

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 ANSWERING BRIEF ON THE MERITS**

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

OCTOBER 2004

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INTRODUCTION

Appellants take two fundamentally different approaches to the appeal on the merits. Significantly, for defendants State of Oregon, Governor Kulongoski, Attorney General Myers, Director Weeks, and State Registrar Woodward (collectively, “the State”), the appeal on the merits is limited to the registration of marriage records.

The State has accepted that, as a matter of law, the Oregon Constitution requires the State to provide same-sex couples with the same rights and duties that the State provides opposite-sex couples whom it permits to marry. The State has also accepted the trial court’s remedy, which allows the legislature 90 days at its next session to pass legislation to extend those rights and duties to same-sex couples, or, failing that, allows same-sex couples the right to marry. The State assigns error solely to the ruling requiring the State Registrar to register marriage records of same-sex couples who received marriage licenses from intervenor-plaintiff Multnomah County and who wed in Oregon (State Br at 12-13).

On the other hand, intervenors-defendants Defense of Marriage Coalition, Cecil Michael Thomas, Nancy Jo Thomas, Dan Mates, and Dick Jordan Osborne (collectively, “DOMC”) contend that the trial court erred completely in ruling for plaintiffs and the County. Like the State, DOMC appeals regarding the registration of the marriage records (DOMC Br at 65). However, citing years of history, and the tradition of marriages limited to opposite-sex couples, DOMC also appeals the “holding that the benefits of marriage must be extended to same sex couples under Article I, section 20” (DOMC Br at 13). DOMC also contends that the trial court could not provide any remedy for the constitutional violation it found, much less one “that extends the benefits of marriage to same sex couples” (DOMC Br at 59).

Yet as a matter of logic and of law, neither years of history nor tradition forecloses the Court’s consideration of the extent to which the State may limit to certain classes of citizens the significant civil right to marry and the benefits that flow from marriage. If Article I, section 20 is to mean anything, it must mean more than a guarantee of the historical social roles occupied by classes of citizens in 1857. And to fulfill its duty to adjudicate

constitutional questions under Article I, section 20, Oregon’s judiciary can and must provide meaningful, constitutionally permissible remedies.

As all parties except DOMC agree, the trial court was right to rule that the marriage statutes are unconstitutional, at least because they bar same-sex couples from the tangible benefits of marriage that the State confers. Accordingly, the trial court was obliged to provide a remedy. Further, because the State Registrar has a non-discretionary duty to register marriage records that a county official has completed and filed in accordance with ORS 432.405, and because the marriages are valid, the trial court correctly entered a judgment requiring the State to register the marriage records.

STATEMENT OF THE CASE

I. Nature of the case.

The State’s description of the nature of the proceeding appears to suggest that plaintiffs sought relief on each and every claim (State Br at 2-3), so plaintiffs do not accept it. Plaintiffs brought three of their four claims – those specifically seeking registration of the marriage records of same-sex couples who wed in Oregon – as alternative claims (ER 38-41).

Plaintiffs also do not accept DOMC’s factually unsupported description of the nature of the action (DOMC Br at 7-8). DOMC’s characterization of Multnomah County’s decision (DOMC Br at 7) as “secret” is unsupported by any citation to the record, and in fact, DOMC acknowledges that there is no support for such statements in the record (DOMC Br at 12, n14). DOMC incorrectly states that plaintiffs’ claims are limited to asking that the State register the marriage records (DOMC Br at 7); plaintiffs, of course, asked for a declaration with respect to the unconstitutionality of the marriage statutes in their First Claim for Relief (ER 37). Plaintiffs also fundamentally disagree that the case is about the “constitutionality of marriage” (DOMC Br at 7).

As for the procedural summary, DOMC again fails to cite any support in the record for its assertions (DOMC Br at 7-8), and plaintiffs disagree with a number of them. DOMC states that the trial court “granted partial summary judgment” to plaintiffs (DOMC Br at 8).

The limited judgment, though, shows that the trial court adjudicated all of plaintiffs' claims, and in their favor (ER 424).

DOMC also says that it was "denied summary judgment on their affirmative defenses and counterclaims" (DOMC Br at 7). That is not what the judgment reflects (ER 423 at ¶¶ 12-13; ER 424), nor is it what the trial court's Order Staying Further Trial Court Proceedings reflects (ER 494). Those affirmative defenses and counterclaims not resolved by the limited judgment were stayed (*id.*). The trial court's remarks at the May 17, 2004 status conference further confirm that.

At the conference, Judge Bearden described the competing forms of judgment and objections to the judgment from DOMC and the State (5/17 Tr at 2-3), and stated that his intent was to have the judgment as entered go up on appeal (5/17 Tr at 3-4). After counsel for DOMC acknowledged that that was the trial court's decision (5/17 Tr at 10-11), Judge Bearden again emphasized his intent that "the constitutional challenge" be the focus of the appeal (5/17 Tr at 12), and in response to counsel for the State, clarified that all remaining issues would be stayed (5/17 Tr at 13).

Accordingly, plaintiffs rely upon and refer the Court to their own statement of the nature of the action in their opening brief on their cross-appeal (Pls Br at 2-3), where they describe their claims and the method of their resolution.

II. Nature of the Judgment.

Plaintiffs accept the State's description of the limited judgment, but they do not accept DOMC's statement of the nature of the judgment because of inaccuracies. Plaintiffs therefore rely upon and refer the Court to their statement regarding the nature of the judgment in their opening brief (Pls Br at 4-5).

III. Appellate jurisdiction.

Plaintiffs agree that this appeal is timely (State Br at 5; DOMC Br at 9), and that the Court has jurisdiction over the appeal pursuant to ORS 19.205(1), ORS 19.270, and the certification of the appeal directly to this Court (State Br at 5; DOMC Br at 9).

IV. Questions on Appeal.

DOMC's appeal from the judgment on the First Claim for Relief presents the following questions:

1. At the very least, do the State's marriage statutes violate Article I, section 20 by denying same-sex couples excluded from marriage all the tangible benefits that the State grants to opposite-sex couples who choose to marry?
 - a. Are the right to marry and the tangible benefits that the State grants to opposite-sex couples who choose to marry "privileges" or "immunities" within the meaning of Article I, section 20, regardless of whether marriage in 1857 was limited to male-female couples?
 - b. Do the marriage statutes restricting marriage to male-female couples discriminate on the basis of sex or, alternatively, sexual orientation?
 - c. If so, are classifications based on sex or, alternatively, sexual orientation suspect?
 - d. Under either heightened scrutiny of the marriage statutes or a rational basis review, does the State have an appropriate and sufficient interest in restricting marriage to male-female couples?
2. Did the trial court have the power and the obligation to provide plaintiffs with a remedy once it found a violation of Article I, section 20?

The State's and DOMC's appeals of the judgment requiring the State Registrar to register marriage records for same-sex couples present the following questions:

1. Does the State Registrar have a non-discretionary duty to file and register each marriage record that a county official has completed and filed in accordance with ORS 432.405 and the State Registrar's rules? Stated another way, does the State Registrar's disagreement with a county official's exercise of authority to issue a marriage license granted by ORS Chapter 106 entitle the State Registrar to invalidate a marriage by refusing to record that the marriage occurred?

2. Was the writ of mandamus that required the State Registrar to register marriage records of same-sex couples properly issued because, under the circumstances, plaintiffs had no speedy and adequate remedy at law?

3. Did the State and DOMC have notice and an opportunity to be heard prior to the trial court's judgment issuing the writ?

V. Summary of Argument.

First, the trial court correctly held that the exclusion of same-sex couples from the benefits of marriage (i.e., the state-conferred tangible benefits of marriage) violates Article I, section 20. Indeed, both marriage and its benefits are privileges and immunities. The exclusion of same-sex couples from both marriage and its benefits is subject to heightened scrutiny because it is a form of gender discrimination and a form of sexual orientation discrimination. Regardless, the exclusion of same-sex couples from both marriage and its benefits fails even rational basis review. Significantly, there are no "historical exceptions" to the constitutional mandate of Article I, section 20.

Second, the trial court had the power to and correctly attempted to fashion a remedy that extends the benefits of marriage to same-sex couples. Indeed, the proper remedy is to extend both marriage and its benefits to otherwise qualified same-sex couples.

Finally, the trial court correctly ordered the State Registrar to register the marriage records. The State Registrar had a non-discretionary duty to register the marriage records; the trial court concluded that there was no plain, speedy, and adequate remedy in the ordinary course of the law; and procedural irregularities did not preclude the order to register of the marriage records. Regardless, there exist alternative bases for affirming the order to register the marriage records.

VI. Supplemental Statement of Facts.

A. Disagreement with the State's Statement of Facts.

Plaintiffs accept most of the State's Statements of Facts for purposes of the State's sole assignment of error. Although the State provides a generally accurate, abbreviated summary of some of the background to the litigation (State Br at 10-11) and certain portions

of Attorney General Myers’ public legal opinion regarding the issuance of marriage licenses to same-sex couples (State Br at 11) in its Statement of Facts, plaintiffs disagree with one of the State’s statements.

The State says that defendants Woodward and Weeks “continue to decline to file and register the licenses issued by Multnomah County to plaintiffs and other same-sex couples” (State Br at 11-12). Although not a fact in the trial court record, DOMC asserts in its brief that the State registered the marriage records of same-sex couples (DOMC Br at 74 n56). In addition, the State elsewhere has asked the Court to take judicial notice of a document (App-23) and “the information that appears on its face” (State Br at 23). The State describes the original document filed with the Court as a certified copy of a “licensing-and-solemnization document recording the marriage of one of the plaintiff couples [Li and Kennedy]” (State Br at 23 and n12). It appears to have a state file number, and from the date stamp visible at the bottom of the document, it appears that the State Registrar certified it as a copy of an original certificate on file in the Vital Records Unit of the Oregon Center for Health Statistics (App-23).

B. Plaintiffs do not object to the State’s request for judicial notice.

Plaintiffs do not question the authenticity of the marriage document appended to the State’s brief. Plaintiffs further note that records of “marriages, if the report thereof was made to a public office pursuant to requirements of law,” are an exception to the hearsay rule. OEC 803(9). Plaintiffs therefore do not object to the State’s request that the Court take judicial notice of the document and information on its face pursuant to OEC 201(b), 201(d), and 201(f).

C. The Court should reject DOMC’s Statement of Facts.

The Court’s rules call for appellants to make “[a] concise summary, without argument, of all the facts of the case material to determination of the appeal.” ORAP 5.40(8). “The summary shall be in narrative form with references to the places in the transcript, * * * record or abstract where such facts appear.” Id. DOMC violates both of these mandates.

DOMC's Summary of Facts contains immaterial assertions and arguments as to conclusions it would like to have drawn from materials outside the record, e.g., references to "secret meetings" (DOMC Br at 13 n14). In its argumentative statement, DOMC relies on two articles it has printed from an internet site and placed in a supplemental "Excerpt of Record" (DER 18-DER 28). Yet DOMC admits those articles were not part of the record below (DOMC Br at 13 n14). Attempting to justify that violation of the court's rules, DOMC states it failed to introduce the "evidence" below because the trial court excluded not the evidence, but the "legal issue to which it was relevant" (*id.*). That is no justification, though, for inserting these materials on appeal. As DOMC implicitly admits, the articles are far afield from the legal issues presented in this Court. The Court should disregard DOMC's Summary of Facts.

D. Plaintiffs object to DOMC's request for judicial notice.

DOMC then requests that the Court take judicial notice of vaguely referenced facts (*id.*). DOMC apparently asks the Court to assume as fact the truth of all of the statements attributed to various individuals in the articles DOMC has inserted on appeal. Those "facts," however, are plainly outside the scope of facts permitted to be judicially-noticed under OEC 201(b). Accordingly, DOMC's request should be denied under OEC 201(b).

In lieu of DOMC's Statement of Facts, plaintiffs rely on and refer the Court to plaintiffs' Statement of Facts in their opening brief on cross-appeal.

E. Supplemental facts relevant to DOMC's appeals on the merits.

DOMC asserts in argument that the State could have an interest in limiting marriage to "opposite sex pairs based on genuine biological distinctions and on an interest in the procreation and nurturing of children" (DOMC Br 28). However, DOMC ignores that the record contains facts as to the State's actual policies and practices relevant to any state interest in promoting procreation and nurturing of children. Plaintiffs therefore provide the following supplemental facts, presenting such evidence in the record below.

1. The State of Oregon does not demand proof of ability or a promise to procreate through sexual intercourse as a prerequisite to issuance of marriage licenses or as a requirement of recognized marriages.

Plaintiffs called to the attention of the trial court that the marriage statutes in ORS Chapter 106 contain no references to procreation (CR 19 at 4). The description of marriage as a civil contract entered into by males at least 17 years old and females at least 17 years old in ORS 106.010 makes no mention of procreation (id.).

The State of Oregon also has two statutes defining void and voidable marriages (id.). Void marriages under ORS 106.020 are those where either party already had a wife or husband living at the time of the marriage and those between first cousins or those nearer of kin to each other (id.). Voidable marriages under ORS 106.030 are those marriages entered into by a party lacking capacity, whose consent is obtained by fraud, or who is not of legal age (id.). Accordingly, the State of Oregon does not consider marriages void or voidable for inability to engage in procreative sexual intercourse or for disinterest in procreation (id.).

Pursuant to ORS 106.110, “[n]o county clerk shall issue a license contrary to the provisions of ORS 106.041 to 106.077 or 106.100” (CR 19 at 4). Thus, it is the policy of the State of Oregon to require issuance of a marriage license in accordance with ORS 106.041 to 106.077 and ORS 106.100 (CR 19 at 4). Those statutes describe the written application for the license, ORS 106.041; the fee, ORS 106.045; proof of age, ORS 106.050; parental consent if the applicant is under age 18, ORS 106.060; a waivable waiting period, ORS 106.077; and a record of the license, ORS 106.100 (CR 19 at 4). Those statutes are devoid of any requirement that the applicants make any statement of their intentions regarding procreation, much less prove an ability to procreate or promise to procreate (id.).

2. Whether children are brought into a parent’s life through procreative sexual intercourse or through reproductive technology or adoption, the State of Oregon recognizes the same parent-child legal relationship.

The ways in which both lesbian and gay couples and heterosexual couples bring children into their lives include, in addition to sexual intercourse, assisted reproductive technology (*e.g.*, artificial insemination or *in vitro* fertilization), adoption, guardianship, and

foster care (ER 153 at ¶ 6). Whether a child is brought into a parent's life through assisted reproductive technology, adoption, or sexual intercourse, each parent has equal parental rights under Oregon law (ER 153-ER 154 at ¶ 7). Likewise, each child has the same legal relationship to his or her parent under Oregon law (id.). These policies are codified at ORS 109.041 and ORS 109.239 to ORS 109.243 (id.).

3. Lesbian and gay parents and heterosexual parents are treated equally by the State of Oregon.

When couples that are parents dissolve their relationships, the sexual orientation of a parent is not a proper factor under Oregon law in determining child custody or visitation disputes; lesbian and gay parents and heterosexual parents are treated equally under Oregon law (ER 154 at ¶ 8). This policy is codified at ORS 107.137(3) (id.).

Under ORS 409.010(2), the Department of Human Services (“DHS”) “is responsible for the delivery and administration of programs and services” relating, among other things, to “[c]hildren and families, including but not limited to child protective services, foster care, residential care for children and adoption services” (CR 19 at 5).

Plaintiffs advised the trial court that DHS promulgates child welfare policies for the State of Oregon, and it has a child welfare policy manual available on the internet through the its website, www.dhs.state.or.us (id.). DHS's child welfare policy manual contains, among other things, regulations providing for minimum standards for adoptive homes in Oregon (CR 19 at 4-5). Pursuant to OAR 413-120-0310(2), proposed “adoptive parents and other members of the household shall maintain a lifestyle and have a personal history, that demonstrates the capacity to meet emotional and physical needs of adoptive children,” and “[m]arried or unmarried prospective adoptive parents should have a relationship of sufficient duration to give evidence of stability, and will be evaluated for their ability to parent adoptive children” (CR 19 at 5).

Joint adoptions are adoptions by two individuals jointly, such as a married couple (ER 154 at ¶ 9). Joint adoptions of children by gay couples and lesbian couples occur in Oregon (id.). The controlling statute, ORS 109.309(1), states that “any person” may adopt “another

person” (id.). No statute requires that the petitioners be married or that they be of the opposite sex (id.). No statute or regulation prohibits gay or lesbian people from adopting, and in fact DHS and the court approve such adoptions routinely when they are in the children’s best interest (id.).

A second-parent adoption is the adoption of a child by a non-biological co-parent of the child (ER 154 at ¶ 10). These adoptions are similar to stepparent adoptions, in which stepparents adopt the children of their spouses (id.). In the case of lesbian and gay couples, the first parent is sometimes the biological parent and sometimes an adoptive parent of the child (id.). Under ordinary circumstances, Oregon does not conduct a home study or a post-placement report in a stepparent or second-parent adoption (id.).¹ Again, such adoptions are routinely approved by DHS and by the court (id.).

When a joint adoption or a second-parent adoption is granted to a lesbian or gay couple, the State Registrar issues birth certificates on which the parents are called “parent” and “parent” instead of the standard “mother” and “father” (ER 155 at ¶ 11; ER 163 at ¶ 13; ER 167; ER 158 at ¶ 13; ER 160; ER 173-ER 174 at ¶ 14; ER 176-ER 177; ER 480 at ¶¶ 13-15; ER 482; ER 110 at ¶ 1; ER 111).

As part of DHS’s Child Welfare Policy #II-B.1, Safety Standards for Foster Care, Relative Care and Adoptive Families, DHS requires that applicants for foster parenting and foster parents must be “responsible, stable, emotionally mature adults who exercise sound judgment” and that they “must have the interest, motivation, and ability to nurture, support, and meet the mental, physical, and emotional needs of children in SOSCF custody.” OAR

¹ The statute providing for the waiver of those reports is ORS 109.309(6)(c), (ER 154 at ¶ 10), which provides:

“The department, upon request by the petitioner, may waive the home study requirements described in paragraph (a)(C) of this subsection in an adoption in which one of the child’s biological or adoptive parents retains parental rights. The department shall waive post-placement reports in an adoption in which one of the child’s biological or adoptive parents retains parental rights.”

413-200-0308(1) and (2). SOSCF is the Oregon State Office for Services to Children and Families, an agency of DHS whose “primary mission” is “to ensure the safety and well being of Oregon’s children.” OAR 413-200-0301(1). DHS, through SOSCF, approves and certifies foster parents for children in its custody. OAR 413-200-0381, 413-200-0390 to 413-200-0395. DHS, through SOSCF, also approves and certifies adoptive parents for children in its custody. OAR 413-120-0190 to 413-120-0240. All of this was pointed out to the trial court by plaintiffs (CR 19 at 7).

When a child is in the custody of the State of Oregon, the State of Oregon has a practice of treating lesbian and gay couples and heterosexual couples equally under the regulations for purposes of foster care placement and adoption (ER 110 at ¶¶ 1-2). The State agreed that the SOSCF places children within its care in foster care families when the foster parents are known to be lesbian or gay (ER 110 at ¶ 2). The State also agreed that SOSCF permits adoptions of foster children by couples whom it knows to be lesbian or gay (ER 110 at ¶ 2). The State has even recruited foster parents whom it knows to be gay (see ER 492 at ¶¶ 1-5).

Plaintiffs also pointed out, (CR 19 at 31), that the State permits its employees, whether heterosexual or lesbian or gay, to take leave to care for a sick child whom the employee parents pursuant to OAR 839-009-0210, which provides in subsection (2) that the child may be “biological, adopted, foster or stepchild, the child of an employee’s same sex-domestic partner or a child with whom the employee is or was in a relationship of in loco parentis.”

4. Oregon’s Attorney General admitted that there appears to be no rational link between Oregon law reserving marriage for opposite-sex couples and procreation and child-rearing.

Attorney General Myers summarized the state of things with respect to the connection between opposite-sex partners and procreation and child-rearing in his public legal opinion as follows:

“Although the courts have not reached uniform conclusions, the connection between opposite-sex partners and child-rearing has considerable historic and cultural momentum. But technology and Oregon law have, if not completely

severed that link, at least attenuated it to a considerable degree. First, of course, people who wish to get married in Oregon need not promise to have children. And technology, some of it not particularly novel, permits women in same-sex relationships to conceive and bear children. Likewise, a man in a same-sex relationship may father and raise a child carried by a surrogate. Oregon law does not disadvantage those children in any way of which we are aware, except by virtue of the marriage statutes.”

(ER 82). He went on to note that “what is denied to same-sex couples is the status of marriage and its attendant benefits, many of which are unrelated to procreation or children”

(ER 83). Attorney General Myers concluded: “Consequently, the connection in Oregon between the specific law in question and that rationale appears strained at best” (ER 83).

ANSWER TO DOMC’S FIRST ASSIGNMENT OF ERROR

The trial court correctly held that the exclusion of same-sex couples from the benefits of marriage (i.e., the state-conferred tangible benefits of marriage) violates Article I, section 20.²

ARGUMENT IN SUPPORT OF ANSWER TO DOMC’S FIRST ASSIGNMENT OF ERROR

I. Preservation and the standard of review.

Although DOMC does not point out where in the record it opposed plaintiffs’ and Multnomah County’s motions for summary judgment on the First Claim for Relief (see DOMC Br at 13-14), plaintiffs do not dispute that it did so in general. Quoting from Davis v. Campbell, 327 Or 584, 587, 965 P2d 1017 (1998) (“The parties do not dispute the material facts.”), DOMC concedes that as to the trial court’s ruling granting those motions, there is no genuine issue of material fact for trial (DOMC Br at 14). Therefore, the Court reviews whether the moving party is entitled to judgment as a matter of law. ORCP 47C; Jones v. General Motors Corp., 325 Or 404, 420, 939 P2d 608 (1997).

II. Both marriage and its benefits are privileges and immunities.

Article I, section 20 guarantees that “[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally

² As set forth in plaintiffs’ opening brief, the trial court erred in failing to hold that the exclusion of same-sex couples from marriage itself also violates Article I, section 20 (Pls Br at 25-33). Except where otherwise indicated, plaintiffs use the term “marriage” to mean “marriage and its benefits” throughout their argument.

belong to all citizens.” As set forth in plaintiffs’ opening brief (Pls Br at 25-33; see also Br of Amici Vermont Freedom to Marry Task Force, et al, at 10-18, 21-31) both marriage and its benefits are privileges and immunities because they confer numerous and various tangible and intangible “advantage[s]” on married couples and their children. See City of Salem v. Bruner, 299 Or 262, 269, 702 P2d 70 (1985).

The parties are in substantial agreement on this point. The State agrees that the benefits of marriage are privileges and immunities (State Br at 36-37). The State does not address whether marriage itself is a privilege or an immunity, but it concedes that the “court’s decisions have, explicitly and implicitly, defined ‘privileges or immunities’ broadly, finding a wide variety of legal rights to be within the scope of section 20’s protection” (id. at 7).

DOMC concedes that the benefits of marriage “can be said to provide * * * cognizable benefit” (DOMC Br at 2). It further concedes that marriage itself is a “civilly-recognized contract concerning a personal relationship” and that “[t]here may be ‘some advantage’ in a marriage contract standing alone” (id. at 2, 47). Indeed, there is significant advantage in such a contract standing alone. The formal commitment to a relationship represented by a marriage confers an advantage separate and apart from the advantage conferred by the benefits of marriage. It engenders a sense of duty on the part of each partner to support the other and to maintain the relationship. Moreover, it engenders a sense of respect on the part of third parties because the formal commitment to a relationship represented by a marriage is uniquely venerated. That the primary motivation of many, if not most, couples who marry is not the opportunity to enjoy the benefits of marriage but rather the opportunity to express their love and commitment to each other and to their community, only confirms the significant advantage in such a contract standing alone.³

Moreover, DOMC concedes the definition of “privilege or immunity:” “Whenever a person is denied some advantage to which he or she would be entitled but for a choice made

³ That DOMC protests so vigorously that same-sex couples should not be afforded marriage itself further confirms that marriage has a value independent of the value of its benefits.

by a governmental authority, Article I, section 20 requires that the government decision to offer or deny the advantage be made by permissible criteria and consistently applied” (*id.* at 47 (quoting *Bruner*, 299 Or at 268-69) (emphases added)). Contrary to DOMC’s argument, the definition does not require a “significant” or “tangible” advantage. Rather, it requires only “some” advantage. *See also* 49 Or Op Att’y Gen 112, 298 (Aug 26, 1998) (“[E]ven a slight advantage might constitute a ‘privilege’ or ‘immunity.’”). Furthermore, the advantage need not be articulated “within the specific statute challenged,” as DOMC contends (DOMC Br at 48 (emphasis omitted)). Rather, Article I, section 20 is implicated “whenever” an advantage is denied.⁴

But for the exclusion of same-sex couples from marriage, same-sex couples would be entitled to enjoy not only the advantage conferred by marriage itself but also the advantage conferred by the benefits of marriage. Accordingly, both marriage and its benefits are privileges and immunities.

III. The exclusion of same-sex couples from both marriage and its benefits is subject to heightened scrutiny because it is a form of gender discrimination.

A. The exclusion of same-sex couples from both marriage and its benefits is a form of gender discrimination.

As a matter of state law, opposite-sex couples can marry, but same-sex couples cannot: “Marriage is a civil contract entered into in person by males at least 17 years of age and females at least 17 years of age, who are otherwise capable, and solemnized in accordance with ORS 106.150.”⁵ ORS 106.010 (emphasis added). DOMC is simply wrong in arguing that ORS Chapter 106 does not mention gender (DOMC Br at 39). On the face of the law, gender is a determinant of whether a person can marry his or her partner. A man who seeks to marry a female partner can marry, but a woman who seeks to marry a female

⁴ DOMC’s assertion that “[a]ll previous Article I, section 20 cases have dealt with specific and tangible rights granted within the specific statute challenged” is contradicted by the case law on which it relies (*id.*) (emphasis omitted). Neither *State v. Freeland*, 295 Or 367, 667 P2d 509 (1983), nor *Anderson v. Gladden*, 234 Or 614, 383 P2d 986 (1963), involved a challenge to statute. Rather, both involved a challenge to the exercise of discretionary authority.

⁵ Plaintiffs concede that ORS 106.010 does not permit marriages of same-sex couples. *See PGE Co. v. BOLI*, 317 Or 606, 859 P2d 1143 (1993).

partner cannot. Similarly, a woman who seeks to marry a male partner can marry, but a man who seeks to marry a male partner cannot. In other words, whether a person can marry his or her partner turns on his or her gender. By definition, this is a form of gender discrimination.

DOMC asserts that the exclusion of same-sex couples from marriage is not a form of gender discrimination because neither men nor women are excluded from marriage and indeed both men and women can marry on equal terms (i.e., a person of the opposite sex). Such logic has long been rejected by the United States Supreme Court. In McLaughlin v. Florida, 379 US 184 (1964), the Court had no difficulty concluding that a penalty on interracial cohabitation was a form of race discrimination, even though it recognized that “each member of the interracial couple [was] subject to the same penalty.” Id. at 188; see also id. at 192 (“We deal here with a racial classification * * * .”). In doing so, the Court expressly overruled the shameful holding of Pace v. Alabama, 106 US 583 (1883), which reasoned that an enhanced penalty on adultery or fornication by an interracial couple did not constitute race discrimination because “all who committed it, white and Negro, were treated alike.” McLaughlin, 379 US at 189. In Loving v. Virginia, 388 US 1 (1967), the Court again had no difficulty concluding that a penalty on interracial marriage was a form of race discrimination, even though it recognized that “[the] miscegenation statutes punish[ed] equally both the white and the Negro participants in an interracial marriage * * * .” Id. at 8; see also id. at 11 (“There can be no question but that [the] miscegenation statutes rest solely upon distinctions drawn according to race.”). The Court flatly “reject[ed] the notion that the mere ‘equal application’ of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment’s proscription of all invidious racial discriminations.” Id. at 8.

Both McLaughlin and Loving reflect the fundamental principle that constitutional rights are individual rights, not class rights. In Shelley v. Kraemer, 334 US 1 (1948), the United States Supreme Court acknowledged this fundamental principle in the course of holding that racially discriminatory restrictive covenants are judicially unenforceable:

“Respondents urge * * * that since the state courts stand ready to enforce restrictive covenants excluding white persons from the ownership or occupancy of property covered by such agreements, enforcement of covenants excluding colored persons may not be deemed a denial of equal protection of the laws to the colored persons who are thereby affected. This contention does not bear scrutiny. * * * The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.”

Id. at 21-22 (footnotes omitted). In Perez v. Lippold, 198 P2d 17 (Cal 1948), the California Supreme Court did likewise in the course of becoming the first court in the nation to strike down an anti-miscegenation statute:

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

Id. at 20 (citations omitted). Thus, courts have long recognized that “indiscriminate imposition of inequalities” is a form of discrimination – so long as a statute discriminates against an individual based on a given characteristic, it is of no moment if the statute does not also discriminate against the class defined by the given characteristic.⁶

This Court has done likewise. In Hewitt v. SAIF Corp., 294 Or 33, 653 P2d 970 (1982), the Court held that the denial of workers’ compensation benefits to men and their children upon the on-the-job death or injury of their unmarried female partners but not

⁶ DOMC may argue that the reasoning in McLaughlin, Loving, Shelley, and Perez is inapposite to this case because the proffered justification for the race discrimination in McLaughlin, Loving, Shelley, and Perez involved notions of white supremacy. Such an argument improperly conflates two analytically distinct questions. Whether the discrimination at issue in this case is a form of gender discrimination does not turn on whether its proffered justification involves notions of male supremacy. In other words, the nature of the discrimination at issue in this case and the sufficiency of its proffered justification are two analytically distinct questions. Thus, it is instructive in this case that, regardless of its proffered justification, the discrimination at issue in McLaughlin, Loving, Shelley, and Perez was a form of race discrimination.

women and their children upon the on-the-job death or injury of their unmarried male partners violated Article I, section 20. In doing so, the Court had no trouble seeing that the law discriminated based on gender, notwithstanding the fact that it discriminated against both men and women:

“It is quite clear that the law in question, ORS 656.226, grants an economic privilege to certain women who have cohabited with men and produced a child or children as a result of that cohabitation, while withholding such benefits from men who might request them on the same terms. It grants as well to certain working men the privilege of providing benefits through workers’ compensation to keep their family unit intact following accidental death but withholds the same benefit from working women. It discriminates against men * * * who have cohabited with female workers and fathered a child by denying them benefits altogether, and it discriminates against women * * * by denying them the privilege of providing through their employment for their surviving family unit. The privilege created by ORS 656.226 is bestowed or withheld solely on the basis of gender.”

Id. at 42-43 (footnote omitted) (emphases added). It was enough that gender was a determinant of whether a person could enjoy workers’ compensation benefits. See also, e.g., Califano v. Goldfarb, 430 US 199 (1977) (law discriminated against surviving husbands vis-à-vis surviving wives and female wage earners vis-à-vis male wage earners, yet Court had no trouble seeing that it discriminated based on gender); Frontiero v. Richardson, 411 US 677 (1973) (law discriminated against servicewomen vis-à-vis servicemen and the husbands of servicewomen vis-à-vis the wives of servicemen, yet Court had no trouble seeing that it discriminated based on gender); Hillesland v. Paccar, Inc., 80 Or App 286, 722 P2d 1239 (1986) (law discriminated against female workers vis-à-vis male workers and husbands of female workers vis-à-vis the wives of male workers, yet court had no trouble seeing that it discriminated based on gender). Thus, Hewitt makes clear that it is of no moment that neither men nor women are excluded from marriage and indeed both men and women can marry on equal terms. It is enough that gender is a determinant of whether a person can marry his or her partner.

This Court would not be the first to conclude that the exclusion of same-sex couples from marriage is a form of gender discrimination. In Baehr v. Lewin, 852 P2d 44 (Haw 1993) (predating a state constitutional amendment permitting marriage to be reserved to

opposite-sex couples), the Hawaii Supreme Court held that the exclusion of same-sex couples from marriage discriminates “on the basis of the applicants’ sex,” reasoning that “[s]ubstitution of ‘sex’ for ‘race’ and article I, section 5 for the fourteenth amendment [in Loving] yields the precise case before us together with the conclusion that we have reached.” Id. at 60, 68. In Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super Ct, Feb 27, 1998) (predating a state constitutional amendment reserving marriage to opposite-sex couples), an Alaska trial court held likewise:

“That [an exclusion of same-sex couples from marriage] is a sex-based classification can readily be demonstrated: if twins, one male and one female, both wished to marry a woman and otherwise met all of the Code’s requirements, only gender prevents the twin sister from marrying under the present law. Sex-based classification can hardly be more obvious.”

Id. at *6. These cases confirm that the exclusion of same-sex couples from marriage is a form of gender discrimination (see also State Br at 41-42; Br of Amici Legal Momentum, et al, at 3-10).

B. Gender discrimination is subject to heightened scrutiny because gender is a true and suspect classification.

A true classification concerns a characteristic that exists apart from the law. State v. Clark, 291 Or 231, 240, 630 P2d 810 (1981). A suspect classification (1) “can be suspected of reflecting ‘invidious’ social or political premises, that is to say, prejudice or stereotyped prejudgments” and “purposeful historical, legal, economic and political unequal treatment,” or (2) concerns a characteristic that “bears no relation to ability to contribute to or participate in society,” or (3) “focuses on ‘immutable’ personal characteristics,” which can be “determined by causes not within the control of the individual,” or (4) a combination of these factors. Hewitt, 294 Or at 45-46. In Hewitt, the Court correctly concluded that gender is a true and suspect classification. Id. at 46.

A true but non-suspect classification is subject to rational basis review. Jensen v. Whitlow, 334 Or 412, 423, 51 P3d 599 (2002). A true and suspect classification is necessarily subject to a more exacting review.⁷ Indeed, the Court has embraced the

⁷ In Hewitt, the Court did not have a need to subject gender discrimination to heightened scrutiny. The classification reflected arbitrary judgments about men and women

hallmarks of heightened scrutiny where a suspect classification is at issue. First, the State bears the burden of justifying a suspect classification. Hewitt, 294 Or at 46 (“The suspicion may be overcome if the reason for the classification reflects [intrinsic differences].”) (emphasis added). Second, a suspect classification can be justified only by actual, not hypothetical, rationales. Id. at 49 (requiring a showing of “intrinsic differences”); see also id. at 46 (“The suspicion may be overcome if the reason for the classification reflects [intrinsic differences].”). Thus, gender discrimination can be justified only where the State can show actual, not hypothetical, rationales. Because the exclusion of same-sex couples from marriage and its benefits is a form of gender discrimination, it is subject to such heightened scrutiny.

IV. The exclusion of same-sex couples from both marriage and its benefits is subject to heightened scrutiny because it is a form of sexual orientation discrimination.

A. The exclusion of same-sex couples from both marriage and its benefits is a form of sexual orientation discrimination.

1. The exclusion of same-sex couples from both marriage and its benefits discriminates against lesbian and gay people on its face.

Whether a person can marry his or her partner turns on whether he or she seeks to enter into an intimate relationship with a person of the same sex or a person of the opposite sex. In other words, whether a couple can marry turns on the essential distinction between lesbian and gay people and heterosexual people. Thus, on the face of the law, sexual orientation is a determinant of whether a person can marry his or her partner.

DOMC asserts that the exclusion of same-sex couples from marriage is not a form of sexual orientation discrimination because neither lesbian and gay people nor heterosexual

and “no other reason.” Hewitt, 294 Or at 46; see also State Br at 47 n35. A classification reflecting nothing more than arbitrary judgments fails even rational basis review. City of Klamath Falls v. Winters, 289 Or 757, 776, 619 P2d 217 (1980) (Article I, section 20 does not tolerate “palpably arbitrary” governmental discrimination); Delgado v. Souders, 334 Or 122, 146, 46 P3d 729 (2002) (“Article I, section 20, prohibits ‘[h]aphazard’ or ‘standardless’ administration of laws.”) (quoting Freeland, 295 Or at 374); see also Lawrence v. Texas, 539 US 558, 582 (2003) (O’Connor, J, concurring) (“Moral disapproval of [lesbian and gay people], like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.”) (citing Romer v. Evans, 517 US 620, 634-35 (1996), and United States Dep’t of Agric. v. Moreno, 413 US 528, 534 (1973)).

people are excluded from marriage and indeed both lesbian and gay people and heterosexual people can marry on equal terms (i.e., a person of the opposite sex). This argument is virtually identical to the argument made by the State of Texas – and rejected by the United States Supreme Court – in Lawrence. In Lawrence, the Court struck down a law prohibiting “deviate sexual intercourse with a person of the same sex.” Lawrence, 539 US at 2476 (quotation omitted). In its brief, the State of Texas argued that, because the law, by its own terms, prohibited sexual intimacy between “same-sex” couples instead of “lesbian and gay” couples, it did not discriminate based on sexual orientation. Lawrence v. Texas, No. 02-102, 2003 WL 470184, at *34 (Feb 17, 2003) (Resp Br) (“Under the facially neutral conduct prohibitions of section 21.06, everyone in Texas is foreclosed from having deviate sexual intercourse with another person of the same sex.”). The majority opinion implicitly rejected such sophistry, acknowledging throughout its analysis that the law discriminated against lesbian and gay people. The concurring opinion explained why:

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

Id. at 2486-87 (O’Connor, J, concurring). Thus, Lawrence stands for the proposition that, where a law discriminates based on an intimate relationship with a person of the same sex, it discriminates against lesbian and gay people based on their sexual orientation on its face. No showing of discriminatory intent is required.

This Court similarly need not labor to find that the exclusion of same-sex couples from marriage is a form of sexual orientation discrimination. Just as common sense tells us that a law that criminalizes the sexual intimacy of same-sex couples criminalizes the sexual intimacy of lesbian and gay couples, it tells us that a law that prohibits marriage of same-sex couples prohibits marriage of lesbian and gay couples. See also Castle v. Washington, No 04-2-00614-4, 2004 WL 1985215, at *13 (Wash Super Ct Sept 7, 2004) (appeal pending) (implicitly recognizing that the exclusion of same-sex couples from marriage constitutes

discrimination based on sexual orientation); State Br at 42-43; Br of Amici Oregon Gay and Lesbian Law Ass'n, et al, at 4-6).

2. In the alternative, the exclusion of same-sex couples from both marriage and its benefits discriminates against lesbian and gay people as applied.

Because the exclusion of same-sex couples from marriage discriminates against lesbian and gay people on its face, the Court need not reach whether it discriminates against lesbian and gay people as applied. That said, given that the marriage statutes by their operation necessarily and categorically exclude 100% of people in lesbian or gay relationships but 0% of people in heterosexual relationships, they indeed discriminate against lesbian and gay people as applied.

DOMC's assertion to the contrary is predicated on two false constructs. First, DOMC's assertion that Article I, section 20 applies only to favoritism stands in direct contradiction to its concession that "the clause came ordinarily to 'be invoked by persons who wanted a privilege or immunity for themselves rather than to withdraw it from others. * * * ' Thus, the Court soon held that the provision's 'protective effect' extended 'to rights against adverse discrimination as well as against favoritism. * * * '" (DOMC Br at 27 n19 (quoting Clark, 291 Or at 237)).

Second, DOMC's attempt to distinguish Zockert v. Fanning, 310 Or 514, 800 P2d 773 (1990), from this case is meritless. DOMC draws a false distinction between, on the one hand, what it denominates the "discriminatory impact within a class analysis" in Zockert and, on the other hand, what it denominates the "disproportionate burden on a separate class [analysis]" in this case (DOMC Br at 43-44 (emphasis omitted)). Zockert concerned discrimination between two similarly situated classes. The two classes were similarly situated in that each was comprised of indigent parents with an equal need for legal assistance in proceedings to terminate parental rights. The basis for the discrimination between the two classes was that one class was comprised of indigent parents in so-called chapter 109 proceedings and the other class was comprised of indigent parents in so-called chapter 416 proceedings. This case likewise concerns discrimination between two similarly

situated classes. The two classes are similarly situated in that each is comprised of people in relationships with an equal need for the advantages that come with marriage. The basis for the discrimination between the two classes is that one class is comprised of people in lesbian or gay relationships and the other class is comprised of people in heterosexual relationships. Thus, there is analytical synchronicity between Zockert and this case. There is no distinction between “discriminatory impact within a class” and “disproportionate burden on a separate class.” There is only discrimination between two similarly situated classes on a particular basis – in this case, on the basis of sexual orientation.

Even though the marriage statutes do not expressly exclude people in lesbian or gay relationships, they operate to exclude them by negative implication and thereby discriminate against them as applied. They do so in the same way that the statute at issue in Zockert operated to exclude indigent parents in so-called chapter 109 proceedings by negative implication and thereby discriminated against them as applied. Where, as here, a statute by its operation necessarily and categorically excludes a class from the enjoyment of a privilege or immunity, it discriminates against the class as applied. See also Namba v. McCourt, 185 Or 579, 588, 204 P2d 569 (1949) (noting that, despite facial neutrality of law, “Japanese aliens today are the only group in Oregon of any significant size to which the Alien Land Law is applicable”).

B. Sexual orientation discrimination is subject to heightened scrutiny because sexual orientation is a true and suspect classification.

Sexual orientation is a true classification: “[T]he class clearly is defined in terms of ad hominem, personal and social characteristics.” Tanner v. OHSU, 157 Or App 502, 524, 971 P2d 435 (1998). The State and DOMC concede that this is so (State Br at 43; DOMC Br at 46).

The Court has not yet addressed whether sexual orientation is a suspect classification. This Court need not answer the question because the exclusion of same-sex couples from marriage fails even rational basis review, as set forth in section V below. See Hooper v. Bernalillo County Assessor, 472 US 612, 618 (1985) (declining to address whether the

classification at issue was subject to heightened scrutiny because, “if the statutory scheme cannot pass even the minimum rationality test, our inquiry ends”). That said, sexual orientation is indeed a suspect classification because it (1) is a classification that “can be suspected of reflecting ‘invidious’ social or political premises, that is to say, prejudice or stereotyped prejudgments,” and “purposeful historical, legal, economic and political unequal treatment;” (2) “bears no relation to ability to contribute to or participate in society;” and/or (3) is a classification that “focuses on ‘immutable’ personal characteristics,” which can be “determined by causes not within the control of the individual.” Hewitt, 294 Or at 46.

1. Sexual orientation discrimination can be suspected of reflecting invidious social and political premises, prejudice, stereotyped prejudgments, and purposeful historical, legal, economic, and political unequal treatment.

Where there is a historical pattern of prejudice directed against a disfavored class, discrimination against the class is subject to heightened scrutiny. This is so because such discrimination has so often proven to be invidious that it must be viewed with a high degree of suspicion. Because lesbian and gay people have experienced and continue to experience systemic discrimination on account of their sexual orientation, such discrimination must be subject to heightened scrutiny.

Lesbian and gay people have suffered broad-based prejudice in the past and continue to suffer such prejudice today. The manifestations of such animus have changed over time, but its existence has remained constant. At the turn of the past century, the medical establishment “embraced the ‘degeneracy’ theory of homosexuality” which “emphasized the depravity of the condition[.] * * * ” Patricia A. Cain, Litigating for Lesbian and Gay Rights: A Legal History, 79 Va L Rev 1551, 1555 (1993) (footnote omitted). The post-World War I era was marked by repression and censorship of sexual orientation-related expression. Id. at 1557. During the McCarthy era, lesbian and gay people were grouped with Communists as security risks, resulting in a Presidential executive order calling for the purge of such “sex perverts” from government service. Id. at 1565-66. Throughout the 1950s and 1960s, police commonly raided gay bars and arrested patrons as a form of harassment. Id. at 1564-65.

Until 1990, lesbian and gay immigrants were precluded from entering the United States, first as “psychopaths,” then as “sexual deviants.” See Tracey Rich, Sexual Orientation Discrimination in the Wake of Bowers v. Hardwick, 22 Ga L Rev 773, 773 n4 (1988). And, until 2003, the legal consequences of sodomy laws “were sufficiently severe to make lesbians and gay men think of themselves as criminals just for being who they were.” Cain, supra at 1564; see also Lawrence v. Texas, 539 US 558 (2003) (striking down a law that criminalized same-sex sodomy).

Today, many lesbian and gay people continue to hide their sexual orientation – from their families, their friends, their neighbors, their places of employment, and their houses of worship – for fear of rejection or harassment. Those who choose not to do so often find themselves the targets of discrimination on account of their sexual orientation. In one recent survey, three out of four respondents reported experiencing such discrimination, with one out of three respondents experiencing physical violence. Kaiser Family Found., Inside-OUT: A Report on the Experiences of Lesbians, Gays and Bisexuals in America and the Public’s Views on Issues and Policies Related to Sexual Orientation, 3, 4 (Nov 2001) (available at <http://www.kff.org/kaiserpolls/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=13874>). Such results are consistent with the findings of the Surgeon General of the United States:

“[O]ur culture often stigmatizes homosexual behavior, identity and relationships. These anti-homosexual attitudes are associated with psychological distress for homosexual persons and may have a negative impact on mental health, including a greater incidence of depression and suicide, lower self-acceptance and a greater likelihood of hiding sexual orientation. * * * In their extreme form, these negative attitudes lead to antigay violence. Averaged over two dozen studies, 80 percent of gay men and lesbians had experienced verbal or physical harassment on the basis of their orientation, 45 percent had been threatened with violence, and 17 percent had experienced a physical attack.”

United States Dep’t of Health and Human Servs., The Surgeon General’s Call to Action to Promote Sexual Health and Responsible Sexual Behavior, 8 (July 9, 2001) (available at <http://www.surgeongeneral.gov/library/sexualhealth/call.htm>) (citations omitted). Indeed, lesbian and gay people remain among the leading targets of hate crimes. See Federal Bureau

of Investigation, Hate Crime Statistics, 5, 9 (2002) (available at <http://www.fbi.gov/ucr/hatecrime2002.pdf>) (1,464 of the 7,462 hate crime offenses reported in 2002 – twenty percent of all reported hate crimes – were motivated by sexual orientation bias).

A similar history of discrimination has been experienced by the lesbian and gay people of Oregon. This fact has been recognized – even documented – by the State itself. On its website, DHS acknowledges the singularly egregious discrimination against lesbian and gay youth: “Among the most ignored, underserved, and mistreated of the adolescent population are gay, lesbian, and bisexual youth” (available at <http://www.dhs.state.or.us/publichealth/ipe/tech/vov.cfm#orientation>).

“The psychosocial problems of gay and lesbian adolescents are primarily the result of societal stigma, hostility, hatred, and isolation * * * gay and lesbian youth often encounter considerable difficulties with their families, schools, and communities * * * peers may engage in cruel name-calling, ostracize, or even physically abuse the identified individual * * * school and other community leaders may resort to ridicule or open taunting, or they may fail to provide support. Such rejection may lead to isolation, runaway behavior, homelessness, domestic violence, depression, suicide, substance abuse, and school or job failure”

(available at <http://www.dhs.state.or.us/publichealth/ipe/docs/faq.cfm#17>) (quotation omitted). Indeed, DHS goes on to report that “population-based studies of self-identified gay and lesbian youth taking anonymous risk behavior surveys have shown that this population is at significantly greater risk of suicidal behavior when compared to their heterosexual peers” (id.) (citations omitted); see also Dep’t of Human Servs., Promotion of Adolescent Mental Health and Prevention of Substance Abuse, at 7 (Sept 2000) (available at <http://www.dhs.state.or.us/publichealth/ofhs/adol.pdf>) (reporting that “suicide is the leading cause of death among lesbian and gay adolescents” and that “[l]esbian and gay youth account for 25% of homeless/throwaway/ runaway and 28% of high school drop outs”) (citations omitted)). The Center for Health Statistics and Vital Records confirms that harassment of lesbian and gay youth continues to be a significant concern in Oregon. In its 2002 Oregon Healthy Teens Survey, 550 of 5,618 respondents reported harassment “because someone thought [they] were gay, lesbian, or bisexual,” approximately the same number who reported

harassment “about [their] race or ethnic origin” (available at <http://www.dhs.state.or.us/publichealth/chs/ohteens/2001/8/ischool/fl17.cfm>) (see also CR19 at 16-19).

This stark pattern of bias against lesbian and gay people is not limited to lesbian and gay youth. The Court can and should take judicial notice of the fact that the Law Enforcement Data System reports that, in 2001, 70 of 232 reported bias crimes in Oregon were motivated by sexual orientation (available at www.leds.state.or.us/oucr/offense_report/2001/section_1b_01.pdf, at 1-24). Relative to the previous year, the increase in sexual orientation-motivated bias crimes outstripped by far the increases in other types of bias crimes. (*Id.*)

In sum, there exists not only a pattern of prejudice directed against lesbian and gay people but indeed an extraordinarily pernicious one (see also ER 156-77, 281-84, 331-34, 478-90).

2. Sexual orientation bears no relation to ability to contribute to or participate in society.

Sexual orientation bears no relation to capacity to participate in or contribute to society. It follows that sexual orientation is an irrelevant consideration in virtually every context in which the government acts, from police protection⁸ to public education⁹ to public employment¹⁰ to custody and visitation disputes.¹¹ This is why discrimination based on sexual orientation is highly suspicious. Such discrimination must be closely scrutinized to ensure that it is not invidious.

⁸ See, e.g., *Johnson v. Johnson*, Nos 03-10455, 03-10505, 03-10722, 2004 WL 1985441 (5th Cir Sept 8, 2004); *Stemler v. City of Florence*, 126 F3d 856 (6th Cir 1997).

⁹ See, e.g., *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F3d 1130 (9th Cir 2003); *Nabozny v. Podlesny*, 92 F3d 446 (7th Cir 1996).

¹⁰ See, e.g., *Miguel v. Guess*, 51 P3d 89 (Wash Ct App 2002); *Quinn v. Nassau County Police Dep’t*, 53 F Supp 2d 347 (EDNY 1999); *Weaver v. Nebo Sch. Dist.*, 29 F Supp 2d 1279 (D Utah 1998); *Glover v. Williamsburg Local Sch. Dist. Bd. of Educ.*, 20 F Supp 2d 1160 (SD Ohio 1998).

¹¹ See, e.g., *In re Marriage of Ashling*, 42 Or App 47, 599 P2d 475 (1979).

Despite the fact that homosexuality “implies no impairment in judgment, stability, reliability or general social and vocational capabilities,” harmful stereotypes about lesbian and gay people have long served as justifications for the discrimination that lesbian and gay people have experienced. American Psychiatric Ass’n, Fact Sheet: Gay, Lesbian and Bisexual Issues, 2 (May 2000) (available at http://www.psych.org/public_info/gaylesbianbisexualissues22701.pdf) (cited at CR19 at 14 n8).

“Homosexuals in our society have suffered from the extreme fear and hatred of the heterosexual majority. They have at various times been viewed as psychotic, immoral, and generally repulsive. As a result of these characterizations, homosexuals have been deprived of many opportunities open to heterosexuals. This deprivation is rarely based on any lack of capability but is instead usually based on the majority’s perception of homosexuality as contrary to nature and morality.”

Rich, supra at 773-74 (footnotes omitted).

The evidence dispelling odious myths that persist about homosexuality is overwhelming. First and foremost, with respect to the notion that lesbian and gay people are mentally ill, “[a]ll major professional mental health organizations have gone on record to affirm that homosexuality is not a mental disorder.” American Psychiatric Ass’n, supra at 1.

Many stereotypes about lesbian and gay people brand them as threats to child welfare. Yet “[n]umerous studies have shown that the children of gay parents are as likely to be healthy and well-adjusted as children raised in heterosexual households. Children raised in gay or lesbian households do not show any greater incidence of homosexuality or gender identity issues than other children.” American Psychiatric Ass’n, supra at 3. Furthermore, there is simply no correlation between homosexuality and child molestation. See Carole Jenny, et al., Are Children at Risk of Sexual Abuse by Homosexuals?, 94 *Pediatrics* 44 (1994) (finding that less than one percent of child molesters are gay); see also John Boswell, Christianity, Social Tolerance and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century at 16 (1980) (noting that, historically, baseless accusations of child molestation have been leveled against various disfavored minorities vulnerable to such propaganda).

Finally, the notion that lesbian and gay people favor sexual promiscuity over committed, family-centered relationships is outright false. Like their heterosexual counterparts, most lesbian and gay people desire stable, loving relationships. Indeed, one recent survey showed that 74% of lesbian and gay people would marry if they could. Kaiser Family Found., supra at 4; see also American Psychological Ass’n, supra at 1 (“The concept of sexual orientation refers to more than sexual behavior. It includes feelings as well as identity.”); ER 156-77, 281-84, 331-34, 478-90.

Thus, lesbian and gay people have been disadvantaged, not on account of their capacity to participate in or contribute to society, but rather on account of insidious untruths associated with their sexual orientation.

3. Sexual orientation discrimination focuses on immutable personal characteristics.

In Hewitt, the Court observed that gender is an immutable characteristic in the course of holding that gender is a suspect classification. Hewitt, 294 Or at 45-46. Significantly, in holding that “a classification is ‘suspect’ when it focuses on ‘immutable’ personal characteristics,” the Court did not hold that a classification is suspect only when it focuses on an immutable characteristic. Id. at 45. Rather, it recognized that, where a classification focuses on an immutable characteristic, it is highly likely to reflect “prejudice or stereotyped prejudgments” and therefore is inherently suspect. Id. It is the high likelihood that a classification reflects prejudice or stereotyped prejudgments that is the hallmark of a suspect classification, for which the fact that a classification focuses on an immutable characteristic is a proxy. Thus, while it is true that a classification that focuses on an immutable characteristic is suspect, it is also true that a classification that focuses on a mutable characteristic but nonetheless reflects prejudice or stereotyped prejudgments is also suspect.¹²

¹² This is consistent with federal jurisprudence. Sometimes, the case law lists immutability as a factor in the identification of a suspect classification and, sometimes, it does not; and where the case law lists immutability as a factor, it often does so in the disjunctive. See, e.g., City of Cleburne v. Cleburne Living Ctr., 473 US 432, 442 n10 (1985); id. at 440-41; Massachusetts Bd. of Retirement v. Murgia, 427 US 307, 313 (1976); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 US 1, 28 (1973); Lyng v. Castillo, 477 US 635, 638 (1986).

That said, sexual orientation is an “immutable characteristic” as the term is implicitly defined in the law. An immutable characteristic is not an unchangeable characteristic. Rather, it is a characteristic that is so essential to one’s identity that one should not be compelled to change it, even if one can do so, to enjoy a privilege or immunity. See Hernandez-Montiel v. INS, 225 F3d 1084, 1092 (9th Cir 2000) (holding that an immutable characteristic “either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences”); Watkins v. United States Army, 875 F2d 699, 726 (9th Cir 1989) (Norris, J, concurring) (“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). That this is necessarily so is borne out by the case law. The Court has noted that gender, alienage, and nationality are suspect classifications even though one can change one’s gender, citizenship, and nationality. Hewitt, 294 Or at 46. The Court has also noted that religion is a similar classification, even though one can change one’s religious affiliate. See Freeland, 295 Or at 375; see also Moccio v. Department of Human Resources, 103 Or App 207, 214, 796 P2d 1233 (1990) (creed and age are suspect classifications although they are subject to change). Sexual orientation is just such an immutable characteristic¹³ (see Br

¹³ Moreover, the social science supports the proposition that sexual orientation is “determined by causes not within the control of the individual.” Hewitt, 294 Or at 46; see also ER-157, 162, 169, 172, 282, 479, 489. Sexual orientation is established at a young age and is difficult to change thereafter (see Br of Amici Richard S. Colman, et al, at 3-6). So-called reparative therapy (i.e., efforts to turn a lesbian or gay person into a heterosexual person) has been repudiated by every mainstream association of mental health professionals (see id. at 5; Br of Amici American Psychological Ass’n, at 36 n90; see also American Psychiatric Ass’n, supra at 2 (“There is no published scientific evidence supporting the efficacy of ‘reparative therapy’ as a treatment to change one’s sexual orientation.”); id. at 4 (noting that the American Psychological Association, the National Association of Social Workers, and the American Academy of Pediatrics agree); United States Dep’t of Health and Human Servs., supra at 8 (“Sexual orientation is usually determined at adolescence, if not earlier, and there is no valid scientific evidence that sexual orientation can be changed.”) (citations omitted).)

of Amici Oregon Gay and Lesbian Law Ass’n, et al, at 25-28; see also State Br at 43-47).

Thus, sexual orientation is a suspect classification. See also Tanner, 157 Or App at 522-23.

Because (1) sexual orientation discrimination can be suspected of reflecting invidious social and political premises, prejudice, stereotyped prejudgments, and purposeful historical, legal, economic and political unequal treatment; (2) sexual orientation bears no relation to ability to contribute to or participate in society; and/or (3) sexual orientation discrimination focuses on immutable personal characteristics, the Court should conclude that sexual orientation is a suspect classification. As the Court of Appeals stated in Tanner:

“[W]e have no difficulty concluding that [lesbian and gay people] are members of a suspect class. Sexual orientation, like gender, race, alienage, and religious affiliation is widely regarded as defining a distinct, socially recognized group of citizens, and certainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice.”

Tanner, 157 Or App at 524; see also Castle, 2004 WL 1985215, at *11 (holding that sexual orientation is a suspect classification); Children’s Hosp. & Med. Ctr. v. Bonta, 118 Cal Rptr 2d 629, 650 (Ct App 2002) (listing sexual orientation as a suspect classification); Watkins, 875 F2d at 724-28 (Norris, J, concurring) (concluding that lesbian and gay people constitute a suspect class).¹⁴ Because the exclusion of same-sex couples from marriage and its benefits is a form of sexual orientation discrimination, it is subject to such heightened scrutiny (see also State Br at 43-47; Br of Amici Oregon Gay and Lesbian Law Ass’n, et al, at 10-29).

¹⁴ The United States Supreme Court has not yet addressed whether lesbian and gay people constitute a suspect class. See Tobias B. Wolff, Principled Silence, 106 Yale LJ 247, 248 (1996). Although some lower federal courts have concluded that lesbian and gay people do not constitute a suspect class, they have relied directly or indirectly on Bowers v. Hardwick, 478 US 186 (1986), a case that the United States Supreme Court has wholly repudiated. See Lawrence, 539 US at 578 (“Bowers was not correct when it was decided, and it is not correct today.”). In the alternative, these courts have mistakenly relied on Romer, a case that did not address whether the classification at issue was subject to strict scrutiny because it failed any level of scrutiny. See Hooper v. Bernalillo County Assessor, 472 US 612, 618 (1985). Accordingly, the conclusions of these courts lack integrity.

V. The exclusion of same-sex couples from both marriage and its benefits fails even rational basis review.

The exclusion of same-sex couples from marriage fails not only heightened scrutiny but even rational basis review. The Court has suggested that rational basis review inquires whether there is “a rational relationship between the classifications and a legitimate state interest.” Gale v. Department of Revenue, 293 Or 221, 231, 646 P2d 27 (1982) (quotation omitted). Alternatively, it has suggested that rational basis review inquires whether there is a “reasonable and relevant distinction” between the classes at issue. Zockert, 310 Or at 522 (emphasis added). The exclusion of same-sex couples from marriage fails either inquiry.

A. The exclusion of lesbian and gay couples from marriage does not rationally further any state interest in “traditional” procreation.

The exclusion of same-sex couples from marriage does not rationally further any state interest in “traditional” procreation. There is simply no connection. Heterosexual couples will continue to bring children into their families via “traditional” procreation regardless of whether lesbian and gay couples are permitted to marry. See Hooper, 472 US at 622 (striking down a statute under rational basis review because it “[was] not written to require any connection between [the classification] and [the proffered state interest].”).

Moreover, even under rational basis review, a proffered justification must have some basis in reality. See Heller v. Doe ex rel. Doe, 509 US 312, 321 (1993) (“[E]ven the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation.”); Allegheny Pittsburgh Coal Co. v. County Comm’n, 488 US 336, 343-44 (1989) (distinguishing between theory and reality); see also Hewitt, 294 Or at 38 (“Surely no judge today * * * would attempt to justify a statute in * * * language * * * [that] hypothesize[s] [a] statutory objective [in the way that Hunter did].”). The reality is that the State’s interest in marriage is not to encourage children to be brought into families via “traditional” procreation. “[P]eople who wish to get married in Oregon need not promise to have children, nor prove that they are capable of doing so” (State Br at 50); see also Goodridge v. Department of Public Health, 798 NE2d 941, 961 (Mass 2003) (“[I]t is the

exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.”).

In reality, the State’s interest in marriage as it relates to children is to support them and their families, regardless of the means by which they were brought into their families. There are a variety of ways in which couples bring children into their families, only one of which is “traditional” procreation. Like heterosexual couples, lesbian and gay couples bring children into their families via assisted reproductive technology (e.g., donor insemination, *in vitro* fertilization), adoption, foster care, and guardianship (ER 153; see also ER 158, ER 163, ER 172-ER 174, ER 480. In this regard, lesbian and gay couples are no different than heterosexual couples. State law confirms that this is so by equally valuing children who are brought into families via “traditional” procreation and those who are brought into families via other means. See, e.g., ORS 109.050 (“An adopted child bears the same relation to adoptive parents and their kindred in every respect pertaining to the relation of parent and child as the adopted child would if the adopted child were the natural child of such parents.”); see also, e.g., ORS 109.041(1) (adopted child to be treated as natural child); ORS 109.243 (child born as a result of artificial insemination to be treated as natural child); ORS 112.175(1) (intestate succession rights for adopted child); ORS 659A.150(4) (family leave for adopted or foster child); ORS 659A.159(1)(a) (same); OAR 101-010-0005(7)(b)(A)-(B) (state employee benefits for adopted child or child under guardianship); OAR 101-020-0020(5) (state employee medical and dental benefits for adopted child); OAR 101-050-0010(2)(e) (state retiree benefits for adopted child); OAR 839-009-0210(2), (5) (family leave for adopted or foster child); OAR 839-009-0230(1) (parenting leave for adopted or foster child); OAR 839-009-0240(6) (parenting leave for adopted or foster child); accord ER 153-ER 54 at ¶ 7; State Br at 50 (“Oregon law protects [children of same-sex couples] to the same degree that it does the children of married couples, except that their parents are denied the benefits conferred by the marriage statutes.”).

Finally, where a classification is “so discontinuous with the reasons offered for it,” those reasons become “impossible to credit.” Romer, 517 US at 632, 635; see also Cleburne,

473 US at 446 (equal protection jurisprudence will not tolerate “a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational”). Here, as the State observes, “Oregon has disconnected marital status and its attendant benefits from childbearing and child-rearing” (State Br at 51). Indeed, the vast majority of the benefits of marriage do not concern procreation (see id. at 51-52). Thus, the exclusion of lesbian and gay couples from marriage deprives them of the full range of benefits that come with marriage, only a subset of which relates to procreation, despite the fact that procreation is not a condition of marriage. In light of the stark discontinuity between the means chosen (exclusion from all benefits of marriage) and the purported objective (procreation), it is ****simply not credible** that any state interest in procreation explains the exclusion.

B. The exclusion of lesbian and gay couples from marriage does not rationally further the state interest in child welfare.

As the Massachusetts Supreme Judicial Court concluded in Goodridge, “[e]xcluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which children will be reared, educated, and socialized. * * * It cannot be rational under our laws, and indeed it is not permitted, to penalize children by depriving them of State benefits because the State disapproves of their parents’ sexual orientation.” Goodridge, 798 NE2d at 964 (quotation and footnote omitted). Here, for the same reasons, permitting lesbian and gay couples to marry would not diminish the welfare of the children of heterosexual couples; rather, it would only enhance the welfare of their own children. Thus, the exclusion of lesbian and gay couples from marriage thwarts, rather than furthers, the state interest in child welfare.

This is true even if, as DOMC contends, lesbian and gay parents are less fit than heterosexual parents (which they are not).¹⁵ The exclusion of lesbian and gay couples from

¹⁵ The social science research and the child welfare community are monolithic in their conclusion that lesbian and gay parents are just as fit as heterosexual parents (see Br of Amici Juvenile Rights Project, Inc., et al; Br of Amici American Psychological Ass’n; see

marriage neither increases the number of children raised by heterosexual parents nor decreases the number of children raised by lesbian and gay parents. There is simply no connection. See Hooper, 472 US at 622-23.

Moreover, the State's own laws, policies, and practices preclude any argument that its interest in marriage is to encourage children to be brought into families of heterosexual couples over those of lesbian and gay couples. See Heller, 509 US at 321; Allegheny, 488 US at 343-44; see also Hewitt, 294 Or at 39. The State has stipulated that it actively endorses parenting by lesbian and gay couples and parenting by heterosexual couples on equal terms (ER 110 at ¶¶ 1-2). The State routinely allows openly lesbian and gay couples to adopt children to the same extent that it allows heterosexual couples to do so (ER 110, ER 154, ER 158, ER 163, ER 172-ER 174, ER 480). Moreover, following either a joint adoption by a lesbian or gay couple or a second-parent adoption by a lesbian or gay partner, the State routinely issues a birth certificate for the child on which the same-sex parents are denominated "parent" and "parent" instead of the standard "mother" and "father" (ER 110, ER 155, ER 158, ER 163, ER 173-ER 174, ER 480). Furthermore, the State routinely places children with foster parents whom it knows to be lesbian or gay (ER 110 at ¶ 2). In addition, in child custody and child visitation disputes, the sexual orientation of a parent has long been deemed by state courts to be irrelevant for purposes of determining the best interests of a child. In re Marriage of Ashling, 42 Or App 47, 599 P2d 475 (1979); see also ER 154 at ¶ 8. These are only some of the ways in which the State has actively endorsed parenting by lesbian and gay couples and parenting by heterosexual couples on equal terms. See also, e.g., OAR 839-009-0210(2), (5) (parental leave for state employees, whether lesbian or gay or heterosexual); accord State Br at 50-51 ("[T]he legislature places no limits on the ability of same-sex couples to have and rear children. * * * Thus, Oregon has disconnected marital status and its attendant benefits from childbearing and child-rearing.").

C. Tradition for its own sake is not a legitimate state interest.

also DOMC Br at 35 (conceding that at least some lesbian and gay couples raise healthy children)).

While an examination of the considerations underlying a longstanding discriminatory practice can help illuminate whether the discriminatory practice has a constitutionally sufficient justification, the mere historical fact of the discriminatory practice cannot be the justification. Hewing blindly to traditional discrimination where a legitimate governmental interest cannot be articulated is by definition “palpably arbitrary.” Winters, 289 Or at 776. The State may not discriminate simply because it discriminates or has discriminated in the past. Indeed, Hewitt stands for the proposition that tradition for its own sake is not a legitimate governmental interest. See Hewitt, 294 Or at 45-46; see also Frontiero, 411 US at 684 (noting that the fact that “[t]raditionally, [discrimination against women] was rationalized by an attitude of ‘romantic paternalism’” did not change the fact that such discrimination “in practical effect, put women, not on a pedestal, but in a cage.”); Eubanks v. Louisiana, 356 US 584, 588 (1958) (“[L]ocal tradition cannot justify failure to comply with the constitutional mandate requiring equal protection of the laws.”); DOMC Br at 35 (“[T]radition has at times been badly distorted for oppressive purposes.”). Thus, the mere historical fact of the exclusion of same-sex couples from marriage does not justify it.¹⁶

Whatever social good results when a couple makes a commitment of the highest order to each other, e.g., a stable household (see DOMC Br at 22 (“[T]he public purpose of marriage [has] to do with protecting and preserving the family unit.”)), it is realizable whether the couple is a lesbian or gay couple or a heterosexual couple. Thus, it is “palpably arbitrary” to allow heterosexual couples to make such a commitment to each other but not to allow lesbian and gay couples to do the same. Winters, 289 Or at 776; see also Delgado, 334 Or at 146. Indeed, the exclusion of lesbian and gay couples from marriage is a type of “social role[] [that is] assigned to [lesbian and gay people] because of their [sexual orientation] and for no other reason.” Hewitt, 294 Or at 46; see also Br of Amici Legal

¹⁶ Plaintiffs note that DOMC’s assertions that “[n]o major civilization has ever given legal recognition to same sex relationships as being the equivalent of marriage” (DOMC Br at 36) and that “[n]o major world religion has ever extended ‘marriage’ rights to same sex couples” (*id.* at 37) are grossly overstated (see, e.g., Br of Amici American Friends Serv. Comm., et al, at 15 n6).

Momentum, et al, at 3-10. Thus, the exclusion of lesbian and gay couples from marriage is nothing more than discrimination for its own sake, something that has long been recognized as anathema in equality jurisprudence. See, e.g., Moreno, 413 US at 534 (“[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare [governmental] desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”); Palmore v. Sidoti, 466 US 429, 433 (1984) (“Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”); see also, e.g., Hewitt, 294 Or at 37 (repudiating the invocation of “general welfare and good morals” as a means of “match[ing] * * * individual conduct to [a] stereotype imposed upon [one’s] sex”). This fundamental principle of constitutional law applies equally where lesbian and gay people are concerned. See, e.g., Romer, 517 US at 634-35; Lawrence, 539 US at 578.

Because there is no constitutionally sufficient justification, the exclusion of lesbian and gay couples from marriage must fail under Article I, section 20. Cf. Goodridge v. Department of Public Health, 798 NE2d 941 (Mass 2003); Baker v. Vermont, 744 A2d 864 (Vt 1999); Baehr v. Lewin, 852 P2d 44 (Haw 1993); Castle v. Washington, No 04-2-00614-4, 2004 WL 1985215 (Wash Super Ct Sept 7, 2004 (appeal pending); Andersen v. King County, No 04-2-04964-4-SEA, 2004 WL 1738447 (Wash Super Ct Aug 4, 2004) (appeal pending); State v. Greenleaf, 780 NYS 2d 899 (Justice Ct 2004); State v. West, 780 NYS 2d 723 (Justice Ct 2004); Brause v. Bureau of Vital Statistics, No. 3AN-95-6562, 1998 WL 88743 (Alaska Super Ct Feb 27, 1998); Halpern v. Toronto, 172 OAC 276 (2003) (Ontario Court of Appeal); EGALE Canada, Inc. v. Attorney General of Canada, 2003 BCCA 251 (2003) (British Columbia Court of Appeal).¹⁷

¹⁷ Courts in Quebec, the Yukon Territory, Manitoba, and Nova Scotia have also ruled in favor of marriage equality for same-sex couples (see www.egale.ca).

VI. There are no “historical exceptions” to the constitutional mandate of Article I, section 20.

The historical exceptions doctrine has never been applied to the constitutional right to equal privileges and immunities,¹⁸ and for good reason. By its nature, equality is a concept that must account for the emergence, over time, of minorities who find disfavor with the majority. Indeed, it is the enduring check on the tyranny of the majority that is the *sine qua non* of any constitutional guarantee of equality. Such forward thinking is manifest in the arguments that were advanced in support of the Oregon bill of rights by the framers of the Oregon constitution:

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

David Schuman, The Creation of the Oregon Constitution, 74 Or L Rev 611, 625 (1995)

(quotation omitted). The constitutional right to equal privileges and immunities would be meaningless if it guaranteed Oregonians nothing more than the “equality” that existed in 1857 – an “equality” that institutionalized biases based on race, sex, illegitimacy, alienage, and numerous other considerations which have since been repudiated.

¹⁸ The historical exceptions doctrine has been applied only in the contexts of free expression and jury trials. Contrary to DOMC’s assertion, (DOMC Br at 20 n16), in State v. Slowikowski, 307 Or 19, 761 P2d 1315 (1988), the Court expressly declined to apply it in the context of search and seizure. See Slowikowski, 307 Or at 27 (“The question is interesting, but we need not answer it here.”). Historical exceptions concerning free expression account for injurious falsehoods that work to defeat the very notion of free expression (see Br of Amici Paula Abrams, et al, at 13-14). See also, e.g., State v. Robertson, 293 Or 402, 412, 649 P2d 569 (1982) (“[P]erjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud and their contemporary variants” are such historical exceptions) (citation omitted). Historical exceptions concerning jury trials are predicated on the retrospective text of the constitutional provisions themselves. See Or Const art I, § 11 (“[T]he existing laws and constitutional provisions relative to criminal prosecutions shall be continued and remain in effect as to all prosecutions for crimes committed before the taking effect of this amendment.”) (emphasis added); Or Const art I, § 17 (“In all civil cases the right of Trial by Jury shall remain inviolate.”) (emphasis added); see also Br of Amici Paula Abrams, et al, at 13. Neither line of reasoning applies in the context of equal privileges and immunities.

It is DOMC that fails to see “the forest for the trees.” Its argument proves far too much. If DOMC is correct in its assertion that “the historical exceptions doctrine recognizes that in those situations where a constitutional phrase – no matter how bold or ringing in its assertion – could not have been intended by the framers to replace some legal, social or historic fact, then history wins out over the pure language of the Constitution” (DOMC Br at 20), then no provision of the Oregon constitution, let alone Article I, section 20, can offer any protection beyond that which the framers of the Oregon constitution specifically contemplated in 1857. This is patently absurd, especially in light of 150 years of Oregon case law to the contrary. This Court has necessarily rejected the extremely cramped view of the Oregon constitution that DOMC urges it to take.

With respect to Article I, section 20 in particular, the text, context, history, and case law all militate in favor of interpreting the equality mandate to be a dynamic one, not a static one – and one that does not except marriage or any other consideration from its ambit. See Priest v. Pearce, 314 Or 411, 415-16, 840 P2d 65 (1992). The text of Article I, section 20 reads in its entirety as follows: “No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.” By its own terms, Article I, section 20 does not limit its own application to the “equality” that existed in 1857, nor does it except marriage or any other consideration from its scope. This expansive reading is only bolstered when Article I, section 20 is placed in context with the rest of the Oregon bill of rights. See, e.g., Or Const art I, § 1 (“We declare that all men, when they form a social compact are equal in right: that all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; * * * .”). While it is well-documented that the framers of the Oregon constitution were racist and sexist, the historical record is silent about whether Article I, section 20 was intended to guarantee only the “equality” that existed in 1857 and whether Article I, section 20 was intended to except marriage or any other consideration from its ambit beyond the specific disabilities imposed on “negroes,” “mulattoes,” “Chinamen,” and women. See Schuman, supra at 625-34. In the absence of historical cues

to the contrary, this Court has interpreted Article I, section 20 expansively. See State v. Clark, 291 Or 231, 630 P2d 810 (1981). In sum, nothing in the text, context, history, or case law of Article I, section 20 supports the radical position adopted by DOMC. Article I, section 20 guarantees exactly what it says it guarantees: equality of privileges and immunities.

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

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

Cox ex rel. Cox v. State, 191 Or App 1, 6-7, 80 P3d 514 (2003) (Schuman, J, concurring). It is inconceivable that, if the law were to discriminate between aliens and non-alien with respect to ownership of real property, there would be no recourse under Article I, section 20 because the framers of the Oregon constitution held biased views about aliens in this regard. See Namba, 185 Or at 611-12 (recognizing that such a law would be “repugnant” to Article I, section 20). It is similarly inconceivable that, if the law were to discriminate between men and women with respect to eligibility for employment-related benefits, there would be no recourse under Article I, section 20 because the framers of the Oregon constitution held biased views about women in this regard. See Hewitt, 294 Or at 49-50 (holding that such a law violates Article I, section 20). The same would be true if the law were to discriminate between legitimate and illegitimate children. See State ex rel. Adult & Fam. Servs. Div. v. Bradley, 295 Or 216, 233, 666 P2d 249 (1983) (“[Article I, section 20] protects against a

law's disparate treatment of groups or persons by virtue of characteristics by which it would be otherwise impermissible to classify people. Illegitimacy is one such characteristic.”).

These are just some of the ways in which Oregon case law flatly rejects DOMC's position.

DOMC's argument that the Oregon constitution has been amended to repeal the specific disabilities imposed on “negroes,” “mulattoes,” and “Chinamen” does not alter the analysis. By virtue of constitutional amendment, racial minorities are now entitled to equality where emigration, suffrage, and conscription are concerned. See Schuman, supra at 632. Under DOMC's theory, however, because the framers of the Oregon constitution did not intend for racial minorities to enjoy equality in other aspects of their lives, they have no recourse under Article I, section 20 outside of these specific contexts.¹⁹ Under DOMC's theory, they must seek further constitutional amendment if they wish to guarantee themselves equal treatment by their own government. Indeed, under DOMC's theory, if the legislature were to re-enact an anti-miscegenation law, racial minorities would have no recourse under Article I, section 20.²⁰ DOMC's argument is plainly inconsistent with Oregon case law.²¹

¹⁹ For example, the historical record confirms that the framers of the Oregon constitution did not intend for racial minorities to enjoy equality in public education. See Schuman, supra at 632-33 (“Judge Deady spoke in favor of an amendment to the Education and School Lands Article that explicitly would have reserved public education to white children, recalling that in Ohio a provision without such an amendment had been construed so as to allow negroes into the public schools. The amendment ultimately lost, but only after Delazon Smith assured the delegates that ‘negroes and Indians could be excluded without it.’”) (footnotes omitted).

²⁰ Until 1951, Oregon made it unlawful “for any white person, male or female, to intermarry with any Negro, Chinese, or any person having one fourth or more negro, Chinese, or Kanaka blood, or any person having more than one half Indian blood * * * .” In re Paquet's Estate, 101 Or 393, 398, 200 P 911 (1921) (quotation omitted).

²¹ In its attempt to distinguish race from sexual orientation – two classes which plaintiffs do not presume to equate – DOMC suggests that the lesson that it has learned from slavery and its aftermath – what it euphemistically calls a “constitutional dialogue” – is not that disfavored classes should be treated equally, but rather that disfavored classes must wait “100 years” and even survive a “blood[y] war” to be treated equally (DOMC Br at 24). Article I, section 20 does not contemplate such a prerequisite.

With respect to marriage in particular,²² again, there is nothing in the text, context, history, or case law of Article I, section 20 that suggests that it is exempt from constitutional scrutiny. And, again, DOMC's argument proves far too much. If indeed the common understanding of the institution of marriage in 1857 is unassailable under Article I, section 20, then there is much more than the exclusion of same-sex couples from marriage at stake. With the notable exception of the principle articulated in Article XV, section 5, Oregonians in 1857 did not view marriage as an equal partnership between married men and married women. Thus, under DOMC's theory, if the legislature were to re-enact laws that imposed civil inequalities on married women (e.g., the inability to sue for loss of consortium), married

²² DOMC would apply the historical exceptions doctrine not only to marriage but also to the statutory and common law benefits of marriage as they existed in 1857 (DOMC Br at 10).

women would have no recourse under Article I, section 20.²³ Again, DOMC's argument is plainly inconsistent with Oregon case law.²⁴

The fact that Article XV, section 5 provides that "[t]he property and pecuniary rights of every married woman, at the time of marriage or afterwards, acquired by gift, devise, or inheritance shall not be subject to the debts, or contracts of the husband; and laws shall be passed providing for the registration of the wife's separate [sic] property" does not change the analysis. Under DOMC's theory, Article XV, section 5 sets a ceiling above which no rights for married women may be obtained under Article I, section 20. In other words, under DOMC's theory, Article I, section 20 may not be invoked to secure marriage equality for married women beyond the right to own separate property and maintain separate finances. Indeed, under DOMC's theory, the right to own separate property and maintain separate

²³ Smith v. Smith, 205 Or 286, 293-94, 287 P2d 572 (1950), provides a non-exhaustive list of such civil inequalities that existed in 1857; see also Kowaleski v. Kowaleski, 227 Or 45, 59, 361 P2d 64 (1961) ("[I]t is seen that the wife has gradually acquired a separate legal identity and there is not a complete unity in law between the spouses.") (emphasis added); Ingalls v. Campbell, 18 Or 461, 468, 24 P 904 (1889) (restriction on married woman's but not married man's ability to execute will); State v. Blackwell, 241 Or 528, 529, 407 P2d 617 (1965) (marital rape exception); Michael Grossberg, Governing the Hearth: Law and the Family in Nineteenth Century America 44 (1985) (Under Oregon law, "a woman of coarse manner, gross in her associations, and imprudent, careless, and reckless, in regard to her conduct and demeanor * * * [was] not injured to the same extent by a breach of promise of marriage than one more confiding, retiring, and modest would [have been]."). Oregon has historically disadvantaged men relative to women as well. See, e.g., Layton v. Layton, 174 Or 463, 469, 149 P2d 574 (1944) (maternal presumption); State v. Meister, 60 Or 469, 471, 120 P 406 (1912) (criminalizing seduction of women but not men of chaste character).

²⁴ Moreover, it is plainly inconsistent with Oregon history. Marriage in Oregon has proven to be a dynamic institution, even beyond considerations of race and gender. For example, the ages at which males and females can marry have changed since 1857 (see DOMC Br at 21). DOMC, however, suggests that the Court should focus only on the "canonical disabilities" in Blackstone's Commentaries that, according to DOMC, are the essential characteristics of marriage without which marriage ceases to exist (see id. at 23). As DOMC concedes, however, Blackstone's Commentaries include "particular corporal infirmities" among such disabilities. This is significant because, historically, Oregon precluded people with certain "infirmities" from marrying. See Roscoe L. Barrow & Howard D. Fabing, Epilepsy and the Law, at 35 (2d ed 1966) (Oregon prohibited epileptics from marrying); University of Ala. Bd. Of Trustees v. Garrett, No 99-1240, 2000 WL 1154025, at *219a (Feb 21, 2000) (Br of Amici Morton Horwitz, et al) (Oregon required people who sought to marry to "[meet] the appropriate standard of 'mentality'"). Under DOMC's theory, when Oregon stopped precluding such people from marrying, marriage stopped being marriage. This is patently absurd.

finances is the sum total of what women can expect from the Oregon constitution.²⁵ In addition, DOMC's theory contradicts a fundamental canon of constitutional construction: Wherever possible, a constitutional provision is not to be read in derogation of another constitutional provision. See Vannatta v. Keisling, 324 Or 514, 527, 931 P2d 770 (1997) ("Any particular forms of expression that have been removed from [Article I, section 8] by a subsequent constitutional amendment must be construed carefully to give effect to the scope of the later exception, but no more, lest the salutary value of Article I, section 8, unintentionally be lost.").²⁶ Simply put, DOMC's position is indefensible.²⁷

A common thread running throughout DOMC's argument is its assertion that the judicial branch has no role in ensuring equality of privileges and immunities for disfavored classes. DOMC asserts that equality of privileges and immunities for disfavored classes may be ensured only through long and arduous majoritarian processes. In effect, they assert that, where disfavored classes experience discrimination at the hands of their own government,

²⁵ Significantly, as a historical matter, the right was narrowly construed. See Inara K. Scott, A Window for Change: Conflicting Ideologies and Legal Reforms in Late Nineteenth-Century Oregon, 37 Willamette L Rev 433, 447-48 (2001).

²⁶ See also State v. Cianci, 591 A2d 1193, 1202 (RI 1991) ("When more than one construction of a constitutional provision is possible, one of which would diminish or restrict a fundamental right of the people and the other of which would not do so, the latter must be adopted.") (quotation omitted); Brimmer v. Thomson, 521 P2d 574, 580 (Wyo 1974) (recognizing "the basic and universally accepted rule that statutory and constitutional provisions which tend to limit the candidacy of any person for public office or exclude any citizen from participation in the elective process must be construed in favor of the right of the voters to exercise their choice and should be construed strictly and not extended to cases not clearly covered thereby"); Howton v. Morrow, 106 SW2d 81, 82 (Ky App 1937) ("[P]rovisions in statutes and Constitutions imposing restrictions upon the right of a person to hold office should receive a liberal construction in favor of his eligibility.").

²⁷ Even if there were historical exceptions to the constitutional mandate of Article I, section 20, there would be none where marriage equality for same-sex couples is concerned. As DOMC concedes, the proper question to be answered is whether there is an exception "that the guarantees * * * in 1859 demonstrably were not intended to reach." Robertson, 293 Or at 412 (emphasis added). DOMC can only point to a negative inference. It cannot point to any evidence that the framers of the Oregon constitution even considered whether the constitutional mandate of Article I, section 20 should include or exclude marriage equality for same-sex couples. Undoubtedly, the historical exceptions doctrine is to be applied advisedly, for its very nature is to limit the protections that Oregonians enjoy under their own constitution. It should not be applied where there is no historical record to support its application.

they must wait until times change to the point that they are no longer disfavored before they may seek judicial recourse – recourse for which they will no longer have any need. DOMC’s assertion disregards the most basic concepts of law and government. Article I, section 20 is intended as a check on the tyranny of minorities by the majority. The very purpose of Article I, section 20 is to ensure that disfavored classes may seek judicial recourse where majoritarian processes fail to ensure equality of privileges and immunities. DOMC’s reading of Article I, section 20 turns the provision on its head. Moreover, under the Oregon constitution, the role of the judicial branch is to serve as a check on the other branches of government. See Or Const art III, § 1 (providing for separation of powers among the branches of government). Indeed, it is where majoritarian processes fail to ensure equality of privileges and immunities for disfavored classes that the judicial branch performs one its most important functions. DOMC’s assertion is nothing more than disingenuous rhetoric. The judicial branch has an essential role in ensuring equality of privileges and immunities for disfavored classes.²⁸

For all of the foregoing reasons, the Court should reject the extremely cramped view of the Oregon constitution that DOMC urges it to take. The historical exceptions doctrine does not apply to the constitutional right to equal privileges and immunities (see also Br of Amici Paula Abrams, et al, at 6-20; Br of Civil Rights and Historians Amici, at 15-27; Br of Amici Legal Momentum, et al, at 10-17).

VII. Question d – Do Oregon’s marriage laws deny equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution?

Neither plaintiffs nor any other party raised a claim under the Fourteenth Amendment to the United States Constitution. Plaintiffs did not do so because they believe that this case can and should be resolved on independent state grounds. Plaintiffs provide the following

²⁸ “All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate would be oppression.” Thomas Jefferson, First Inaugural Address (Mar 4, 1801); see also Marbury v. Madison, 5 US 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

analysis – which demonstrates that Oregon’s marriage laws deny equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution – only because the Court requested it.

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

As set forth in section III.A. above, the exclusion of same-sex couples from marriage is a form of gender discrimination.

Under federal law, gender discrimination is subject to heightened scrutiny because gender is a quasi-suspect classification:

“The burden of justification is demanding and it rests entirely on the State. The State must show at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”

United States v. Virginia, 518 US 515, 533 (1996) (quotations and citations omitted)

(alterations in original). In other words, “[p]arties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.” *Id.* at 531 (quotations omitted). Thus, the exclusion of same-sex couples is subject to heightened scrutiny.

B. The exclusion of same-sex couples from marriage is subject to strict scrutiny because it is a form of sexual orientation discrimination.

As set forth in section IV.A.1. above, the exclusion of same-sex couples from marriage is a form of sexual orientation discrimination.

The United States Supreme Court has not yet addressed whether sexual orientation is a suspect classification. As set forth in section IV.B. above, sexual orientation discrimination should be subject to strict scrutiny because sexual orientation should be a suspect classification. *See Rodriguez*, 411 US at 28 (listing “traditional indicia of suspectness” as whether the class is “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to

command extraordinary protection from the majoritarian political process”); United States v. Carolene Prods. Co., 304 US 144, 152 n4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”). A suspect classification must be “narrowly tailored to further compelling governmental interests.” Grutter v. Bollinger, 539 US 306, 326 (2003). Thus, the exclusion of same-sex couples is subject to strict scrutiny.

C. The exclusion of same-sex couples from marriage is subject to strict scrutiny because it imposes a disparate burden on the exercise of the fundamental right to marry.

1. A disparate burden on the exercise of a fundamental right is subject to strict scrutiny under equal protection jurisprudence.

Governmental action is subject to strict scrutiny under equal protection jurisprudence, not only where it disadvantages a suspect class, as set forth in section VII.B. above, but also where it disadvantages a class, whether suspect or non-suspect, in its access to a fundamental right. Cleburne, 473 US at 440; see, e.g., Shapiro v. Thompson, 394 US 618 (1969). In other words, equal protection jurisprudence provides an alternative trigger for strict scrutiny that is dependent, not on the nature of the disadvantaged class, but instead on the nature of the burdened right. If the burdened right is a fundamental right, then a disparate burden on the right is subject to strict scrutiny regardless of whether the disadvantaged class is a suspect class. Thus, where the government grants differential access to a fundamental right, the government must demonstrate that it does so in furtherance of a compelling governmental interest and in a narrowly tailored manner.

2. The right to marry is a fundamental right.

The fact that the right to marry has long been recognized as a fundamental right is entirely unsurprising. It is fully consistent with the extraordinary respect historically afforded to personal autonomy. The United States Supreme Court has used the strongest language possible to describe the importance and the breadth of the right to autonomy: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the

universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.” Planned Parenthood of Southeastern Pa. v. Casey, 505 US 833, 851 (1992); *see also* Lawrence, 123 S Ct at 2475 (“Liberty presumes an autonomy of self that includes freedom of thought, belief, expression and certain intimate conduct.”). At the core of the right to autonomy are personal decisions made by adults about child bearing, child rearing, sexual intimacy, and, of particular relevance to this case, marriage.²⁹ *See, e.g.,* Lawrence v. Texas, 123 S Ct 2472 (2003); Troxel v. Granville, 530 US 57 (2000); Zablocki v. Redhail, 434 U.S. 374 (1978); Roe v. Wade, 410 US 113 (1973); Eisenstadt v. Baird, 405 US 438 (1972); Griswold v. Connecticut, 381 US 479 (1965).

The right to marry is plainly a right “which [is], objectively, deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it was] sacrificed.” Washington v. Glucksberg, 521 US 702, 720-21 (1997) (quotations omitted). Indeed, the United States Supreme Court has long recognized that the right to marry goes to the core of individual liberty, and that the decision to marry is one of the most significant decisions that a person can make.³⁰ *See, e.g.,* Turner v. Safley, 482 US 78, 95-96 (1987); Boddie v. Connecticut, 401 US 371, 376 (1971); Loving, 388 US at 12; Griswold, 381 US at 486; Skinner v. Oklahoma, 316 US 535, 541 (1942); Meyer v. Nebraska, 262 US 390, 399 (1923); Maynard v. Hill, 125 US 190, 211-12 (1888).

²⁹ Significantly, the United States Supreme Court has made clear that the contours of the right to autonomy are not static: “As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.” Lawrence, 123 S Ct at 2484; *see also* id. at 2480 (finding “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in *matters pertaining to sex*” id. at 2492 (noting that “[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry”) (quotation omitted). Indeed, as all parties to this case agree, the contours of the right to marry have evolved over time (*see* Pls Br at 21).

³⁰ Zablocki traces a line of cases from 1888 to 1977 that establish that “the right to marry is of fundamental importance for all individuals.” Zablocki, 434 US at 384 (emphasis added).

Significantly, fundamental rights jurisprudence makes clear that the proper inquiry is what has historically been enjoyed (e.g., the right to marry), not who has historically enjoyed it (e.g., people in heterosexual relationships). In other words, the jurisprudence concerns itself not with the class that has historically enjoyed the right, but rather with the right itself. If it were otherwise, no class historically denied a right could ever enjoy it under the United States Constitution.

In Griswold, the Court struck down a prohibition on the use of contraceptives by married people. In doing so, it relied on history to conclude that married people enjoy a privacy right that precludes governmental regulation of their sexual relationships. In Eisenstadt, the Court struck down a prohibition on the distribution of contraceptives to unmarried people. In doing so, the Court did not rely on history to conclude that unmarried people also enjoy a privacy right that precludes governmental regulation of their sexual relationships. Such a conclusion would have been inconsistent with history at that time. Instead, the Court concluded that, if history establishes that the right to sexual privacy exists, then it exists for all people, whether married or unmarried.³¹ See also Carey v. Population Servs. Int'l, 431 US 678 (1977) (the right to sexual privacy exists for minors); cf. Weber v. Aetna Cas. & Sur. Co., 406 US 164, 175 (1972) (right of child rearing extends to unmarried parents, notwithstanding fact that “[t]he status of illegitimacy has expressed through the ages society’s condemnation of irresponsible liaisons beyond the bonds of marriage”); Stanley v. Illinois, 405 US 645 (1972) (same).

The rule – where a right exists, it exists for all people – is especially evident in the case law concerning the right to marry. The United States Supreme Court could not have decided Loving, Boddie, Zablocki, or Turner as it did if the right to marry were limited to those who by tradition enjoyed it. Historically, the right to marry did not extend to people in

³¹ Bowers suggested an exception to this rule where lesbian and gay people are concerned. Lawrence, however, wholly repudiated Bowers, not only overruling it, but indeed holding that “[it] was not correct when it was decided.” Lawrence, 123 S Ct at 2484. Placing itself squarely in the line of cases following Griswold, Lawrence confirmed that lesbian and gay people “may seek autonomy for [purposes such as sexual relationships], just as heterosexual persons do.” Id. at 2482.

interracial relationships. Just nineteen years before Loving, at least thirty states prohibited interracial marriage, at least six by constitutional provision. Loving, 388 US at 6 n5. Moreover, historically, the right to marry did not include a right to marry a second time. England was a divorceless society until 1857 and, while some states in the nineteenth century allowed legal separation, legal divorce was rare, often requiring an act of a state legislature and only under limited circumstances such as adultery. See Lawrence Friedman, A History of American Law 179-86 (1973). Similarly, if the right to marry were recast as the right of prisoners to marry, it would be much more difficult to conclude that the right is “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.” By tradition, the right to marry extended in none of these circumstances. Nevertheless, the right to marry was extended in all of these circumstances in Loving, Boddie, Zablocki, and Turner.

The United States Supreme Court has made clear that the right to marry exists for all people. It necessarily follows that the right to marry extends to people in lesbian and gay relationships. See Castle, 2004 WL 1985215, at *12-*13; Andersen, 2004 WL 1738447, at *5-*7.

3. The exclusion of same-sex couples from marriage disparately burdens the exercise of the fundamental right to marry.

The exclusion of same-sex couples from marriage plainly imposes a disparate burden on the exercise of the fundamental right to marry. Opposite-sex couples can marry; same-sex couples cannot. The exclusion of same-sex couples from marriage therefore is subject to strict scrutiny.

D. The exclusion of same-sex couples from marriage must fail because it does not even rationally further a legitimate state interest.

As set forth in section V above, the exclusion of same-sex couples from marriage must fail because it does not even rationally further a legitimate governmental interest. See Heller, 509 US at 320; Romer, 517 US at 634-35; see also Lawrence, 123 S Ct at 2495-98 (Scalia, J, dissenting).

E. Baker v. Nelson does not change the analysis.

At the time of Baker v. Nelson, 191 NW2d 185 (Minn 1971), appeal dismissed, 409 US 810 (1972), the United States Supreme Court had no discretion to decline to accept jurisdiction over certain types of appeals. See Hicks v. Miranda, 422 US 332, 344 (1975). It therefore routinely and summarily dismissed such appeals “for want of a substantial federal question,” as it did in Baker, 409 US at 810. “[T]he precedential effect of a summary affirmance can extend no farther than the precise issues presented and necessarily decided by those actions.” Illinois State Bd. of Elections v. Socialist Workers Party, 440 US 173, 182 (1979) (quotation omitted); see also In re Kandu, No 03-51312, 2004 WL 1854112, at *7 (Bankr WD Wash Aug 17, 2004) (“[S]ummary dispositions are to be narrowly interpreted and are of limited precedential value.”) (quotation omitted). Of particular significance to this case, “[s]ummary actions * * * should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved.” Mandel v. Bradley, 432 US 173, 176 (1977) (emphasis added). This is wholly consistent with the principle that continued reliance on a summary dismissal for want of a substantial federal question is unwarranted where there have been “extensive intervening doctrinal developments.” Jones v. Bates, 127 F3d 839, 851 n13 (9th Cir 1997); see also Hicks, 422 US at 344 (reliance on a summary dismissal is unwarranted “when doctrinal developments indicate otherwise”) (quotation omitted).

Intervening case law of the United States Supreme Court has altered the legal landscape so drastically that Baker now has little, if any, precedential value. Perhaps most significantly, since the summary dismissal in Baker, the Court has expressly held that gender discrimination is subject to heightened scrutiny. Compare Frontiero, 411 US at 682 (decided in 1973) (“[C]lassifications based upon sex * * * [are] subject to close judicial scrutiny.”) with Reed v. Reed, 404 US 71, 76 (1971) (“The question presented by this case * * * is whether a difference in * * * sex * * * bears a rational relationship to a state objective that is sought to be advanced.”). This is significant because Baker expressly acknowledged that the exclusion of marriage is a form of gender discrimination. Baker, 191 NW2d at 187

(characterizing the exclusion as “a marital restriction * * * based upon the fundamental difference in sex”), yet subjected the exclusion to rational basis review. Id. (“There is no irrational or invidious discrimination.”). The sea change in the treatment of gender classifications under the Fourteenth Amendment to the United States Constitution means that Baker has no remaining precedential value.

Moreover, since 1972, the equality jurisprudence of the United States Supreme Court with respect to sexual orientation has been revolutionized. The Court has held that the exclusion of lesbian and gay people from legal protections that are available to heterosexual people can violate the right to equal protection. Romer, 517 US at 634-35. The Court has further held that that lesbian and gay people are protected by the right to privacy to the same extent as heterosexual people. Lawrence, 123 S Ct at 2484; see also Kandu, 2004 WL 1854112, at *8 (“The Supreme Court’s approach to the constitutional analysis of same-sex conduct * * * at least arguably appears to have shifted. This is particularly apparent in light of the Supreme Court’s decision in Lawrence.”) (citation omitted). In light of such case law, continued reliance on Baker is no longer warranted.

Finally, since 1972, the Court has expanded the right to marry to circumstances in which it had not expressly applied before. As set forth in section VII.C.2. above, both Zablocki and Turner held that the exclusion of disfavored groups from marriage can violate the right to marry. For all of these reasons, it is no longer credible to assert that the exclusion of same-sex couples from marriage raises no substantial federal question. Therefore, Baker does not change the analysis.

ANSWER TO DOMC’S SECOND ASSIGNMENT OF ERROR

The trial court correctly attempted to fashion a remedy that extends the benefits of marriage to same-sex couples.³²

³² As set forth in plaintiffs’ opening brief, the trial court erred in failing to fashion a remedy that also extends marriage itself to same-sex couples (Pls Br at 40-49).

ARGUMENT IN SUPPORT OF ANSWER TO DOMC’S SECOND ASSIGNMENT OF ERROR

I. Preservation and the standard of review.

As with its First Assignment of Error, DOMC does not point out where in the record it opposed plaintiffs’ and Multnomah County’s motions for summary judgment on the First Claim for Relief (see DOMC Br at 59-60). Plaintiffs do not dispute that it did so in general. Citing to a denial of mandamus relief case, DOMC characterizes the claim as one at law, to be reviewed for errors of law (DOMC Br at 60). Plaintiffs acknowledge that as to the question of the unconstitutionality of the statutes, review is for error of law. However, as to review of the remedy, it is possible for the Court to review the remedy to be provided using a different standard of review than that used for the legal issue requiring a declaration. See, e.g., Stevens v. Foren, 154 Or App 52, 59 n5, 959 P2d 1008 (1998) (where party sought contract determination via declaration and specific performance, court reviewed fact questions relating to contract meaning as it would in action at law and would have reviewed factual issues relating to remedy *de novo*). DOMC, however, appeals regarding the trial court’s decision to go further than issue a declaration. It asserts that the trial erred “in crafting a remedy that did not simply declare the marriage statutes unconstitutional” and that courts “have no authority to craft legislation” (DOMC Br at 60). Plaintiffs agree that DOMC’s second assignment error turns on a question of law and should be reviewed for error of law.

II. The proper remedy is to extend marriage to otherwise qualified same-sex couples.

As set forth in plaintiffs’ opening brief, the proper remedy is to extend marriage to otherwise qualified same-sex couples (Pls Br at 40-43; see also Br of Amici Paula Abrams, et al, at 20-23). Contrary to DOMC’s argument, a court has the power and the obligation to provide a remedy once it finds a violation of Article I, section 20. See Or Const art I, § 10 (“[E]very man shall have remedy by due course of law for injury done him in his person, property, or reputation.”). Remedies law contemplates only two remedial options: extending marriage to otherwise qualified same-sex couples or nullifying marriage for all couples. See

Hewitt, 294 Or at 50-53. Because it is clear that the legislature would choose the former over the latter, the former is the proper remedy. See id.

The State’s assertion that remedies law contemplates a third remedial option – deferring to the legislature to fashion a remedy – is incorrect. The Court has considered and rejected this very suggestion, reasoning that “alternate remedies the legislature may choose were we to invalidate [a] statute * * * are no less available to the legislature by the extension of the statute to the excluded [class] should it decide to amend the law.” Id. at 53 n18. The Court has recognized that the possibility of a legislative response is no reason to defer to the legislature to fashion a remedy because a legislative response is not only always possible but also never precluded. Accordingly, deferring to the legislature is not a third remedial option.³³

DOMC concedes the two remedial options (DOMC Br at 63 (citing Hewitt, 294 Or at 51-52)). DOMC further concedes that the proper remedy is the option that the legislature would choose (id. (citing Hewitt, 294 Or at 51-52)). Contrary to DOMC’s assertion, however, “it is beyond dispute that the legislature would not choose simply to abolish marriage in Oregon”(State Br at 62). Furthermore, 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). Both common sense and the legislative record confirm that, between extending marriage to otherwise qualified same-sex couples and nullifying marriage for all couples, the legislature would choose to extend marriage to otherwise qualified same-sex couples.

³³ The State’s assertion that extending marriage to otherwise qualified same-sex couples would be burdensome on the legislature is also incorrect. Extending marriage to otherwise qualified same-sex couples would not necessitate any substantive change to any state program. It would necessitate only extending pre-existing benefits of marriage to married couples, whether same-sex or opposite-sex, on pre-existing terms. Thus, plaintiffs oppose the State’s request for additional time in which to fashion a remedy.

III. The remedy is properly limited to otherwise qualified same-sex couples.

As set forth in plaintiffs' opening brief, the remedy is properly limited to otherwise qualified same-sex couples (Pls Br at 50-51). Plaintiffs do not – and indeed cannot – seek a more expansive remedy.

DOMC resorts to wild-eyed fear-mongering and conclusory assertions. Extending marriage to otherwise qualified same-sex couples would not necessitate extending marriage to incestuous or polygamous units any more than extending marriage to otherwise qualified interracial couples did so. DOMC does not suggest that, like discrimination against same-sex couples or interracial couples, discrimination against incestuous or polygamous units is subject to heightened scrutiny. Moreover, DOMC does not acknowledge the differences between incestuous and polygamous units and same-sex and interracial couples. For example, with respect to incestuous units, they do not address questions of public health or familial discord and, with respect to polygamous units, they do not acknowledge situations in which one person marries two persons who decline to marry each other or in which two spouses have conflicting interests vis-à-vis a third spouse (e.g., two spouses disagreeing over how to care for an incapacitated third spouse, two spouses competing over the estate of an intestate third spouse). Simply put, DOMC's argument lacks integrity.

COMBINED ANSWER TO STATE'S SOLE ASSIGNMENT OF ERROR AND DOMC'S THIRD ASSIGNMENT OF ERROR

The trial court correctly ordered the State Registrar to register the marriage records.

ARGUMENT IN SUPPORT OF COMBINED ANSWER TO STATE'S SOLE ASSIGNMENT OF ERROR AND DOMC'S THIRD ASSIGNMENT OF ERROR

I. Preservation and the standard of review.

Plaintiffs do not dispute that DOMC and the State preserved the error. Plaintiffs also agree that the standard of review is for error of law. Kirschbaum v. Abraham, 267 Or 353, 355, 517 P2d 272 (1973).

II. The State Registrar had a non-discretionary duty to register the marriage records.

A. A writ of mandamus may issue to compel the performance of a duty by a governmental officer.

ORS 34.110 provides that “[a] writ of mandamus may be issued to any * * * officer or person to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station * * * ” ORS 34.110 further provides that, “though the writ may require such * * * officer or person to exercise judgment, or proceed to the discharge of any functions, it shall not control judicial discretion.” Thus, a writ of mandamus may issue to compel the performance of a non-discretionary duty by a governmental officer. State ex rel. First Nat’l Bank v. Siemens, 68 Or 1, 8, 133 P 1173 (1913) (“Mandamus will lie to compel the execution, by a public officer, of a duty prescribed by law, but not to control the exercise of that duty, when the act to be done involves the exercise of judgment or discretion.”); see also State ex rel. Pac. Tel. & Tel. Co. v. Duncan, 191 Or 475, 502, 230 P2d 773 (1951) (defining “discretion” not as “personal or individual discretion” but rather as “cautious reasoning”).

An examination of the case law reveals that the primary – and often sole – touchstone in assessing whether a duty is discretionary or non-discretionary is whether it is described in discretionary or non-discretionary terms. “Bearing in mind the legal maxim to the effect that all parts of a statute must be construed together, * * * because * * * the term ‘may’ is used in some places, and the stronger word ‘must’ is employed in others, it was the evident intention of the Legislature to make the duty mandatory in the latter class, and optional in the former.” In re Clark, 79 Or 325, 329, 155 P 187 (1916).

In the rare instances where the Court has concluded that a duty is discretionary despite the fact that it is described in non-discretionary terms, it has done so to avoid rendering a co-provision a nullity.³⁴ For example, in McAlmond v. Myers, 262 Or 521, 500

³⁴ See Carlson v. Myers, 327 Or 213, 233, 959 P2d 31 (1998) (“When * * * a literal application of the language produces an absurd or unreasonable result, it is the duty of the court to construe the act, if possible, so that it is a reasonable and workable law and not inconsistent with the general policy of the legislature[.]” (quotation omitted) (second alteration in original)).

P2d 457 (1972), the Court observed that the statute at issue provided that “the Secretary of State shall prepare and deliver to the county clerks a certification of offices and candidates for the general election” and that “[the Secretary of State] shall issue a certificate of nomination to the person receiving the highest number of votes in the primary.” Id. at 524 (emphases added). The Court, however, also observed that the statute “require[d] a candidate to file a statement with the Secretary of State that such candidate [would] qualify if elected” and gave the Secretary of State “the authority to verify the validity of all such statements.” Id. at 525. In harmonizing the seemingly contradictory co-provisions, the Court reasoned that the authority of the Secretary of State to verify the validity of a statement “would be meaningless if it was not contemplated that [the Secretary of State] would take action if facts became known to him which show[ed] that [a] candidate [was] unqualified.” Id. Thus, despite the fact that the duty of the Secretary of State to certify the victor of a primary was described in non-discretionary terms, the Court declined to conclude that the duty was non-discretionary.

Even if a duty is discretionary, a writ of mandamus may issue to compel the performance of the duty where a governmental officer has abused his or her discretion. Johnson v. Craddock, 228 Or 308, 314, 365 P2d 89 (1961) (“Mandamus can be invoked * * * to correct an arbitrary abuse of discretion, in the absence of any other adequate remedy, even though it results in the court’s review of the officer’s exercise of discretionary power.”) (citations omitted); Ruonala v. Board of County Comm’rs, 212 Or 309, 317-18, 319 P2d 898 (1957) (“[I]f a challenged act involves the exercise of discretion * * * [t]he writ [of mandamus] will issue * * * only in the event that the record establishes an arbitrary abuse of discretion.”) (citations omitted); State ex rel. Bethke v. Bain, 193 Or 688, 703, 240 P2d 958 (1952) (“‘Judicial discretion’ never authorizes arbitrary, capricious action that tends to defeat the ends of substantial justice.”). As the Court explained in Reisland v. Bailey, 146 Or 574, 31 P2d 183 (1934):

“There are important exceptions to the general rule. * * * It is not accurate to say that the writ [of mandamus] will not issue to control discretion, for it is well settled that it may issue to correct an abuse of discretion, if the case is

otherwise proper. The public officer * * * may be guilty of so gross an abuse of discretion, or such an evasion of positive duty, as to amount to a virtual refusal to perform the duty enjoined, or to act at all, in contemplation of law.”

Id. at 577-78. Of significance to this case, the Court has noted that an abuse of discretion includes a misapprehension by a governmental officer of the scope of his or her legal obligation:

“The discretion must be exercised under the established rules of law * * *. If by reason of a mistaken view of the law or otherwise there has been in fact no actual and bona fide exercise of judgment and discretion, as, for instance, where the discretion is made to turn upon matters which under the law should not be considered, or where the action is based upon reasons outside the discretion imposed, mandamus will lie.”

Id. at 578 (quotation omitted) (emphasis added).

Of further significance to this case, the Court has held that an open question of law need not have been answered at the time of the petition for the writ; rather, it need only be answered in the course of the issuance of the writ. As the Court explained in State ex rel. Maizels v. Juba, 254 Or 323, 460 P2d 850 (1969):

“It is plain, regardless of what this court has said to the contrary, that mandamus has repeatedly been used to require public officers * * * to act in a certain way where the applicable law governing their actions was legitimately in dispute. * * * Notwithstanding that courts will not grant mandamus to control discretion, the rule does not apply to preliminary questions of law. * * * The character of a purely preliminary question, though judicial, does not test the right to mandamus because the decision of such a question is a mere incident leading up to the main function or act.”

Id. at 328 (citation and quotation omitted). The Court went on to illustrate the distinction between, on the one hand, circumstances in which the law grants discretion to a governmental officer to act in various ways and, on the other hand, circumstances in which the law may be interpreted in various ways, none of which grants discretion to a governmental officer:

“‘Discretion’ refers to the power or privilege to act unhampered by a legal rule. It describes a situation where a choice can be made among several courses of action, any one of which is legally permissible and not subject to review. In such a situation mandamus or any other method of review is inappropriate. The present case does not pose such a situation. Petitioner either is entitled to have the warrant quashed and his property returned or he is not. There is only one legally permissible answer.”

Id. at 330.

Accordingly, even if a duty is discretionary, a writ of mandamus may issue to compel the performance of the duty where a governmental officer has misapprehended the scope of his or her legal obligation. And, that is so even if the scope of his or her legal obligation was an open question of law at the time of the petition.

B. The State Registrar has a non-discretionary duty to register marriage records.

ORS 432.405(1) provides that “[a] record of each marriage performed in this state * * * shall be registered if it has been completed and filed in accordance with this section and rules adopted by the State Registrar of the Center for Health Statistics” (emphasis added). With respect to marriage records that “[have] been completed and filed in accordance with this section and rules adopted by the State Registrar,” ORS 432.405(1) permits no exception and grants no discretion. Indeed, it describes the duty to register such marriage records in non-discretionary terms. Thus, the duty is a non-discretionary one, and a writ of mandamus may issue to compel its performance.³⁵

The record confirms that the marriage records were properly completed and filed: “[The State Registrar] * * * did not * * * register the marriage records of plaintiffs Li and Kennedy, Knox and Warshaw, Burke and Doyle, and Potter and Moen for the sole reason that they are same-sex couples” (ER 57 at ¶ 29) (emphasis added)); see also ER 103-ER 106 (State Registrar’s letters to married plaintiffs). Thus, the State’s argument that the State Registrar did not register the marriage records because they were not properly completed and filed is meritless.

Regardless, the State’s sole defense is that the State Registrar did not register the marriage records because, in her view, the marriages are not valid. The State implicitly concedes that, if the marriages are valid, the State Registrar had a non-discretionary duty to register the marriage records. Whether the marriages are valid is not a question of discretion

³⁵ Significantly, no co-provision would be rendered a nullity if the plain language were given such effect.

but rather a question of law. Married plaintiffs “[are] entitled to have” the marriage records registered “or [they are] not. There is only one legally permissible answer.” Juba, 254 Or at 330. And, a writ of mandamus may issue notwithstanding the fact that the validity of the marriages was an open question of law. Id. Thus, should the Court rule in favor of plaintiffs and the County on their cross-appeals, a writ of mandamus may issue.³⁶

Should the Court rule in favor of plaintiffs and the County on the first claim for relief, it need not reach whether the State Registrar has the authority to determine the validity of a marriage. That said, the State Registrar does not have the authority to determine the validity of a marriage. The Oregon statutory code does not grant her such authority; rather, it grants her only authority to regulate forms concerning marriage. See ORS 432.030. Indeed, the Oregon statutory code grants exclusive authority to county clerks to determine the validity of a marriage. See ORS 106.041, ORS 106.077, ORS 106.110. This statutory scheme is practically sound. Unlike the State Registrar – or countless other government officials who have occasion to interact with married people (e.g., government employers who offer spousal benefits) – a county clerk is in a position to assess fully whether an applicant for a marriage license meets the statutory criteria. See ORS 432.405 (noting that it is the county clerk who prepares the marriage record). Thus, it is the county clerk, not the State Registrar, who has the authority to determine the validity of a marriage.³⁷

C. The marriages are valid because the couples married in good faith.

As a matter of state law, a marriage is valid even if a marriage license is not. ORS 106.041(1) provides that

“[a]ll persons wishing to enter into a marriage contract shall obtain a license therefor from the county clerk upon application, directed to any person or religious organization or congregation authorized by ORS 106.120 to solemnize marriages, and authorizing such person,

³⁶ Should the Court rule in favor of plaintiffs and the County on their cross-appeals yet conclude that the State Registrar’s legal obligation was not sufficiently clear under Juba, the Court may conclude that the marriages of same-sex couples should be registered as valid marriages nonetheless for the reasons set forth in sections II.C. or II.D. below.

organization or congregation to join together as husband and wife the persons named in the license.”

Id. (emphases added). In turn, ORS 106.130 provides that

“[a] marriage solemnized before any person professing to be a judicial officer of this state, a county clerk or a clergyperson of a religious congregation or organization therein is not void, nor shall the validity thereof be in any way affected, on account of any want of power or authority in such person, if such person was acting at the time in the office or the capacity of a person authorized to solemnize marriage and if such marriage is consummated with the belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage.”

Id. (emphases added). It follows that, even if a marriage license is invalid and therefore incapable of authorizing an officiant to solemnize a marriage, a marriage is still valid if the couple married in good faith. See ORS 106.990(2).

ORS 106.130 reflects the strong common-law presumption in favor of marriage. See In re Megginson’s Estate, 21 Or 387, 393, 28 P 388 (1891) (“The policy of the law is strongly opposed to regarding a marriage entered into in good faith, believed by one or both of the parties to be legal, followed by cohabitation on, as void[.]”); In re De Force’s Estate, 119 Or 556, 563, 249 P 632 (1926) (“Where a marriage has been consummated in accordance with the form of the law, the law indulges a strong presumption in favor of its validity.”) (quotation omitted); Ollschlager’s Estate v. Widmer, 55 Or 145, 156, 105 P 717 (1909) (“The law presumes morality, and not immorality; marriage, and not concubinage* * *”) (citation and quotation omitted). This presumption “is not lightly to be repelled[.]” and “[t]he evidence for the purpose of repelling it must be strong, distinct, satisfactory, and conclusive.” Id. at 156-57 (quotation omitted); see also Megginson’s Estate, 21 Or at 393 (“[T]his presumption can only be overcome by clear and convincing evidence to the contrary.”).

Here, the couples married in good faith in light of legal opinions issued by the County Attorney, the Attorney General, and Legislative Counsel (ER 59-ER 63, ER 66-ER 84). Because the marriages are valid regardless of whether the marriage licenses are, there is no

reason why the State Registrar should not have registered the marriage records as part and parcel of the trial court's ruling.³⁸

D. The marriages are valid because the County executive had a constitutional duty to order the issuance of the marriage licenses.

When an executive official realizes that her execution of a governmental practice is clearly unconstitutional, she has not only the authority but indeed the obligation to cease the clearly unconstitutional governmental practice. The resulting change in governmental practice is an appropriate – indeed, mandatory – exercise in conforming her executive actions to clear constitutional constraints.

The case law confirms that this is so. In Cooper v. Eugene Sch. Dist. No. 4J, 301 Or 358, 723 P2d 298 (1986), the Court made the following observation:

“Long familiarity with the institution of judicial review sometimes leads to the misconception that constitutional law is exclusively a matter for the courts. To the contrary, when a court sets aside government action on constitutional grounds, it necessarily holds that legislators or officials attentive to a proper understanding of the constitution would or should have acted differently.”

Id. at 364. Of particular significance to this case is the following passage:

“Article XV, section 3 of the Oregon Constitution provides:

‘Every person elected or appointed to any office under this Constitution, shall, before entering on the duties thereof, take an oath or affirmation to support the Constitution of the United States and of this State, and also an oath of office.’

“As these provisions show, the constitution does not contemplate that legislators and officials will act as they think best and leave the constitutionality of their acts to the courts. Courts may have the last word in interpreting constitutions, but Chief Justice Marshall’s defense of ‘the province and duty of the judicial department to say what the law is,’ Marbury v. Madison, 5 US (1 Cranch) 137, 177, 2 L Ed 60 (1803), did not imply that constitutional law is the province and duty only of the judicial department, leaving Congress and the executive branch unconstrained to pursue their ends subject only to judicial review.”

³⁸ While it is true that the trial court stated in its May 12, 2004 letter to the parties that the marriage licenses are not yet valid, it is also true that the trial court did not state that the marriages themselves are not yet valid (DER-1-2). Thus, the trial court, too, distinguished between the validity of a marriage and the validity of a marriage license.

Cooper at 364 n.7 (emphasis in original). The Court could not have been more clear in delineating the constitutional duty of executive officials: They must execute laws in ways that avoid constitutional conflict.³⁹

The broad language of Cooper refutes any argument that this principle applies only where administrative tribunals are acting in quasi-judicial capacities.⁴⁰ Significantly, the State has advocated for an expansive interpretation of Cooper in contexts other than those involving administrative tribunals. For example, in Lipscomb v. State, 305 Or 472, 753 P2d 939 (1988), the State did so in a case involving the exercise of veto power by the governor. In response, the Court reiterated that “[g]overnors, legislators, and other public officials are responsible in the first instance for determining their constitutional duties, as [the State] say[s].” Id. at 478-79 (citing Cooper) (emphasis added); see also State Br at 27-28 (“The state agrees that [Cooper and its progeny] stand for the proposition that executive officials have the power to assess the constitutionality of a governing statute or rule in the context of applying it.”); 46 Or Op Att’y Gen 78, 1924 (June 15, 1988) (“[S]tate officers remain obligated to uphold and enforce the constitution.”) (citing Cooper).

State v. County Court, 185 Or 392, 203 P2d 305 (1949), a case in which the Court analyzed the circumstances under which a county must bend to the will of the state, lends further support to an expansive interpretation of Cooper. Even as the Court held that “[a] county is merely a political agent of the state created by law for governmental purposes, invested with legislative powers and charged with the performance of duties for the state,” it made clear that there is an absolute exception: “Where a state by enactment, in furtherance of its governmental purposes, imposes an obligation upon a county not in conflict with the Constitution of the state, that obligation becomes one which the county must fairly meet.”

³⁹ Oregon is not the only jurisdiction in which this principle applies. See, e.g., State ex rel. Test v. Steinwedel, 180 NE 865, 866-67 (Ind 1932); Toombs v. Sharkey, 106 So 273, 277 (Miss 1925); Van Horn v. State ex rel. Abbott, 64 NW 365, 371-72 (Neb 1895); Holman v. Pabst, 27 SW2d 340, 342-43 (Tex Ct Civ App 1930); Hindman v. Boyd, 84 P 609, 612 (Wash 1906); State ex rel. McCurdy v. Tappan, 29 Wis 664, 1872 WL 5848, at *11 (Wis Jan 1872).

⁴⁰ For one thing, by its own terms, Cooper applies to legislative as well as executive officials.

Id. at 409 (quotation and citation omitted) (emphasis added); see also State v. Stoneman, 323 Or 536, 542, 920 P2d 535 (1996) (“[A] state legislative interest, no matter how important, cannot trump a state constitutional command.”). Thus, a county, including a county executive, has an affirmative duty to ascertain whether a state-imposed obligation is in fact consistent with the Oregon constitution.

In this case, once the County executive realized that her execution of County practices concerning the issuance of marriage licenses was in clear violation of the Oregon constitution, she had a constitutional obligation to ensure that such clearly unconstitutional discrimination ceased, consistent with her oath of office. See ORS 204.020(2) (“Before entering upon any office listed in ORS 204.005, the person elected must qualify by filing * * * the person’s certificate of election, with an oath of office indorsed thereon, and subscribed by the elected person, to the effect that the person will support the Constitution of the United States and of this state, and faithfully carry out the office being assumed.”). The State’s complaint that the County executive acted without sufficient restraint is disingenuous because there was only one permissible way in which the County executive could have conformed her execution of County practices to clear constitutional constraints, and she was obligated to take it.

First, the Cooper principle is not limited to circumstances in which a court has ruled on a fact pattern identical to the one at issue. Otherwise, it would be virtually meaningless. Rather, it is limited to circumstances in which an official applies a clear constitutional principle. In this case, while it is true that no court had assessed the constitutionality of differential treatment between same-sex couples and opposite-sex couples in the specific context of marriage, it is also true that such differential treatment in related contexts had been analyzed under heightened scrutiny and that no justification for such differential treatment

had been identified.⁴¹ See Tanner v. OHSU, 157 Or App 502, 971 P2d 435 (1998); 49 Or Op Att’y Gen 197 (May 25, 1999); see also Hewitt v. SAIF Corp., 294 Or 33, 653 P2d 970 (1982).

Second, the State’s assertion that there were three remedial options available to the County executive is incorrect. The State’s suggestion that the County executive should have followed Benton County in nullifying marriage for all couples stands in direct contradiction to its concession that “the state takes it as beyond dispute that the legislature would not choose simply to abolish marriage in Oregon” (State Br at 62). Moreover, the State’s suggestion that the County executive should have deferred to the legislature to fashion a remedy is misguided for reasons that plaintiffs have already briefed (see supra at Answer to DOMC’s Second Assignment of Error, § II; Pls Br at 40-43). There was in fact only one remedial option available to the County executive – extending marriage to same-sex couples – and she was obligated to take it.

The State’s complaint that the County executive should have filed a declaratory judgment action does not square with its concession that “[t]he state agrees that [Cooper and its progeny] stand for the proposition that executive officials have the power to assess the constitutionality of a governing statute or rule in the context of applying it” (State Br at 27-28 (emphasis added)). Indeed, the County executive would have been exposed to liability if she had ignored the legal advice rendered by her counsel. See ORS 30.287(1).

Finally, the State’s assertion that the County executive purported to effect statewide policy is incorrect. Consistent with the Cooper principle, she effected only countywide policy concerning the issuance of marriage licenses. The indirect effect on the State Registrar was not a function of the legal advice rendered by her counsel. Rather, it was

⁴¹ The State’s observation that “this court has not approved the Tanner analysis” ignores the fact that (1) the Tanner analysis was nevertheless binding on the County executive, (2) this Court has not explicitly or implicitly disapproved the Tanner analysis, and (3) this Court has approved the Hewitt analysis (contra State Br at 29 n17). Moreover the State’s observation that “courts in other states * * * have arrived at different conclusions” ignores the fact that the Cooper principle required the County executive to conform her execution of County practices to clear constitutional constraints in the Oregon constitution which differ from those in the constitutions of other states (contra id.).

simply a function of the fact that the State Registrar does not have the authority to determine the validity of a marriage, as set forth in section II.B. above.

Thus, the marriages are valid because the County executive had a constitutional duty to order the issuance of the marriage licenses and, therefore, the State Registrar should have registered the marriage records as part and parcel of the trial court's ruling.⁴²

III. The trial court concluded that there was no plain, speedy, and adequate remedy in the ordinary course of the law.

ORS 34.110 provides that a writ of mandamus “shall not be issued in any case where there is a plain, speedy and adequate remedy in the ordinary course of the law.” Although its reasoning was opaque, the trial court held that there was no such remedy in this case.

In holding that alternative remedies were neither speedy nor adequate, the trial court focused on the fact that “[the] marriages [of the married plaintiff couples] appear[ed] to be in a legal limbo” and “[t]he State’s refusal to * * * register their licenses effectively invalidate[d] their marriages and thus denie[d] them the benefits that they [were] seeking” (ER 432 at 6). The trial court noted that “the State Registrar’s inaction [potentially] affect[ed] property rights, health and survivorship benefits, etc.” (ER 440-ER 441 at 14-15; see also State Br at 25 (“[P]ersons will, at times, need to rely on copies of the state’s marriage, divorce and other vital records to determine or protect their legal rights.”)).

It may be inferred that the trial court concluded that the irrevocable loss of opportunities to enjoy important benefits was “a special loss beyond the burden of litigation,” rendering alternative remedies insufficient to vindicate the rights of the married plaintiff couples. State ex rel. Anderson v. Miller, 320 Or 316, 323, 882 P2d 1109 (1994) (citation and quotation omitted). The trial court apparently recognized that the parties had effectively agreed to defer the litigation of the second and third claims for relief to a subsequent round of cross-motions for partial summary judgment, with respect to which there was no agreement as to expedition (see CR 86, Ex 1 at 8). The trial court apparently anticipated that, during the

⁴² Plaintiffs incorporate by reference the County’s counterargument to DOMC’s argument concerning Article VI, section 10 in the County’s answer to DOMC’s Third Assignment of Error, pursuant to ORAP 5.77(4)(a).

delay occasioned by such litigation, the married plaintiff couples could experience the loss of opportunities to enjoy important benefits and, significantly, that such loss could be irrevocable because, even if the litigation were to yield a favorable ruling, the ruling would not necessarily apply retroactively. See Bain, 193 Or at 705 (“[A writ of mandamus] is designed to promote justice. It may issue even where other remedies exist, if they are not sufficiently speedy to prevent material injury.”) (emphasis added).

Amici Vermont Freedom to Marry Task Force, et al., report an extra-record development concerning plaintiffs Burke and Doyle that helps to illustrate the trial court’s concern. Burke is a stay-at-home parent (ER 164 at ¶ 14). Prior to Burke and Doyle’s marriage, Burke did not have access to health benefits through Doyle’s private employer because such benefits are reserved for married partners (id. at ¶ 15). As a result, Burke and Doyle incurred significant out-of-pocket expenses for private health insurance for Burke (id. at ¶¶ 15-16). Amici Vermont Freedom to Marry Task Force, et al., report that, in light of Burke and Doyle’s marriage, Burke now has access to health benefits through Doyle’s private employer (Br of Amici Vermont Freedom to Marry Task Force, et al, at 30-31). In allowing Burke access to such benefits, Doyle’s private employer could have required Burke and Doyle to demonstrate the registration of their marriage record. Had the registration of their marriage record been delayed, Burke and Doyle would have continued to incur significant out-of-pocket expenses, which a favorable ruling would not necessarily have allowed them to recoup.

In the alternative, it is apparent that the trial court concluded that the “legal limbo” of the marriages implicated a public right. In McAlmond, this Court held that, notwithstanding the existence of alternative remedies, “a prohibition from using the writ [of mandamus] should not necessarily follow when the right to be vindicated is a public as well as a private one.” McAlmond, 262 Or at 526-27. The Court went on to illustrate the distinction between a private and a public right:

“If petitioner were the only one concerned, we would not allow the use of the writ where he permitted the time to elapse within which he could have brought a statutory contest. However, we believe we should not invoke such a

prohibition when the entire voting public has an interest in knowing as soon as possible whether [the candidate] is qualified.”

Id. at 527. In this case, the trial court apparently recognized that the “legal limbo” of the marriages affected not only the married plaintiff couples but indeed the entire community in its interactions with thousands of married couples. The trial court apparently understood that the entire public had an interest in knowing as soon as possible whether the marriages were verifiable.

Thus, there is support for the trial court’s holding that there was no plain, speedy, and adequate remedy in the ordinary course of law in this case.⁴³

IV. Procedural irregularities did not preclude the order to register the marriage records.

With respect to the order to register the marriage records, plaintiffs acknowledge that there were procedural irregularities. The irregularities, however, did not preclude ordering the State Registrar to register the marriage records.

DOMC, the only party to assign error to the irregularities, has effectively waived its objection to the irregularities by requesting that “this court decide the county’s authority to issue the licenses now” (DOMC Br at 67). Indeed, DOMC argues that “[l]ack of a decision here will unnecessarily extend the existing uncertainty concerning all manner of issues and decisions that turn on the existence or nonexistence of the marriage statutes” and asserts that “[t]his Court has the discretion to decide this issue now” (Id. at 67-68 (citation omitted)). DOMC cannot have it both ways. By arguing the issue on the merits, DOMC has effectively waived its objection to the irregularities. See Johnson v. City of Astoria, 227 Or 585, 589, 363 P2d 571 (1961).

Moreover, DOMC had notice and an opportunity to show cause why the peremptory writ should not have issued. See Seufert v. Stadelman, 178 Or 646, 652, 167 P2d 936 (1946)

⁴³ This Court has yet to address whether the Administrative Procedures Act provides the exclusive remedy in a case such as this one. Significantly, the decisions of the Court of Appeals cited by the State pre-date Smother v. Gresham Transfer, Inc., 332 Or 83, 23 P3d 333 (2001). Under the analytical framework set forth by Smother, the proper question to be answered is whether the APA is a constitutionally sufficient substitute for a writ of mandamus under Article I, section 10.

(rejecting argument that “[defendants] were entitled to be given proper notice and every opportunity of defense that they could have had under an alternative writ”).

DOMC had notice. The trial court’s opinion and order preceded the effective date of the registration requirement in the judgment by several weeks. Furthermore, plaintiffs filed a complaint in which they requested the issuance of an alternative writ (ER 42-ER 43 at ER 33-34). The complaint set forth “the facts * * * showing the obligation of the defendant to perform the act, and the omission of the defendant to perform it * * * .” ORS 34.150; see also ER 40-ER 41 (Pls Am Compl at 31-32). Thus, plaintiffs effectively gave notice that a peremptory writ might issue. The fact that plaintiffs filed a complaint instead of a petition is not fatal. DOMC cured the defect by referring to the complaint in its answer. See Bain, 193 Or at 697; see also ER 182-ER 84, ER 196. The fact that plaintiffs requested the issuance of an alternative writ instead of a peremptory writ is also not fatal. The issuance of a writ is tested not by the sufficiency of the petition, which is not a part of the pleadings, but rather by the sufficiency of the writ itself.⁴⁴ See Shively v. Pennoyer, 27 Or 33, 39 P 396 (1895); Elliott v. Oliver, 22 Or 44, 29 P 1 (1892); Crawley v. Munson, 131 Or 428, 283 P 29 (1929).

In addition, DOMC had an opportunity to show cause why the peremptory writ should not have issued.⁴⁵ First, in the course of briefing summary judgment, DOMC anticipatorily presented the very argument that it has presented in the course of briefing the appeal (CR64), to which neither plaintiffs nor the County offered a response in light of the trial court’s April 13, 2004 letter to the parties (ER 294-ER 295). Second, after the issuance of the trial court’s opinion and order but before the entry of judgment on the fourth claim for relief, DOMC filed objections to the entry of judgment on the fourth claim for relief (ER

⁴⁴ As set forth in section II above, the non-discretionary duty to register the marriage records was clear. See ORS 34.160 (“When the right to require the performance of the act is clear and it is apparent that no valid excuse can be given for not performing it, a peremptory [writ] shall be allowed in the first instance; * * * .”).

⁴⁵ A hearing was not required. See ORS 34.150 (guaranteeing a hearing only where an alternative writ issues); see also 52 Am Jur 2d Mandamus § 455 (“Although in most instances the writ is awarded and provided for by a final judgment rendered on a hearing or trial of the issues presented, in a proper case a motion for a peremptory writ on the pleadings will lie, and the writ may under some circumstances issue without a hearing.”) (footnotes omitted).

411-ER 420). DOMC would not be prejudiced if the Court were to render a decision on the merits, especially given that the fourth claim for relief presents a pure question of law.⁴⁶ Should the Court conclude that procedural irregularities preclude a decision on the merits, however, plaintiffs respectfully request a remand with respect to their second, third, and fourth claims for relief.

V. There exist alternative bases for affirming the order to register the marriage records.

Should the Court conclude that the trial court erred either procedurally or substantively in issuing the writ of mandamus, there exist alternative bases for resolving the question of law at issue. See Outdoor Media Dimensions, Inc. v. State, 331 Or 634, 659-60, 20 P3d 180 (2001) (“As developed by this court’s decisions, the ‘right for the wrong reason’ principle permits a reviewing court – as a matter of discretion – to affirm the ruling of a lower court on an alternative basis when certain conditions are met. The first condition is that, if the question presented is not purely one of law, then the evidentiary record must be sufficient to support the proffered alternative basis for affirmance. * * * The second condition is that the decision of the lower court must be correct for a reason other than that upon which the lower court relied. Third, and finally, the reasons for the lower court’s decision must be either (a) erroneous or (b) in the reviewing court’s estimation, unnecessary in light of the alternative basis for affirmance.”).

⁴⁶ Other jurisdictions have declined to put form over substance in this very context. See, e.g., Martinez v. State, 796 P2d 250, 251 (NM Ct App 1990); Ferency v. Secretary of State, 362 NW2d 743, 746 (Mich Ct App 1984); Lowry v. Obledo, 169 Cal Rptr 732, 738 (Ct App 1980); Maute v. Frank, 657 A2d 985, 986 (Pa Super Ct 1995); see also State ex rel. Smith v. Barbur, 73 Or 10, 11, 144 P 126 (1914) (“Owing to the exigency of the case * * * we treat this variance from the practice as negligible and will consider the matter as if the writ had been issued in the alternative and the defendant had thus attacked the writ itself.”).

The trial court “resolve[d] the second and third claims for relief” (ER 441); see also ER 424 (entering judgment on the fourth claim for relief “in the alternative to [the] Second and Third Claims for Relief”). In doing so, the trial court effectively denied the State’s motion for summary judgment on the second and third claims for relief (ER 50) and DOMC’s motion for summary judgment on the second claim for relief (ER 47). Although neither plaintiffs nor the County filed a cross-motion for summary judgment on the second or third claim for relief and, as a general rule, it is error for a trial court to enter summary judgment *sua sponte*, the Court of Appeals has held that “[i]f * * * the party against whom the court entered summary judgment could not prevail as a matter of law, the error is harmless.” Advance Resorts of Am., Inc. v. City of Wheeler, 141 Or App 166, 180, 917 P2d 61 (1996) (citation omitted). Under such reasoning, in addition to entering summary judgment in favor of plaintiffs and the County on the first claim for relief, the trial court could have entered summary judgment in favor of plaintiffs and the County on the second or third claims for relief *sua sponte* because, as set forth in sections II.C. and II.D. above, neither the State nor DOMC could have prevailed as a matter of law on the second or third claim for relief under such a circumstance.

In the alternative, in their first claim for relief, plaintiffs and the County requested not only a declaration that the exclusion of same-sex couples from marriage is unconstitutional but also “such other relief as the Court may deem just and proper” (ER 43; see also ER 45). See ORS 28.080 (“Further relief based on a declaratory judgment may be granted whenever necessary or proper. The application thereof shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment to show cause why it should not be granted forthwith.”). The trial court could have granted the application for “such other relief as the Court may deem just and proper” by ordering the State Registrar to register the marriage records. Significantly, the State and DOMC had what were tantamount to opportunities to show cause why such an

order should not issue (CR 109, CR 97, CR 98 (DOMC's motion for summary judgment re plaintiffs' second through fourth claims and supporting memorandum), CR 108 at 4 (State's motion for partial summary judgment on plaintiffs' second and third claims); ER 411-ER 420).

Thus, even if the Court were to conclude that the trial court erred in issuing the writ of mandamus, there would exist alternative bases for ordering the registration of the marriage records.

CONCLUSION

The Court should affirm the judgment requiring the State Registrar to register the marriage records of all same-sex couples who married in Oregon. As the individual plaintiffs note in their opening brief on their cross-appeal, the judgment declaring that ORS Chapter 106 is unconstitutional by excluding the individual plaintiffs from the benefits of marriage should be affirmed as modified to reflect that ORS Chapter 106 violates Article I, section 20 of the Oregon constitution by denying same-sex couples the right to marry. Further, the Court should modify the remedy to extend the civil right to marry to same-sex couples.

DATED this 25th day of October, 2004.

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that I served the foregoing **PLAINTIFFS-RESPONDENTS AND CROSS-APPELLANTS' COMBINED ANSWERING BRIEF ON THE MERITS** on October 25, 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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