-sex ‘spouses,’ we doubt that the attempt to circumvent the court’s decision in Goodridge would be so purposeful.”).) This, too, is enough to trigger an Article I, section 20 analysis.⁵

³ Moreover, to trigger an Article I, section 20 analysis, it does not matter how plaintiffs redress the denial of some advantage, e.g., benefit by benefit, or all at once through a challenge to the denial of marriage licenses. It matters only whether plaintiffs are denied some advantage.

⁴ A ready means by which others may recognize a couple and their children as a family unit is not the same thing as “the general acceptance of homosexuals in society.” (Cf. Intervenors-Defs' Resp to Mots for Partial Summ J at 10.) For example, the ready recognition of one spouse as a family member of the other spouse for purposes of hospital visitation is not the same thing as general approval of the relationship between the spouses. (See, e.g., Frankel Decl ¶ 9.)

⁵ Intervenors-defendants confuse the purpose that the Oregon marriage statutes serve with the advantage that they confer, the latter being the touchstone in assessing whether they constitute a privilege. Still, there is no doubt that a ready means by which others may recognize a couple and their children as a family unit is a manifestation of the purpose that the Oregon marriage statutes serve. (See Intervenors-Defs' Memo of Law in Support of Mot for Partial Summ J at 9 (explaining that the framers of the Oregon constitution themselves “assumed that the public purpose of marriage had to do with protecting and preserving the family unit”).)

1 Because plaintiffs are denied significant advantage because they are not permitted to
2 marry, they may seek judicial recourse under Article I, section 20.

3 **3. The exclusion of same-sex couples from marriage discriminates**
4 **against individuals based on their sexual orientation.**

5 Intervenor-defendants reiterate their assertion that, because the Oregon marriage
6 statutes do not permit individuals to marry “same-sex” partners instead of “lesbian or gay”
7 partners, they do not discriminate against individuals based on their sexual orientation.
8 Plaintiffs have already debunked this sophistry. (Pls’ Opp’n to Intervenor-Defs’ Mot for
9 Partial Summ J at 4-6.)

10 Regardless, it is dispositive that intervenor-defendants do not dispute that the Oregon
11 marriage statutes have a disparate impact on lesbian and gay individuals. (See Intervenor-
12 Defs’ Resp to Mots for Partial Summ J at 15; Intervenor-Defs’ Memo of Law in Support of
13 Mot for Partial Summ J at 25-28.) This is so because, contrary to intervenor-defendants’
14 assertions, Article I, section 20 jurisprudence does not require plaintiffs to show that the
15 disparate impact on lesbian and gay individuals is intentional:

16 “According to OHSU, the fact that such a facially neutral
17 classification has the unintended side effect of discriminating
18 against homosexual couples who cannot marry is not
19 actionable under Article I, section 20. We are not persuaded
20 by the asserted defense. Article I, section 20, does not prohibit
21 only intentional discrimination. * * * OHSU has taken action
22 with no apparent intention to treat disparately any true class of
citizens. Nevertheless, its actions have the undeniable effect of
doing just that. As in Zockert, OHSU’s intentions in this case
are not relevant. What is relevant is the extent to which
privileges or immunities are not made available to all citizens
on equal terms.”

23 Tanner v. Oregon Health Scis. Univ., 157 Or App 502, 524-25, 971 P2d 435 (1998) (citing
24 Zockert v. Fanning, 310 Or 514, 800 P2d 773 (1990)).

25 Thus, under any analysis, the exclusion of same-sex couples from marriage
26 discriminates against individuals based on their sexual orientation.

1 4. **The exclusion of same-sex couples from marriage discriminates**
2 **against individuals based on their gender.**

3 Intervenors-defendants vigorously protest that, as a matter of sound analysis, the
4 Oregon marriage statutes do not discriminate against individuals based on their gender. In
5 doing so, however, intervenors-defendants succeed only in confirming that the opposite is
6 true.

7 Intervenors-defendants emphasize that it is proper to compare similarly situated
8 people when “look[ing] at the discrimination in the statutory scheme from ‘both sides’ of the
9 equation.” (Intervenors-Defs’ Resp to Mots for Summ J at 12.) Thus, intervenors-
10 defendants note that, in Hewitt, it was proper to compare surviving male partners with
11 surviving female partners, and to compare deceased female partners with deceased male
12 partners. Each comparison yielded a disparity based on gender. Here, it is similarly proper
13 to compare similarly situated people when “looking at the discrimination from both sides of
14 the equation.” In other words, here, it is proper to compare males who want to marry
15 females, with females who want to marry females, and to compare females who want to
16 marry males, with males who want to marry males. Each comparison yields a disparity
17 based on gender. Thus, intervenors-defendants are incorrect when they assert that
18 “[p]laintiffs are, and remain, free to marry irrespective of their own gender.” (Id. at 14.)
19 (emphasis in original). Whether plaintiffs can marry their partners depends entirely on
20 whether plaintiffs are male or female.⁶

21
22
23 ⁶ The fact that the exclusion of same-sex couples from marriage discriminates against
24 couples as well as individuals does not change the analysis. If the State were to prohibit two
25 individuals of the same race (but not comparable pairs of a different race) or two individuals
26 of the same height (but not comparable pairs of a different height) to associate with one
 another in a particular way, the prohibition would discriminate against each pair as well as
 each individual. And yet there is no doubt that an Article I, section 20 claim would lie. The
 same is true here, where the State prohibits two individuals of the same sex to associate with
 one another in a particular way.

Thus, intervenors-defendants' analysis only confirms that the exclusion of same-sex couples from marriage discriminates against individuals based on their gender.⁷

5. Because intervenors-defendants' argument continues to assume an incorrect level of scrutiny, it is inapposite to the analysis in this case.

Both sexual orientation discrimination and gender identity discrimination merit "a particularly exacting scrutiny."⁸ Tanner, 157 Or App at 522; Hewitt, 294 Or at 45.

⁷ Plaintiffs have already rebutted intervenors-defendants' assertion that, to challenge restrictions on marriage based on sexual orientation and gender, plaintiffs must also challenge restrictions on marriage not based on sexual orientation and gender. (Pls' Opp'n to Intervenor-Defs' Mot for Partial Summ J at 8 n5.)

⁸ Although Tanner holds that sexual orientation is immutable as a matter of law, intervenors-defendants have raised questions about the definition of the term "immutable." In addition to Tanner (which plaintiffs have already briefed), federal case law is instructive in this regard.

Although the United States Supreme Court has mentioned immutability in some of its level of scrutiny jurisprudence, it has never held that only classes of people with immutable traits can be deemed suspect. See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc., 473 US 432, 442 n10 (1985) (casting doubt on immutability theory); *id.* at 440-41 (setting forth the defining characteristics of suspect classes without mentioning immutability); Massachusetts Bd. of Retirement v. Murgia, 427 US 307, 313 (1976) (same); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 US 1, 28 (1973) (same); Lyng v. Castillo, 477 US 635, 638 (1986) (immutability is one of several disjunctive alternatives).

Regardless, immutability refers to neither a genetic trait nor an absolute inability to change a trait. Illegitimate children can be adopted; aliens can be naturalized; and people can change their sex. Rather, immutability refers to a characteristic that is "beyond the individual's control." Cleburne, 473 U.S. at 441 (explaining why illegitimacy is a suspect classification); see also Hernandez-Montiel v. INS, 225 F3d 1084, 1092 (9th Cir. 2000) ("immutable" means that the trait that defines the class "either cannot change, or should not be required to change because it is fundamental to * * * individual identities or consciences").

Sexual orientation is such a characteristic. Although the origins of sexual desire are still unknown, there is consensus that a person's sexual orientation, homosexual or heterosexual, cannot be changed either by a simple decision-making process or by medical intervention. See Surgeon General's Call to Action to Promote Sexual Health and Responsible Sexual Behavior (2001) ("There is no valid scientific evidence that sexual orientation can be changed."); http://www.psych.org/public_info/gaylesbianbisexualissues22701.pdf (because there is "no published scientific evidence supporting the efficacy of 'reparative therapy' as a treatment to change one's sexual orientation," the American Psychiatric Association "opposes any psychiatric treatment, such as 'conversion' or 'reparative' therapy, which is based upon the assumption that homosexuality per se is a mental disorder, or based upon a prior assumption that the patient should change his/her sexual orientation"); <http://glad.org/marriage/>

1 Intervenor-defendants, however, assume rational basis review throughout their argument.
2 (See, e.g., Intervenor-Defs' Resp to Mots for Partial Summ J at 7 (Plaintiffs "ignore the
3 prerogative of a rational, unbiased Legislature.") (footnote omitted); *id.* ("[T]hese are all
4 choices properly left to the Legislature, rationally based on specific biological difference
5 between same-sex and opposite sex couples."); *id.* at 8 (State laws, policies, and practices
6 "[have] nothing to do with whether the Legislature can legitimately think it best to codify
7 heterosexual unions as the optimal child rearing environment in the first instance.") (footnote
8 omitted).) Thus, their argument is inapposite to the analysis in this case.

9 Intervenor-defendants' misapplication of rational basis review flows from its
10 misunderstanding of *Hewitt*. Intervenor-defendants assert that "[t]he *Hewitt* test for
11 justifying a law based on 'biological differences' is whether the Legislature could have had
12 any valid, non-prejudicial reason for enacting the law." (*Id.* at 7 (citation and footnote
13 omitted) (emphasis added).) This is incorrect. *Hewitt* requires intervenor-defendants to
14 show that the State actually has a valid, non-prejudicial basis for excluding lesbian and gay
15 couples from marriage:⁹ "[W]hen classifications are made on the basis of gender, they are,
16 like racial, alienage and nationality classifications, inherently suspect. The suspicion may be
17 overcome if the reason for the classification reflects specific biological differences between
18 men and women." *Hewitt*, 294 Or at 46 (footnotes omitted) (emphasis added).

19
20
21 Psychology Professionals Brief.pdf (brief filed in *Goodridge v. Department of Public*
22 *Health*, 798 NE2d 941 (Mass 2003), by amici Massachusetts Psychiatric Society, et al.); see
23 also *Watkins v. United States Army*, 875 F2d 699, 726 (9th Cir. 1989) (Norris, J, concurring)
24 (concluding that the theoretical mutability of sexual orientation does not present an obstacle
25 to recognizing lesbian and gay individuals as a suspect class after posing the following
26 thought experiment: "Would heterosexuals living in a city that passed an ordinance
burdening those who engaged in or desired to engage in sex with persons of the opposite sex
find it easy not only to abstain from heterosexual activity but also to shift the object of their
sexual desires to persons of the same sex?") (emphasis in original).

⁹ Curiously, intervenor-defendants speak of the legislative branch and the executive
branch as if they were not components of the same entity, i.e., the State. In determining the
motivations of the State, it is appropriate to examine the actions of the State as a whole.

1 Here, intervenors-defendants cannot show that the exclusion of same-sex couples
2 from marriage even rationally (let alone substantially) furthers an actual interest of the State
3 concerning either procreation or parenting.

4 **Procreation.** Even if the State has an actual interest in ensuring that couples bring
5 children into their families via procreative sexual intercourse, it is not even rationally (let
6 alone substantially) furthered by the exclusion of same-sex couples from marriage.

7 Moreover, the State's own laws, policies, and practices confirm that, in actuality, its
8 interest in ensuring that couples bring children into their families through procreative sexual
9 intercourse is no greater than its interest in ensuring that couples bring children into their
10 families by other means (e.g., artificial insemination, adoption). (See Pls' Opp'n to
11 Intervenor-Defs' Mot for Partial Summ J at 11-13.) Because same-sex couples bring
12 children into their families by means other than procreative sexual intercourse to the same
13 extent that different-sex couples do so, the exclusion of same-sex couples from marriage does
14 not reflect an actual interest of the State.

15 **Parenting.** Intervenor-defendants have failed to show that the State has an actual
16 interest in discouraging same-sex couples from bringing children into their families. Indeed,
17 the State's laws, policies, and practices confirm that, in actuality, it has no such interest, and
18 in fact actively endorses parenting by same-sex couples to the same extent that it endorses
19 parenting by different-sex couples. (See Pls' Opp'n to Intervenor-Defs' Mot for Partial
20 Summ J at 14-15.) Because, in actuality, the State has no interest in discouraging same-sex
21 couples from bringing children into their families, the exclusion of same-sex couples from
22 marriage does not reflect an actual interest of the State.

1 **Immutability.** Intervenor-defendants have submitted Dr. Satinover's second
2 affidavit in support of their assertion that sexual orientation is not immutable.¹⁰ Plaintiffs
3 dispute the truth of Dr. Satinover's second affidavit. (See Berlin Decl; see also Li Decl ¶ 4;
4 Warsaw Decl ¶ 4; Burke Decl ¶ 4; Potter Decl ¶ 4; Vetri Decl ¶ 5; Frankel Decl ¶ 4;
5 Williams Decl ¶ 3.) The Court, however, need not reach the issue because, under Tanner,
6 sexual orientation is immutable as a matter of law, and because there is simply no link
7 between the mutability of sexual orientation and the exclusion of same-sex couples from
8 marriage.

9 Should the Court nonetheless decide to consider Dr. Satinover's second affidavit, the
10 expert declaration submitted by plaintiffs in rebuttal would create a genuine dispute of
11 material fact that would defeat summary judgment. (See Berlin Decl.) Even under rational
12 basis review, plaintiffs must be afforded an opportunity to disprove the proffered basis for
13 excluding lesbian and gay couples from marriage (to the extent that it is relevant to the
14 analysis, that is). Thus, should the Court decide to consider Dr. Satinover's second affidavit,
15 plaintiffs would respectfully request to move to disqualify Dr. Satinover, if appropriate, and
16 to participate in an evidentiary hearing at which the experts of all parties to this action may
17 be heard. Plaintiffs submit, however, that none of this is necessary in light of Tanner, and in
18 light of the absence of any link between the mutability of sexual orientation and the
19 exclusion of same-sex couples from marriage.

20 Plaintiffs note that, throughout his second affidavit, Dr. Satinover also misrepresents
21 facts concerning HIV and AIDS, including the demographics of the infected population.
22 (See e.g., Second Satinover Aff ¶ 13 (AIDS is "tightly constrained to the young, gay male
23 community.")) Plaintiffs dispute the truth of Dr. Satinover's opinions concerning HIV and
24

25 ¹⁰ Dr. Satinover's second affidavit notes that he is "directing the International Center
26 for Quantitative Analysis, a joint project of the Alliance Defense Fund, the Marriage Law
Project, the Heritage Foundation, and Columbus School of Law," entities which, according to
their websites, are stridently opposed to marriage equality for same-sex couples, primarily for
religious reasons. (Second Satinover Aff ¶ 3.)

1 AIDS. Given the 48-hour window in which they were required to respond, however,
2 plaintiffs were unable to retain an expert to submit a rebuttal declaration. Should the Court
3 decide to consider Dr. Satinover's opinions concerning HIV and AIDS, plaintiffs would
4 respectfully request the opportunity to retain an expert to submit a rebuttal declaration, to
5 move to disqualify Dr. Satinover, if appropriate, and to participate in an evidentiary hearing
6 at which the experts of all parties to this action may be heard.

7 For all of the foregoing reasons, the exclusion of same-sex couples from marriage
8 violates Article I, section 20.

9 **II. The Court's ruling on plaintiffs' First Claim for Relief will determine the**
10 **constitutional question in its entirety, and certifying that there is no just reason**
11 **for delay will permit an effective appeal.**

12 **A. The constitutional issue does arise in plaintiffs' second through fourth**
13 **claims for relief, but in the context of the authority of Multnomah County**
14 **to give marriage licenses to same-sex couples in the face of Oregon's**
15 **statutory code regarding marriage.**

16 The State defendants argue that the constitutional issue is common to all of plaintiffs'
17 claims, and so implies that the State is entitled to seek summary judgment on all of plaintiffs'
18 claims at once and the Court should rule on all of them now. (Defs' Resp at 3.) However,
19 plaintiffs' second through fourth claims for relief implicate the County's authority to issue
20 marriage licenses to same-sex couples, and it is only in that context that the
21 unconstitutionality of ORS 106.010 comes into play in those claims.

22 Plaintiffs' Second Claim for Relief challenges the State's non-recognition of the
23 married plaintiffs' marriages at the State Registrar's office. The State Registrar contends that
24 the same-sex couples do not have marriage records from Multnomah County that must be
25 registered because the statutes do not allow issuance of marriage licenses to same-sex
26 couples. The State's position is that, regardless of the unconstitutionality of the statutes, the
mere fact of the existence of those statutes means that Multnomah County was not entitled to
issue licenses to same-sex couples.

1 Plaintiffs' Third Claim for Relief makes the same challenge under the Administrative
2 Procedures Act, except couching it in terms of review of administrative orders. The orders
3 challenged are the State Registrar's March 23, 2004 letters to the married couples stating her
4 reasons for refusing to register their marriage records. Likewise, the County's authority to
5 issue licenses when a statute regarding marriage between men and women was still in effect
6 comes into play.

7 Plaintiffs' Fourth Claim for Relief makes the same challenge to the State Registrar's
8 refusal to perform a duty to register marriage records, but in the alternative to all other
9 claims. The relief sought in that claim is an alternative writ of mandamus and, ultimately, a
10 judgment that would require registration of the marriages of same-sex couples, including the
11 married plaintiffs. Once again, the County's authority to act in the face of a statute defining
12 marriages to be between men and women comes to the fore.¹¹

13 Thus, these claims are less likely to purely address the constitutionality of
14 ORS 106.010 and are not the appropriate vehicles for a final ruling on the constitutional
15 question that is suitable for immediate appeal. Rather, a ruling on plaintiffs' First Claim for
16 Relief, which raises solely the constitutional issue, will permit a final judgment for appeal
17 under ORCP 67 B.

18 **B. This Court can declare the rights of the parties without reference to the**
19 **County's authority to determine the constitutionality of its own practices**
20 **with respect to issuance of marriage licenses.**

21 By ruling on plaintiffs' First Claim for Relief, this Court can fully declare the rights
22 of the parties – including an appropriate remedy – without reference to the County authority
23 issue. Under Oregon law, the County authority issue, i.e., whether a county may issue
24 marriage licenses despite ORS 106.010 if it determines for itself that the statute is

25 ¹¹ Plaintiffs reserve their right to brief the issues raised as to each of these claims,
26 including the County authority issue, other parties' defenses, and counterclaims regarding the
County authority issue, at an appropriate date.

1 unconstitutional, is separate from the constitutional remedy in this case. None of the State's
2 arguments regarding remedies (Defs' Resp at 3-4) demand otherwise.

3 **1. The alternative remedies for a constitutional violation supplied by**
4 **Hewitt provide full resolution of the controversy.**

5 As plaintiffs have noted (Pls' Mem in Support of Summ J at 36-37), Hewitt v. State
6 Accident Ins. Fund Corp., 294 Or 33, 653 P2d 970 (1982), supplies the controlling Oregon
7 law on the applicable remedy in this case. Under Hewitt, "[w]here a statute is defective
8 because of underinclusion there exist two remedial alternatives: a court may either declare
9 [the statute] a nullity and order that its benefits not extend to the class that the legislature
10 intended to benefit, or it may extend the coverage of the statute to include those who are
11 aggrieved by exclusion." 294 Or at 52. Neither alternative requires determining the
12 County's authority to issue marriage licenses to lesbian and gay couples while an Oregon law
13 providing that marriage is a civil contract between men and women is still on the books.

14 On its way towards urging this Court to disregard Hewitt, the State argues that Hewitt
15 does not require the Court to extend the privilege of marriage to same-sex couples. (Defs'
16 Resp at 8.) Of course, that is a logical truth given the very terms of Hewitt's holding, but the
17 argument is of no moment. In fact, as plaintiffs acknowledge, the Court has a choice under
18 Hewitt: extension of the privilege on equal terms or nullification of the statute and
19 withdrawal of the privilege on equal terms. Hewitt, 294 Or at 52. However, as plaintiffs also
20 have noted (Pls' Mem in Support of Summ J at 37-38; Pls' Opp to Defs' Mot for Summ J at
21 8-9), the only other remedy permitted by Hewitt – statutory nullification and denial of civil
22 marriage to all in Oregon – would not comport with the salutary purpose of civil marriages.
23 Not two weeks ago, the State itself admitted in this action that judicial nullification is "not an
24 acceptable remedy because that would mean that nobody could get a marriage license in
25 Oregon until the legislature acts." (Defs' Mot for Summ J at 18-19.) The State, then, is left
26 with arguing that the Court must discard Hewitt in favor of the approach the Vermont

1 Supreme Court took in Baker v. State, 744 A.2d 864 (Vt 1999), without offering any credible
2 Oregon authority for that proposition.

3 The permitted remedies under Hewitt plainly do address whether same-sex couples
4 may get licenses to marry, contrary to the State's argument. (Defs' Resp at 4.) And, as the
5 State recognizes by citing Alto v. State Fire Marshall, 319 Or 382, 876 P2d 774 (1994), state
6 agencies ought to follow the law and recognize the marriages of same-sex couples should the
7 Court declare a constitutional violation and extend the privilege of marriage to same-sex
8 couples, without any injunction being entered against them. See Burke v. Children's
9 Services Div., 288 Or 533, 548, 607 P2d 141 (1980) (in this case, which the Alto court relied
10 on for an observation that an injunction was unnecessary, the Supreme Court held that the
11 trial court's injunction was not needed, and that it was presumed that the state agency would
12 follow the law as the court declared it). Obviously, the effect of such a declaration on the
13 behavior of Oregon counties should likewise be marked, for at least two reasons. First,
14 because the State presumably will follow the law as declared by Oregon courts, counties that
15 currently are not issuing marriage licenses to same-sex couples because of the existence of
16 the statute or because of the actions of state officials or both, (see section III.D, *infra*), should
17 be able to determine for themselves that they too should follow the law as declared by
18 Oregon courts. Second, the counties will have a significant incentive do so; counties that
19 ignore the law will subject themselves to suit by lesbian and gay couples denied marriage
20 licenses on equal terms. Thus, the State's asserted concern about uncertain or insufficient
21 guidance for the state's agencies and the counties that issue licenses (Defs' Resp at 4) is, to
22 say the least, unwarranted.

23 **2. Judgment on all claims is not needed for effective appeal under**
24 **ORCP 67 B.**

25 The State next asserts that jurisdictional problems in the appellate courts lie ahead for
26 any judgment entered on the First Claim for Relief under ORCP 67 B. (Defs' Resp at 4-5.)

1 The State suggests that a judgment on the claim will not fully adjudicate one claim or the
2 interests of one party as required by Rule 67 B because plaintiffs “apparently seek a
3 declaration that they are entitled to receive marriage licenses from counties that are not
4 parties to this proceeding.” (Defs’ Resp at 5.) First of all, the declaratory relief sought by
5 plaintiffs is actually that “the failure of the Oregon statutory code to permit marriages of
6 same-sex couples violates Article I, section 20 of the Oregon constitution.”¹² (Am Compl.
7 at 32.) Moreover, plaintiffs appropriately seek relief from the State on its statute. That 35
8 out of 36 Oregon counties are not issuing marriage licenses to same-sex couples is directly
9 attributable to the State’s statute and/or the conduct of state officials. (See section III.D,
10 *infra*.) The fact that the State did not allege that plaintiffs failed to join necessary parties or
11 so move in their motion for summary judgment also reflects that Oregon’s counties are not
12 necessary parties for plaintiffs to receive the declaration they seek regarding the
13 unconstitutionality of the state marriage statute.

14 The State also argues that “an appellate court could find that the court lacked subject
15 matter jurisdiction to decide only the declaratory relief claim because the APA provides the
16 exclusive remedy for at least some of the plaintiff couples.” Even were the State correct that
17 the married couples’ only possible viable claim is their third claim for relief challenging the
18 non-registration of their marriage records under the APA, and plaintiffs do not concede that
19 is so, this court has subject matter jurisdiction over the First Claim for Relief by virtue of the
20 unmarried plaintiffs who seek declaratory relief, none of whom interacted with a state agency
21 in regard to the marriage law. Unquestionably, there could be a full (and therefore certifiable
22 and appealable) adjudication of the First Claim for Relief as to these parties.

23
24
25 ¹² The fact that plaintiffs seek a specific declaration regarding the statute’s
26 unconstitutionality and not just a declaration that they are entitled to judgment in their favor
on their first claim for relief distinguishes the case of Burks v. Lane County, 72 Or App 275,
695 P2d 1373 (1985), which the State relies on to caution that a judgment in this case must
declare the rights of the parties. (See Defs Resp at 3, n 5.)

1 **3. A Rule 67 B judgment on plaintiffs' First Claim for Relief will**
2 **serve the public interest.**

3 Ultimately, plaintiffs seek to promote an appealable judgment on their First Claim for Relief
4 that squarely and directly addresses the constitutionality of excluding same-sex couples from
5 the privilege of marriage in Oregon under Article 1, section 20 of the constitution. Plaintiffs
6 thought that is what the State wanted as well. (See Stip Facts Ex 13.) The County authority
7 issue clouds the constitutional question, and the State's suggestion that the Court adjudicate
8 all claims and counterclaims before entering a final judgment for appeal (Defs' Resp at 5-6)
9 seems contrary to the State's demand for expedited briefing and consideration in this case
10 and to the public interest in certainty on the marriage issue in that it will delay the time for
11 appellate review of the constitutional question.

12 A ruling on plaintiffs' First Claim for Relief – without tying in the County authority
13 issue and without requiring adjudication of all of the other claims and counterclaims – will
14 fully determine the constitutional issue squarely and will enable the Court to enter a Rule 67
15 B judgment that is immediately appealable.

16 **III. The individual plaintiffs have standing to bring their claim under the Uniform**
17 **Declaratory Judgments Act.¹³**

18 The State defendants acknowledge that the “nine gay and lesbian couples named as
19 plaintiffs are directly affected by current state law” and concede that the individual plaintiffs
20 have standing. (Defs' Mem in Support of Summ J at 7, n 34.) Although intervenors-
21 defendants did not raise plaintiffs' standing as a problem in their answer, intervenors-
22 defendants have asserted in their response brief, without analysis and without citation to
23 authority, an argument entitled, “Plaintiffs Have No Standing to Seek Relief Based on Their
24 Desire for Social Acceptance and Amorphous Sense of Security.” (Intervenors-Defs Resp at
25 30-31.) Intervenors-defendants contend that plaintiffs' interests in the litigation are, like

26 ¹³ Plaintiffs reserve their right to address the standing of intervenors-defendants to
 bring counterclaims at an appropriate date.

1 intervenors-defendants’ own interests in this litigation, “similarly value-driven.” (*Id.* at 30.)
2 They complain that “[i]f values are immaterial to determining standing, plaintiffs must
3 comply with the same standards to which they seek to hold intervenors.” (*Id.* at 31.) The
4 problem with intervenors-defendants’ argument is that plaintiffs actually have cognizable
5 interests in the outcome of this litigation – not mere “value-driven” objections to the way
6 laws are construed or enforced.

7 **A. The text of the Uniform Declaratory Judgments Act.**

8 The UDJA clarifies that Oregon courts have jurisdiction to declare the rights of
9 parties, “whether or not further relief is or could be claimed.” ORS 28.010. Under ORS
10 28.020, the ability of persons to obtain declarations regarding laws is specifically addressed
11 in sweeping language:

12 “Any person interested under a deed, will, written contract or
13 other writing constituting a contract, or whose rights, status or
14 other legal relations are affected by a constitution, statute,
15 municipal charter, ordinance, contract or franchise may have
16 determined any question of construction or validity arising
under any such instrument, constitution, statute, municipal
charter, ordinance, contract or franchise and obtain a
declaration of rights, status or legal relations thereunder.”

17 (Emphasis added.) However, the counterbalance to the statutory language is, as Oregon
18 courts have recognized, the requirement under the Oregon constitution that courts decide
19 justiciable controversies in keeping with Article VII, section 1. *Cummings Constr. v. School*
20 *Dist. No. 9*, 242 Or 106, 109, 408 P2d 80 (1965); *Utsey v. Coos County*, 176 Or App 524,
21 537-47, 32 P3d 933 (2001) (en banc) (analyzing inconsistent Supreme Court cases and
22 ultimately holding that there is a constitutional limitation on jurisdiction to grant declaratory
23 relief), *rev allowed*, 334 Or 75 (2002), *rev dismissed as moot*, 335 Or 217 (2003).

1 **B. Oregon cases set forth a practical effects test for standing under the**
2 **UDJA.**

3 The Supreme Court addressed standing under the UDJA in Budget Rent-a-Car of
4 Washington-Oregon, Inc. v. Multnomah County, 287 Or 93, 597 P2d 1232 (1979). The issue
5 in that case was whether the plaintiff had standing to challenge a county tax assessment on
6 cars that it rented. The Supreme Court stated that under ORS 28.020, the plaintiff must plead
7 and show how its rights are affected by the challenged instrument and “some injury or other
8 impact on a legally recognized interest beyond an abstract interest in the correct application
9 of the law.” 287 Or at 95. The Supreme Court reasoned that because the plaintiff was
10 burdened by collection of the tax, even if it was paid by the plaintiff’s customers, and the
11 plaintiff had a risk of “potential controversies over plaintiff’s compliance with the
12 ordinance,” the plaintiff had satisfied the requirements of the UDJA. 287 Or at 96.

13 The Court of Appeals prepared an exhaustive analysis of standing and of justiciability
14 generally in Utsey v. Coos County. The Court of Appeals emphasized that its review of the
15 cases required the determination of the controversy to “have some practical effects on the
16 rights of the parties” to the controversy. 176 Or App at 539-40. The Court of Appeals cited
17 to a string of Supreme Court cases that either used the “practical effects” language or that
18 supported its use. Id. at 539-41.

19 The Court of Appeals then went on to discuss the “scope of the practical effects
20 requirement.” 176 Or App at 541. The court noted that perhaps the scope was defined more
21 in the negative by the Supreme Court’s cases stating what was not sufficient, and declared
22 that no prior decisions had defined the “outer boundaries” of the practical effects
23 requirement. Utsey, 176 Or App at 541-42. What we do know, the court said in Utsey, is
24 that standing does not exist if the party invoking the jurisdiction of the courts merely seeks to
25 vindicate a public right to have the laws of the state properly enforced and administered. Id.
26 at 542.

1 Since the decision in Utsey, the Court of Appeals has relied on the test articulated in
2 it to determine direct standing. In Lovelace v. Board of Parole and Post-Prison Supervision,
3 183 Or App 283, 51 P2d 1269 (2002), for example, the Court of Appeals carefully reviewed
4 the asserted interest of a prisoner in challenging an administrative rule that had the effect of
5 precluding re-examination of a 2001 parole decision that resulted in his release date being in
6 April 2004. The court noted that although the challenge to the rule would not directly affect
7 his release date, if the prisoner were able to obtain a judgment declaring the rule invalid, the
8 prisoner could immediately bring a *habeas corpus* petition to seek relief from the 2001
9 decision postponing his release using his declaratory judgment. Under those circumstances,
10 and given that the prisoner had demonstrated his determination to challenge the parole
11 board's previous ruling, the Court of Appeals held that the prisoner had demonstrated the
12 practical effect of a ruling and had standing. 183 Or App at 291-92.

13 **C. Plaintiffs have standing because of the practical effects of a decision in**
14 **this case on them.**

15 As the facts (not mere allegations) demonstrate, plaintiffs have standing to bring their
16 First Claim for Relief.¹⁴

17 **1. Plaintiffs want marriage equality for themselves and their**
18 **children.**

19 Plaintiffs are 18 Oregonians in nine lesbian or gay couples. Four of the couples (Li-
20 Kennedy; Knox-Warshaw; Burke-Doyle; Potter-Moen) are Multnomah County residents who
21 married after receiving marriage licenses from Multnomah County. All of the married
22 couples have children.

23 _____
24 ¹⁴ Contrary to intervenors-defendants' suggestion that there are only "allegations"
25 regarding standing (using that term and referencing only the complaint and argument at
26 pages 30-31 of their response), there are facts in the record through plaintiffs' declarations
and the Stipulated Facts. To facilitate their discussion of standing, plaintiffs summarize the
facts and refer the Court to the Statement of Facts section in their opening memorandum in
support of partial summary judgment for a more detailed factual description and for citations
to the record.

1 The unmarried couples seeking legally recognized marriages now are two Lane
2 County couples who were refused marriage licenses by Lane County, Farrera-Korican and
3 Sheklow-Lefton, and two couples from Benton County who want to obtain marriage licenses
4 from their own county, Williams-Belisle and Frankel-Kiefer. The remaining couple, Vetri-
5 DeWitt, resides in Linn County and seeks to secure the choice to marry in the future.

6 All plaintiffs have been in committed relationships of significant duration, varying
7 from 4 to 26 years. But for the fact that they are same-sex couples, all of the plaintiffs
8 qualify to marry in that they do not have another living wife or husband, are not first cousins
9 or nearer of kin, and have the legal age and capacity needed to enter a marriage.

10 **2. A decision on the First Claim for Relief will have a practical effect**
11 **on each and every plaintiff seeking relief.**

12 All plaintiffs are excluded from legally recognized marriages by virtue of the State of
13 Oregon's refusal to recognize plaintiffs' relationships through its statutory code. It is simply
14 beyond legitimate dispute that a decision on the First Claim for Relief will have a practical
15 effect on each of the plaintiffs.

16 **Access to the privilege and the panoply of rights and benefits of marriage.** It
17 almost goes without saying, but plaintiffs will state the obvious in light of intervenors-
18 defendants' challenge to their standing. A practical effect of the declaration plaintiffs seek
19 through their First Claim for Relief will be access to the privilege of a legally recognized
20 marriage statewide – a privilege each of them wants to have, either immediately or as a
21 choice in the future.

22 **Removal of state-imposed stigma and benefit of social recognition of their**
23 **families.** As a result of the exclusion of same-sex couples, and therefore lesbian and gay
24 couples, from legally recognized marriage, all plaintiffs are stigmatized, as are their families,
25 including the children of the married plaintiffs.

1 All plaintiffs know that they cannot count on their families being recognized as such
2 when the State excludes them from marriage. Frankel and Kiefer have experienced non-
3 recognition of their family relationship in the medical context, and Frankel is now
4 apprehensive about him and Kiefer having access to one another in a medical crisis. Burke
5 and Doyle feared that Doyle's parental relationship to her son was in jeopardy when Burke
6 had health problems just after their son's birth and before Doyle had any legal relationship to
7 her son through adoption. Sheklow and Lefton have the same worry about recognition of
8 their family in the event of a medical emergency and in other aspects of their lives, including
9 what might happen if one of them dies. Farrera and Korican have long had worries about
10 recognition of their family in the medical context and with respect to retirement.

11 Plaintiffs, including Knox and Warshaw, Li and Kennedy, Williams and Belisle, and
12 Potter and Moen desire and would obtain an increased sense of security through a legally
13 recognized marriage. Even the plaintiffs who have had the benefit of domestic partnership
14 benefits, such as Li and Williams, know they have to think about the possibility of losing
15 those benefits because other employers may cover only legally recognized spouses, and Vetri
16 knows that DeWitt will not be treated as a spouse for purposes of health benefits once Vetri
17 retires, despite their relationship that even now spans 26 years.

18 A ruling on the First Claim for Relief that the marriage statute is unconstitutional
19 under Article I, section 20 and extending plaintiffs the privilege of marriage will remove the
20 State's official brand of inferiority on them and their families and allow them to be
21 recognized as families.

22 Although intervenors-defendants recognize that it would be natural for plaintiffs to
23 feel stigmatized and to feel anxious about the lack of social recognition for their family
24 relationships, (see Resp at 31, lines 5-6), they fail to acknowledge that stigma is of any
25 consequence in determining the justiciability of this case. (Resp at 31.) Stigma, however, is
26 in fact recognized harm for purposes of justiciability in Oregon. In State v. Linde, 179 Or

1 App 553, 41 P3d 440 (2002), for example, the Court of Appeals *sua sponte* raised the
2 question of mootness in an appeal brought by a citizen who had been involuntarily confined
3 for a mental disorder and whose confinement was extended through an order continuing his
4 civil commitment. The appellant sought reversal of that order even though his confinement
5 had ended. Id. at 555. The question the Court of Appeals posed was whether the case
6 remained justiciable based on “any additional stigma arising from prolonging the duration of
7 appellant’s commitment.” Id. at 556. The court concluded that stigma associated with civil
8 commitment “is a function not only of the fact of commitment but, also, of its duration” and
9 held that the case was not moot. Id.

10 Accordingly, a decision on this claim will have a practical effect on all plaintiffs. As
11 such, they have standing to bring this claim.

12 **Entitlement to specifically identified spousal benefits.** Some of the plaintiffs are
13 directly affected by the lack of a legally recognized marriage in terms of spousal benefits
14 they want and would be entitled to receive now if they were married. The determination that
15 they seek on this claim will allow them to obtain certain spousal benefits that they desire
16 immediately, such as health insurance, retirement benefits, and the marital communications
17 privilege.

18 Without a legally recognized marriage, Burke and Doyle cannot qualify for employer-
19 sponsored health benefits for Burke, a stay-at-home mom. Their family has had financial
20 hardship because of the cost of individual health benefits for Burke. Without a legally
21 recognized marriage, Farrera is not eligible for health benefits from Korican’s employer,
22 although they want that benefit. Similarly, Sheklow is not eligible for health benefits from
23 Lefton’s employer, and as a result, Sheklow has no health insurance. Frankel has been
24 unable to put Kiefer down as the beneficiary of several of his retirement funds because they
25 are not a married couple.

1 Potter and Moen are police officers for the City of Portland, and so are witnesses in
2 legal proceedings. They are not able to take advantage of the privilege afforded to legally
3 recognized married couples that would allow each to claim the right to abstain from
4 testifying against the other or to have their communications not become the subject of inquiry
5 by third parties, see ORS 44.040; State v. Lindley, 11 Or App 417, 419-20, 502 P2d 390
6 (1972), an important privilege because of their profession. All other plaintiffs would be
7 entitled to this privilege immediately as well.

8 These are all cognizable practical effects. See Lovelace, 183 Or App at 291-92
9 (practical effect shown when the plaintiff could use the declaration as a tool to gain a benefit
10 in the context of a *habeas corpus* action the plaintiff intended to bring). Accordingly,
11 plaintiffs also have this independent and additional basis for standing to bring their claim.

12 **D. Intervenor-defendants confuse issues of venue with standing and ignore**
13 **the practical effects test for standing.**

14 Although it is a point not made in the section of the response in which intervenors-
15 defendants challenge plaintiffs' standing, plaintiffs feel compelled to address footnote 11 at
16 page 22 of intervenors-defendants' response because it appears to be an argument about their
17 standing. On that point, it appears that intervenors-defendants have mistaken issues of venue
18 for issues of standing or else ignored the basic test for standing in making their argument.

19 Citing to a portion of the UDJA regarding standing of parties, ORS 28.110,
20 intervenors-defendants argue that they have refrained from asserting "unavoidable
21 difficulties raised by Plaintiffs from outside Multnomah County instituting an action against
22 a county outside that county's jurisdiction." It is difficult to know what intervenors-
23 defendants are objecting to given that plaintiffs sued common defendants, the State of
24 Oregon and state officials, and given intervenors-defendants' acknowledgment that Linn,
25 Benton, and Lane counties are not parties to this action. (Intervenors-Defs Resp at 22.)
26 Venue in this county is proper under ORS 14.060 because the action may be brought against

1 state departments and officials “wherein the cause of suit, or some part thereof, arose.” Part
2 of the suit involves defendants Weeks and Woodward’s refusal to recognize and register
3 marriage records for the married plaintiffs, which occurred in this county. (Stip Facts ¶ 6.)

4 Intervenor-defendants also assert that “[s]everal of the plaintiffs have no viable
5 claims.” (Resp at 22.) They appear to argue that because the unmarried plaintiffs could
6 travel to Portland to get a marriage license, they have no standing. That argument, of course,
7 ignores the fact that the State’s position is that no marriages of same-sex couples are
8 permitted or recognizable under Oregon law anywhere in this state, including Multnomah
9 County, given ORS 106.010. That argument also ignores the practical effects of a ruling in
10 this case on the unmarried plaintiffs.

11 The parties agree that all Oregon counties except Multnomah County are refusing to
12 issue marriage licenses to same-sex couples because the Oregon statutory code does not
13 permit marriages of same-sex couples. (Stip ¶ 27.) The State’s statute is the basis for
14 counties such as Lane County to refuse to issue marriage licenses to same-sex couples like
15 Sheklow and Lefton and Farrera and Korican. (Stip ¶ 19; Ex 8; Sheklow Decl ¶ 12; Farrera
16 Decl ¶ 13.) But for Governor Kulongoski’s and Attorney General Myers’ reliance on
17 ORS 106.010 and pressure on Benton County, that county would have begun to issue
18 licenses to same-sex couples such as Frankel and Kiefer and Williams and Belisle based on
19 the unconstitutionality of ORS 106.010 under Article I, section 20 of the Oregon constitution.
20 (Stip ¶¶ 18, 20, 21, 23, 24; Exs 10, 15, 14; Jaramillo Decl ¶¶ 3-10.) And, these plaintiffs
21 from Lane and Benton counties do not want to travel to Portland to get a marriage license.
22 (Sheklow Decl ¶ 13; Farrera Decl ¶ 14; Williams Decl ¶¶ 6-8; Frankel Decl ¶ 12.) There is
23 certainly no requirement that plaintiffs know of that they do so. As the State recognizes, all
24 of the plaintiffs are directly affected by state law.

25 In sum, plaintiffs’ practical interests are not like the intervenors-defendants’ asserted
26 “I’m offended” interest. Merely taking offense does not entitle one to seek a declaration


1 under the UDJA and to litigate over the proper construction of the marriage statute and its
2 constitutionality under Article I, section 20 of the Oregon constitution. Rather, individuals
3 have to establish that a decision on the merits would have a practical effect on them. The
4 individual plaintiffs have done so. They have standing.

5 **CONCLUSION**

6 For all of the reasons above, and for the reasons stated in plaintiffs' other memoranda
7 of law relating to summary judgment in this action, plaintiffs respectfully request that the
8 Court grant their motion for partial summary judgment and, ultimately, enter pursuant to
9 ORCP 67 B an appealable judgment in their favor on their First Claim for Relief.

10 DATED this 14th day of April, 2004.

11
12
13 By:



Lynn R. Nakamoto

OSB #88087

(503) 295-3085

Cooperating Counsel for the ACLU

Foundation of Oregon

Of Attorneys for Plaintiffs

Kenneth Y. Choe, *Pro Hac Vice*

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Lesbian and Gay Rights and AIDS Projects

125 Broad Street

New York, NY 10004

(212) 549-2553

Of Attorneys for Plaintiffs

23 70921
24
25
26

ATTORNEY CERTIFICATE OF SERVICE

I hereby certify that I have made service of the foregoing **PLAINTIFFS' COMBINED REPLY IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT** on the party/ies listed below in the manner indicated:

Stephen K. Bushong
Oregon Department of Justice
DOJ Trial Division
1162 Court Street NE
Salem, OR 97301-4096

☒ U.S. Mail
☐ Facsimile
☐ Hand Delivery
☐ Overnight Courier
☒ Email

Kelly W. G. Clark
Kristian Roggendorf
O'Donnell & Clark LLP
1706 NW Glisan, #6
Portland, OR 97209

☒ U.S. Mail
☐ Facsimile
☐ Hand Delivery
☐ Overnight Courier
☒ Email

Herbert G. Grey
Kelly E. Ford
Kelly E. Ford, P.C.
4800 SW Griffith Drive, #320
Beaverton, OR 97005

☒ U.S. Mail
☐ Facsimile
☐ Hand Delivery
☐ Overnight Courier
☒ Email

Agnes Sowle
Jenny Morf
Multnomah County Attorney
501 SE Hawthorne Blvd., Suite 500
Portland, OR 97214

☒ U.S. Mail
☐ Facsimile
☐ Hand Delivery
☐ Overnight Courier
☒ Email

Jordan Lorence
Benjamin W. Bull
Alliance Defense Fund
15333 N. Pima Road, Suite 165
Scottsdale, AZ 85260

☒ U.S. Mail
☐ Facsimile
☐ Hand Delivery
☐ Overnight Courier
☒ Email

Raymond M. Cihak
Pamela Hediger
Evashevski Elliott Cihak & Hediger, PC
PO Box 781
Corvallis, OR 97339

☒ U.S. Mail
☐ Facsimile
☐ Hand Delivery
☐ Overnight Courier
☒ Email

Kevin Clarkson
Brena Bell & Clarkson
310 K Street, Suite 601
Anchorage, AK 99501

☒ U.S. Mail
☐ Facsimile
☐ Hand Delivery
☐ Overnight Courier
☒ Email

DATED this 14th day of April, 2004.



Lynn R. Nakamoto
OSB #88087
Attorney for Plaintiffs

CERTIFICATE OF SERVICE