

IN THE SUPREME COURT OF THE STATE OF OREGON

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

Plaintiffs-Respondents, Cross-Appellants,

and

MULTNOMAH COUNTY,

Intervenor-Plaintiff-Respondent, Cross-Appellant,

v.

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

Defendants-Appellants, Cross-Respondents,

and

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

Intervenors-Defendants-Appellants,
Cross-Respondents.

Multnomah County Circuit
Court Case No. 0403-03057

SC S51612

**PLAINTIFFS-RESPONDENTS AND CROSS-APPELLANTS'
COMBINED REPLY BRIEF ON CROSS-APPEAL**

Appeal from a Judgment of the Circuit Court of Multnomah County
Honorable Frank L. Bearden, Judge

NOVEMBER 2004

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INTRODUCTION

In response to plaintiffs’ opening brief on cross-appeal, the State appears to take no position on whether the right to marry is a “privilege” or “immunity” within the meaning of Article I, section 20 of the Oregon Constitution. However, the State discredits DOMC’s argument that the right to marry and the benefits attendant on that right are not “privileges” or “immunities” by virtue of a “historical exception.” In doing so, the State supports plaintiffs’ position, the County’s position, and the position of numerous *amici* that Article I, section 20 has never been, and should not be, analyzed by excepting from its purview any advantage simply because it was not provided to all Oregonians on equal terms in the nineteenth century at the time the Oregon Constitution was enacted. The State’s argument in opposition to plaintiffs’ first three assignments of error is one raised for the first time on appeal. The State’s new suggestion that plaintiffs’ claim to a right to marry is not ripe for adjudication is without merit; the present controversy before the Court has been and remains justiciable.

As to the trial court’s remedy, the State’s suggestion that Oregon courts should defer to the legislature in this case, where a statute is unconstitutionally under-inclusive, lacks support in Oregon law. The State’s and DOMC’s other primary argument – that this Court would impermissibly tread on legislative power by extending the rights in ORS Chapter 106 to same-sex couples – also lacks support in Oregon law.

In sum, the trial court failed to identify any constitutionally sufficient reason for the exclusion of same-sex couples from civil marriage, and neither of the appellants has presented any such reason to affirm the judgment without the modifications plaintiffs seek on appeal.¹

¹ Plaintiffs submit this brief without regard to the election results of November 2, 2004, on Ballot Measure 36, the effect of which plaintiffs will brief separately pursuant to the Court’s request issued today.

**REPLIES TO THE STATE AND DOMC ON PLAINTIFFS' FIRST, SECOND, AND
THIRD ASSIGNMENTS OF ERROR ON CROSS-APPEAL**

I. The State sidesteps the merits.

The State does not address the merits of plaintiffs' first three assignments of error and does not refute that the right to enter into a marriage is a "privilege" or "immunity" under Article I, section 20 of the Oregon constitution (State Answering Br at 5-9). Indeed, the State's searching examination of those terms (see id. at 21-47) using the analytical framework of Priest v. Pearce, 314 Or 411, 840 P2d 65 (1992), leads to the conclusion that the right to marry – and not merely the "legal incidents of civil marriage" (State Answering Br at 21) – is a "privilege" or "immunity."

Instead, the State makes two abbreviated technical arguments. First, the State contends that the trial court did not adjudicate plaintiffs' claim to a right to marry (id. at 5-9). Second, the State rather cryptically argues that there is no existing controversy with respect to the right to marry (id. at 9). Neither argument, though, holds water. This case squarely presents for this Court's decision whether same-sex couples have a right to marry in Oregon in light of Article I, section 20.

A. The trial court implicitly denied plaintiffs' request that it declare that their exclusion from the right to marry under the Oregon marriage statutes is unconstitutional.

In their complaint, plaintiffs alleged, among other things, that the "failure to permit marriages of same-sex couples constitutes an unjustified denial of a privilege and therefore constitutes a violation of the Oregon constitution" in their First Claim for Relief (ER 37). Plaintiffs sought a declaration that "the failure of the Oregon statutory code to permit marriages of same-sex couples violates Article I, section 20 of the Oregon constitution" (ER 41). Plaintiffs moved for partial summary judgment on their First Claim for Relief (ER 150). The judgment grants a part of what plaintiffs sought, by declaring the Oregon marriage law unconstitutional in denying plaintiffs certain benefits that flow from marriage, but did not

declare that the denial of the right to marry violated the Oregon Constitution (ER 424-ER 425). Thus, there can be no legitimate dispute that the trial court denied the portion of plaintiffs' motion for partial summary judgment relating to marriage equality. Plaintiffs then assigned error to that implicit denial (Pls Opening Br at 21-22, 39). The trial court's ruling denying plaintiffs the right to marry is squarely before this Court.

B. The individual plaintiffs' claim to an equal right to marry is justiciable.

Next, for the first time on appeal, the State questions the justiciability of plaintiffs' First Claim for Relief. Curiously, the State argues that, because the right to marry and the benefits that flow from marriage are connected, the Court must ignore the right to marry and focus solely on the state-conferred benefits that flow from marriage lest it issue an advisory opinion (State Answering Br at 7). Citing Yancy v. Shatzer, 337 Or 345, 97 P3d 1161 (2004), the State contends that "whether marital status *per se* is a 'privilege' under Article I, section 20, is an academic question" (State Answering Br at 2), and that there is no existing controversy (*id.* at 2, 9). That claim, though, rests on a faulty premise.

The State's implicit argument regarding ripeness is this: (1) The right to marry does not stand alone; (2) a court cannot know what attributes the right has, standing alone; and (3) therefore, a court cannot decide whether the right to marry, standing alone, is a "privilege." The fallacy in the State's argument, of course, is that plaintiffs are not asking the Court to decide whether a hypothetical civil right to marry that carries with it no access to State-granted benefits, standing alone, is a "privilege" or "immunity." Plaintiffs and *amici* have briefed the advantages that the present right to marry has, beyond those that the State grants to those permitted to marry. Those additional advantages are both different from the set of state-conferred benefits contingent on marriage, and significant and valuable in themselves (see Pls Opening Br at 28-33; see also Br of Vermont Freedom to Marry Task Force, *et al.* at 8-18, 21-31). Plaintiffs' claim is justiciable because it involves a present

controversy – the denial of marriage to plaintiffs – not “future events of a hypothetical issue.” Brown v. Oregon State Bar, 293 Or 446, 449, 648 P2d 1289 (1982).²

II. DOMC’s argument is without merit.

A. Plaintiffs properly assigned error.

Before reaching the merits, DOMC also makes an erroneous technical argument (DOMC Answering Br at 8-9). DOMC acknowledges that plaintiffs assigned error as to “the status of marriage and the remedy” but faults plaintiffs for failing to “raise a specific question of law on which this Court can rule” (*id.* at 9). In Oregon, though, assignments of error are directed to specific rulings, not specific questions of law. See, e.g., Rutter v. Neuman, 188 Or App 128, 132, 71 P3d 76 (2003) (the appellant’s assignment of error that the “trial court erred in not ruling that plaintiffs’ claim was barred by the statutes of ultimate repose” was defective, because “it assigns error to what is essentially a legal conclusion and not a specific ruling”).

Plaintiffs avoided assigning error to particular legal reasoning by the trial court. Rather, plaintiffs assigned error to the trial court’s rulings as they relate to the right to marry, both in the trial court’s opinion and order in part denying their summary judgment motion (and, to the extent the Court concludes so, in part granting a portion of the State’s summary judgment motion) and in entering the limited judgment (see Pls Opening Br at 4-5, 21-23,

² *Amicus curiae* Liberty Counsel also makes, in part, an implied argument that this case is not justiciable. Besides claiming, without factual support, that the trial court was biased in favor of “the litigants” (Liberty Counsel Br at 39) and did not allow “a full and fair presentation of relevant evidence” (*id.*), Liberty Counsel contends that the proceeding below was “sham” (*id.* at 18, 38, 39) and that the trial court should have allowed certain legislators leave to intervene in the case (*id.* at 40-42). Liberty Counsel’s suggestion that this case involves collusion simply ignores the reality that both DOMC, a “Pre-Suit Participant” adverse to plaintiffs and Multnomah County (see CR 86, Ex 1 at 1-2, 6-8, 10-11) that Liberty Counsel neglects to mention in its brief, and the State have opposed the individual plaintiffs’ claim that excluding them from the right to marry violates Article I, section 20. Intervention is also a non-issue. The prospective intervenors and their legal counsel chose not to appeal; Liberty Counsel plainly lacks standing; and the Court lacks jurisdiction regarding the issue.

38-39; ER 437; ER 424; ER 425). Plaintiffs' assignment of error directed to the trial court's rulings was proper.

B. The right to marry constitutes a privilege under Article I, section 20.

As set forth in plaintiffs' opening and answering briefs, the right to marry constitutes a privilege under Article I, section 20 because a marriage confers numerous important advantages on a married couple and their children.

The advantages conferred by a marriage include exclusive access to the benefits of marriage. As the State observes, "[t]he status of civil marriage is inseparable from the statutory benefits and obligations that are part of (or arise from) a civil marriage contract" (State Answering Br at 7). By predicating its argument on the observation that "[t]he benefits statutorily related to marriage are not themselves marriage" (DOMC Answering Br at 6), DOMC demonstrates its misunderstanding of the definition of the term "privilege." Article I, section 20 is implicated "[w]henever a person is denied some advantage to which he or she would be entitled but for a choice made by a government authority." City of Salem v. Bruner, 299 Or 262, 268-69, 702 P2d 70 (1985) (emphases added). Because exclusive access to the benefits of marriage is an advantage conferred by a marriage, such benefits inform whether the right to marry constitutes a privilege under Article I, section 20. The observation that "federal benefits and other states' benefits are plainly outside the compass of Oregon's marriage statutes" (DOMC Answering Br at 6 n6) similarly misses the point. Because exclusive access to such benefits is at least a "potential" advantage conferred by a marriage, such benefits similarly inform whether the right to marry constitutes a privilege under Article I, section 20. See David Schuman, The Right to "Equal Privileges and Immunities:" A State's Version of "Equal Protection," 13 Vt L Rev 221, 230 (1988).

The advantages conferred by a marriage include more than exclusive access to the benefits of marriage. As DOMC concedes, a marriage yields "positive consequences for married people in daily private life" (DOMC Answering Br at 6-7). "[T]he extension of

private benefits [to] [and] societal approval [of]” (*id.* at 7) a married couple are advantages conferred by a marriage. For purposes of determining whether the right to marry constitutes a privilege under Article I, section 20, it does not matter that neither is compelled by the State. It matters only that, but for their exclusion from marriage by the State, same-sex couples would have the opportunity to enjoy both to an extent that they do not enjoy them now.

Furthermore, a marriage is “a form of expression, almost a type of speech” (*id.*). As set forth in plaintiffs’ opening and answering briefs, only a marriage can express what is universally recognized as a commitment of the highest order. As DOMC concedes, “[t]he right to engage in expressive activity is of course well-protected in Oregon” (see *id.* (citation omitted)). The opportunity to exercise this constitutional right is an advantage conferred by a marriage.³ Even if the expressive qualities of a marriage are not protected by the right to engage in expressive activity,⁴ they are nevertheless an advantage conferred by a marriage.

For the foregoing reasons as well as those set forth in plaintiffs’ opening and answering briefs, the right to marry constitutes a privilege under Article I, section 20 (see also State Answering Br at 22-25 (the framers of the Oregon constitution understood the terms “privilege” and “immunity” to be broadly defined)).

³ Article I, section 20 is implicated wherever the State discriminates between classes in their exercise of a constitutional right. *See, e.g., Salem Coll. & Acad., Inc., v. Employment Div.*, 298 Or 471, 488-89, 695 P2d 25 (1985) (Article I, section 20 is implicated wherever the State discriminates between classes in their exercise of the right to free exercise of religious opinion); *see also* State Answering Br at 22 (“Other sections of the constitution do identify the ‘privileges’ protected by their terms.”) (citations and emphasis omitted). The exercise of the right to engage in expressive activity is no exception. The passage in *League of Or. Cities v. State*, 334 Or 645, 56 P3d 892 (2002), to which DOMC cites merely observes that, under certain circumstances, an Article I, section 8 claim is more likely to meet with success than an Article I, section 20 claim. *See id.* at 671 n22.

⁴ DOMC fails to offer any meaningful argument to support an assertion that “the guarantees * * * in 1859 demonstrably were not intended to reach” the expressive qualities of a marriage. *See State v. Robertson*, 293 Or 402, 412, 649 P2d 569 (1982) (setting forth the proper inquiry under the “historical exceptions doctrine”).

C. The exclusion of same-sex couples from marriage is subject to heightened scrutiny because it is a form of gender discrimination and a form of sexual orientation discrimination.

As set forth in plaintiffs' answering brief, the exclusion of same-sex couples from marriage is subject to heightened scrutiny because it is a form of gender discrimination and a form of sexual orientation discrimination.

Significantly, DOMC concedes that "[h]omosexuals are comparably suited to heterosexuals to perform or contribute in society" (DOMC Answering Br at 42). In doing so, DOMC effectively concedes that sexual orientation is a suspect classification. As set forth in plaintiffs' opening brief, the fact that sexual orientation bears no relation to ability to contribute to or participate in society renders sexual orientation discrimination suspect (see also Br of Amicus American Ctr. for Law and Justice at 6 (listing the indicia of a suspect classification in the disjunctive)).

REPLY TO THE STATE AND DOMC ON PLAINTIFFS' FOURTH, FIFTH, AND SIXTH ASSIGNMENTS OF ERROR ON CROSS-APPEAL

I. The State's argument is without merit.

A. Only two remedial options are available under Oregon remedies law.

As set forth in plaintiffs' opening and answering briefs, the Court has established only two remedial options: nullifying the privilege or extending the privilege. The State suggests a third remedial option: deferring to the legislature to decide whether to modify the privilege. Such an option has never been available under Oregon remedies law, and for good reason.

First, Oregon remedies law recognizes that separation-of-powers principles require the Court, not the legislature, to fashion a remedy. See State ex rel. Bushman v. Vandenberg, 203 Or 326, 334-35, 280 P2d 344 (1955); see also Or Const art I, § 10 (guaranteeing a remedy by due course of law); Or Const art III, § 1 (establishing separation of powers). Indeed, the State acknowledges "the unremarkable propositions that courts are prohibited

from exercising legislative powers and that the legislature is prohibited from exercising judicial power” (State Answering Br at 14 n3).

Second, Oregon remedies law recognizes that separation-of-powers principles preclude the Court from engaging in legislative action. Thus, in fashioning a remedy, the Court may not modify the privilege. Rather, it must nullify the privilege or – where the legislature would extend rather than nullify the privilege as is – extend the privilege. See Hewitt v. SAIF Corp., 294 Or 33, 52, 653 P2d 970 (1982). In either case, the legislature retains the ability to modify the privilege equally for all. See id. at 53 n18.

These principles belie the State’s and DOMC’s argument that, because the right to marry implicates a set of statutory benefits beyond the immediate right to marry itself, for a court to extend the civil right to marry to plaintiffs would be to legislate. Courts do not legislate by extending a privilege that is unconstitutionally granted to some but not all citizens on the same terms. See id. (noting that extending a privilege is no more legislating than nullifying a privilege). Rather, they perform their constitutional function without legislating. Nothing in Oregon law suggests that Oregon’s judiciary lacks the power to extend to plaintiffs a privilege that they have been denied unconstitutionally simply because that privilege is one that permits them to receive other benefits.

This case is no exception. Because the legislature would extend rather than nullify the right to marry as is,⁵ the Court must extend the right to marry to same-sex couples.

⁵ Contrary to the State’s assertion that “[no] Legislative Assembly since 1854 [has] considered the policy implications of same-sex marriage” (State Answering Br at 15), the legislature has considered and rejected proposed legislation that would have expressly precluded marriages of same-sex couples. See, e.g., 1999 HJR 4, 70th Leg Assem, Reg Sess (Or 1999) (voted down in the Senate); 1999 HJR 29, 70th Leg Assem, Reg Sess (Or 1999) (tabled in the House).

B. The Massachusetts and Vermont marriage equality cases do not provide persuasive authority to change Oregon remedies law.

The State disingenuously suggests that the trial court's remedy, which would permit the legislature in the first instance to fashion civil unions for same-sex couples to avoid extending to same-sex couples the right to marry, would be available under Massachusetts remedies law. In Goodridge v. Department of Public Health, 798 NE2d 941 (Mass 2003), the Massachusetts Supreme Judicial Court held that the exclusion of same-sex couples from marriage violated the Massachusetts constitution, id. at 969, but stayed entry of judgment "to permit the Legislature to take such action as it may deem appropriate in light of this opinion," id. at 970 (citation omitted) (emphasis added). The Massachusetts high court emphatically rejected that "such action" could include shunting same-sex couples, but not opposite-sex couples, into "civil unions." In re Opinions of the Justices to the Senate, 802 NE2d 565 (Mass 2004).

Moreover, the State's reliance on Vermont remedies law is suspect. By deferring to the Vermont legislature, the Vermont Supreme Court permitted an outcome that was driven entirely by political, not constitutional, considerations. See Br of *Amici* Vermont Freedom to Marry Task Force, et al., at 18-20.

Accordingly, the Massachusetts and Vermont marriage equality cases do not provide persuasive authority to change Oregon remedies law. Cf. Kopp v. Fair Political Practices Comm'n, 47 Cal Rptr 108, 122-26 (1995) (proper remedial option is to extend privilege); Beal v. Beal, 388 A2d 72, 75-76 (Me 1978) (same).

C. The trial court erred by fashioning an unconstitutional remedy.

In arguing that "[t]he constitutionality of a 'civil union' statute that is yet to be enacted, and may not be enacted, is a question that is not yet justiciable" (State Answering Br at 18), the State misapprehends plaintiffs' argument. Plaintiffs' argument does not concern the constitutionality of future legislative action. Rather, it concerns the constitutionality of

present judicial action. Where the Court fashions a remedy, it engages in state action. Thus, it, too, is constrained by the constitutional guarantee of equality. And it may not allow the legislature to do what it itself is constrained from doing.

The trial court ordered a remedy that allows and in fact strongly encourages the Oregon legislature to shunt same-sex couples, but not opposite-sex couples, into “civil unions.” As set forth in plaintiffs’ opening brief, that remedy violates the constitutional guarantee of equality because (1) the protections afforded by a “civil union” could not equal those afforded by a marriage, and (2) shunting same-sex couples, but not opposite-sex couples, into “civil unions” would constitute impermissible segregation. Contrary to the State’s assertion that “it is impossible to know whether remedial legislation might be unconstitutionally ‘stigmatizing,’ whether the legislature would craft a ‘civil union’ system for same-sex couples that is completely separate from the current marriage laws, or whether any ‘separate’ system would not be sufficiently ‘equal’ to satisfy the Oregon Constitution”⁶ (State Answering Br at 18), shunting same-sex couples, but not opposite-sex couples, into “civil unions” would be inherently stigmatizing and inherently “separate and unequal.” See Br of Civil Rights and Historian *Amici* at 1-15; see also Br of *Amici* Vermont Freedom to Marry Task Force, et al., at 10-18, 21-31.

For the foregoing reasons, it is appropriate for the Court to examine the trial court’s remedy, which allows the legislature to avoid providing same-sex couples with the right to marry on equal terms by shunting same-sex couples, but not opposite-sex couples, into “civil unions,” and to determine whether that remedy was erroneous and a violation of the constitutional guarantee of equality.

⁶ The State’s suggestion that “the legislature could choose to abolish ‘marriage’ licenses altogether, replacing them with ‘civil union’ licenses for both same-sex and opposite-sex couples” (*id.* at 18 n5) appears disingenuous. Current federal law suggests that such a choice would constitute an impermissible deprivation of the fundamental right to marry guaranteed by the United States Constitution. See *Zablocki v. Redhail*, 434 US 374, 384 (1978).

REGISTRATION OF THE MARRIAGE RECORDS AND THE FOURTEENTH AMENDMENT EQUAL PROTECTION QUESTION

In their answering briefs on cross-appeal, both the State and DOMC comment on each other's assignment of error regarding the registration of the records of marriages of same-sex couples and on the Court's Fourteenth Amendment equal protection question (Question d). Thus, plaintiffs also briefly address both the State's sole assignment of error and DOMC's third assignment of error and Question d in this reply.

I. Plaintiffs' reply on the State's sole and DOMC's third assignment of error.

As set forth in plaintiffs' answering brief, the trial court correctly ordered the State Registrar to register the marriage records.

The State does not offer any new argument to the contrary. It offers only commentary on DOMC's argument. The State first correctly characterizes DOMC's argument concerning Article VI, section 10 as "not material to the question whether the trial court erred in requiring the State Registrar to register the marriage license-and-solemnization documents" (State Answering Br at 55 n24). The State then observes that "[t]he record appears to support DOMC's contention that the plaintiffs' Fourth Claim for Relief was not before the court for summary judgment" (id. at 55 (footnote omitted)). As set forth in plaintiffs' answering brief, however, such procedural irregularities did not preclude the order to register the marriage records because DOMC (and the State) had notice and opportunity to show cause why the peremptory writ should not have issued.

DOMC similarly does not offer any new argument to the contrary. It offers only commentary on the State's argument and recycles its own argument. As set forth in plaintiffs' answering brief, such arguments are without merit.

II. Plaintiffs' reply on Question d.

As set forth in plaintiffs' answering brief, the exclusion of same-sex couples from marriage also denies equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution.⁷

The State's explanation of "the standard manner in which equal privileges or equal protection analyses are conducted" bolsters plaintiffs' argument that the exclusion of same-sex couples from marriage imposes a disparate burden on the exercise of the fundamental right to marry: "[T]he court first identifies the right or privilege granted to some and denied to others, then evaluates the basis on which the law grants or denies that right or privilege" (State Answering Br at 51 (emphases added)). In other words, the State agrees that the proper inquiry is what has historically been enjoyed (i.e., the right to marry), not who has historically enjoyed it (i.e., people in opposite-sex relationships). As set forth in plaintiffs' answering brief, DOMC's argument is analytically flawed because it incorrectly seeks to recast the "right to marry" as the "right of people in same-sex relationships to marry."

THE ADDITIONAL BRIEFS OF *AMICI* FILED IN SUPPORT OF DOMC

The additional briefs of amici filed in support of DOMC primarily seek to counter plaintiffs' arguments that (1) the exclusion of same-sex couples from marriage is subject to heightened scrutiny because it is a form of sexual orientation discrimination and (2) the exclusion of same-sex couples from marriage does not rationally further the state interest in child welfare. In their answering brief, plaintiffs rebutted all such counterarguments.⁸

⁷ Contrary to DOMC's assertion, plaintiffs did not waive their right to brief this issue. See Pls Br at 51 n16.

⁸ Plaintiffs object to *amicus curiae* American Center for Law and Justice's insertion of an affidavit by an individual in its appendix. It does not present the kinds of facts that courts may take judicial notice of. See OEC 201(b).

CONCLUSION

For the reasons stated above and in plaintiffs' opening brief, the judgment in favor of plaintiffs and Multnomah County on the First Claim for Relief should be modified to declare that in barring same-sex couples from the right to marry, ORS 106.010 *et seq.* violate Article I, section 20 of the Oregon Constitution. To remedy the under-inclusiveness of the marriage statutes, the Court should vacate the 90-day period permitting the legislature to act and the concomitant injunction against the County and, instead, extend the right to marry to same-sex couples.

DATED this 4th day of November, 2004.

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that I served the foregoing **PLAINTIFFS-RESPONDENTS AND CROSS-APPELLANTS' COMBINED REPLY BRIEF ON CROSS-APPEAL** on November 4, 2004, by directing to each party VIA U.S. FIRST CLASS MAIL two true, exact, and full copies thereof addressed as follows:

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