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

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

12 Plaintiffs,

13 and

14 MULTNOMAH COUNTY,

15 Intervenor-Plaintiff,

16 vs.

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

22 Defendants,

23 vs.

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

Intervenors-Defendants.

No. 0403-03057

**PLAINTIFFS' MEMORANDUM
OF LAW IN SUPPORT OF
MOTION FOR PARTIAL
SUMMARY JUDGMENT**

**(ORAL ARGUMENT
REQUESTED)**

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1 **I. INTRODUCTION**

2 Plaintiffs Li and Kennedy, Knox and Warshaw, Burke and Doyle, Potter and
3 Moen, Vetri and DeWitt, Sheklow and Lefton, Farrera and Korican, Frankel and Kiefer,
4 and Williams and Belisle (collectively “plaintiff couples”) are lesbian and gay couples
5 who seek to protect themselves and their children by availing themselves of marriage, the
6 social recognition that it confers, and the hundreds of rights, responsibilities, benefits, and
7 obligations that it affords. Above and beyond the myriad tangible harms that flow from
8 the exclusion of same-sex couples from marriage, there is an immeasurable dignitary
9 harm to plaintiff couples and their children because the laws of their state make their
10 families strangers to society. The exclusion of same-sex couples from marriage
11 stigmatizes plaintiff couples and their children as second-class citizens.

12 Article I, section 20 of the Oregon constitution does not tolerate such unjustified
13 discrimination against a disfavored class. The exclusion of same-sex couples from
14 marriage violates this most basic constitutional guarantee of equality of privileges and
15 immunities for all Oregonians. Plaintiff couples seek a declaration that the failure of the
16 State of Oregon to permit marriages of same-sex couples violates Article I, section 20.

17 **II. STATEMENT OF FACTS**

18 **A. The State of Oregon’s statutory code excludes same-sex couples from**
19 **marriage.**

20 Defendant State of Oregon is a state organized and existing under the Oregon
21 constitution. (Stipulated Facts (“Stip”) ¶ 1.) The State of Oregon has a statute that
22 describes marriage as a “civil contract entered into in person by males at least 17 years of
23 age and females at least 17 years of age, who are otherwise capable, and solemnized in
24 accordance with ORS 106.150.” ORS 106.010.

25 Multnomah County began issuing marriage licenses to same-sex couples on
26 March 3, 2004 based on the Multnomah County Attorney’s legal opinion. (Stip ¶ 11; Exs

2, 3.¹) Although the Multnomah County Attorney, Agnes Sowle, concluded that a court would likely hold that ORS 106.010 limits marriages to those between one man and one woman, (Ex 2 at 1-2), she and independent counsel Charles Hinkle concluded that the statute and the County's practice of denying marriages licenses to those who wished to marry another person of the same sex violated Article I, section 20 of the Oregon constitution. (Stip ¶ 11; Ex 2 at 5; Ex 3; Ex 18.)

The Attorney General of the State of Oregon, Hardy Myers, is responsible for enforcing the laws of the State of Oregon. (Stip ¶ 3.) As a result of Multnomah County's change in practice regarding marriage licenses, on March 12, 2004, the Attorney General issued a public legal opinion regarding same-sex marriage. (Stip ¶ 17; Ex 5.)

In part, the Attorney General analyzed ORS 106.010, noting that it "sets out the legal significance of and basic qualifications for marriage." (Ex 5 at 2.) He concluded that the context of ORS 106.010, namely, other provisions in ORS chapter 106, particularly ORS 106.150(1) and 106.041(1), and prior versions of statutes in ORS chapter 106, "leave no doubt" that under the Oregon statutory code, a marriage "must consist of a man and a woman." (Ex 5 at 2-3.)

The Attorney General's opinion contained the same conclusion regarding ORS 106.010 as did the public legal opinion issued by Oregon's Legislative Counsel, Gregory Chaimov, on March 8, 2004. (Stip ¶ 16; Ex 4 at 1-2.) Legislative Counsel concluded that "[t]he Legislative Assembly limits marriage to between a man and a woman," citing and construing ORS 106.010. (Ex 4 at 1-2.)

On March 15, 2004, Governor Theodore Kulongoski, responsible for executing the laws of the State of Oregon, (Stip ¶ 2), stated publicly his directive to all state

¹ All references to exhibits are to those attached to the Stipulated Facts, unless otherwise indicated.

1 agencies regarding same-sex marriages: “Pending a decision by the Oregon Supreme
2 Court, and in accord with the Attorney General’s advice, I have directed all state agencies
3 to adhere to current state statutes, which do not recognize same-sex marriages.” (Ex 7.)

4 On March 18, 2004, the Attorney General sent letters to all 36 Oregon counties.
5 (Stip ¶ 20; Ex 10.) In those letters, the Attorney General confirmed for the counties that
6 “current law defines marriage as a union between a male and a female,” that “existing
7 Oregon statutes authorize issuance of a marriage license only to one man and one
8 woman,” that the Governor “has instructed all state agencies to enforce current marriage
9 laws unless otherwise directed by the Oregon Supreme Court,” and that “state agencies
10 will not recognize the validity of same-sex marriages until and unless directed to do so by
11 the judicial branch.” (Ex 10.) The Attorney General further stated that on his advice and
12 “in accordance with the Governor’s policy, the State Registrar has been directed to
13 decline to file or register same sex marriage records.” (Ex 10.)

14 There is every indication that state agencies are and will be excluding same-sex
15 couples from the rights and benefits of marriage based on the Oregon statutory code and
16 in accordance with the Governor’s directive. Gary Weeks is the Director of the
17 Department of Human Services of the State of Oregon, and he is responsible for
18 overseeing the Center for Health Statistics. (Stip ¶ 4.) The Center for Health Statistics is
19 an agency within the Department of Human Services of the State of Oregon and
20 maintains vital records, including marriage records, for the State of Oregon. (Stip ¶ 5.)
21 Jennifer Woodward is the State Registrar in the Center for Health Statistics. (Stip ¶ 6.)
22 Director Weeks and State Registrar Woodward are not filing and registering the marriage
23 records of same-sex couples whose marriages were licensed and solemnized in Oregon
24 because the Oregon statutory code does not permit marriages of same-sex couples. (Stip
25 ¶ 28.)
26

1 **B. The State of Oregon’s policies and practices relating to marriage and**
2 **families generally.**

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

7 The description of marriage as a civil contract entered into by males at least 17
8 years old and females at least 17 years old, ORS 106.010, makes no mention of
9 procreation.

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

17 Pursuant to ORS 106.110, “[n]o county clerk shall issue a license contrary to the
18 provisions of ORS 106.041 to 106.077 or 106.100.” Thus, it is the policy of the State of
19 Oregon to require issuance of a marriage license in accordance with ORS 106.041 to
20 106.077 and ORS 106.100. Those statutes describe the written application for the
21 license, ORS 106.041; the fee, ORS 106.045; proof of age, ORS 106.050; parental
22 consent if the applicant is under age 18, ORS 106.060; a waivable waiting period, ORS
23 106.077; and a record of the license, ORS 106.100. Those statutes are devoid of any
24 requirement that the applicants make any statement of their intentions regarding
25 procreation, much less prove an ability to procreate or promise to procreate.

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

5 The ways in which both lesbian and gay couples and heterosexual couples bring
6 children into their lives include, in addition to sexual intercourse, assisted reproductive
7 technology (*e.g.*, artificial insemination or *in vitro* fertilization), adoption, guardianship,
8 and foster care. (Johnson Decl ¶ 6.)

9 Whether a child is brought into a parent’s life through assisted reproductive
10 technology, adoption, or sexual intercourse, each parent has equal parental rights under
11 Oregon law. Likewise, each child has the same legal relationship to his or her parent
12 under Oregon law. These policies are codified at ORS 109.041 and ORS 109.239 to
13 ORS 109.243. (Johnson Decl ¶ 7.)

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

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

20 Under ORS 409.010(2), the Department of Human Services “is responsible for
21 the delivery and administration of programs and services” relating, among other things, to
22 “[c]hildren and families, including but not limited to child protective services, foster care,
23 residential care for children and adoption services.” The Department is described in the
24 Oregon Blue Book as “the state's health and human services agency.” See
25 http://bluebook.state.or.us/state/executive/Human_Services/human_services_duties.htm.

26 The Department of Human Services promulgates child welfare policies for the
 State of Oregon, and it has a child welfare policy manual available on the internet
 through the Department’s website, www.dhs.state.or.us. The Department’s child welfare

1 policy manual contains, among other things, regulations providing for minimum
2 standards for adoptive homes in Oregon. Pursuant to OAR 413-120-0310(2), proposed
3 “adoptive parents and other members of the household shall maintain a lifestyle and have
4 a personal history, that demonstrates the capacity to meet emotional and physical needs
5 of adoptive children,” and “[m]arried or unmarried prospective adoptive parents should
6 have a relationship of sufficient duration to give evidence of stability, and will be
7 evaluated for their ability to parent adoptive children.”

8 Joint adoptions are adoptions by two individuals jointly, such as a married couple.
9 Joint adoptions of children by gay couples and lesbian couples occur in Oregon. The
10 controlling statute, ORS 109.309(1), states that “any person” may adopt “another
11 person.” No statute requires that the petitioners be married or that they be of opposite
12 sex. No statute or regulation prohibits gay or lesbian people from adopting, and in fact
13 the Department of Human Services and the court approve such adoptions routinely when
14 they are in the children’s best interest. (Johnson Decl ¶ 9.)

15 A second-parent is the adoption of a child by a non-biological co-parent of the
16 child. These adoptions are similar to stepparent adoptions, in which stepparents adopt the
17 children of their spouses. In the case of lesbian and gay couples, the first parent is
18 sometimes the biological parent and sometimes an adoptive parent of the child. Under
19 ordinary circumstances, Oregon does not conduct a home study or a post-placement
20 report in a stepparent or second-parent adoption.² Again, such adoptions are routinely
21 approved by the Department of Human Services and by the court. (Johnson Decl ¶ 10.)
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25 ² The statute providing for the waiver of those reports is ORS 109.309(5)(c),
26 (Johnson Decl ¶ 10), which provides:

1 When a joint adoption or a second-parent adoption is granted to a lesbian or gay
2 couple, the State Registrar issues birth certificates on which the parents are called
3 “parent” and “parent” instead of the standard “mother” and “father.” (Johnson Decl ¶ 11;
4 Burke Decl ¶ 13, Ex 1; Li Decl ¶ 13, Ex. A; Potter Decl ¶ 14, Ex A; Knox Decl ¶¶ 13-15,
5 Ex A; Stip Between Pls and Defs ¶ 1.)

6 As part of the Department of Human Service’s Child Welfare Policy #II-B.1,
7 Safety Standards for Foster Care, Relative Care and Adoptive Families, the Department
8 requires that applicants for foster parenting and foster parents must be “responsible,
9 stable, emotionally mature adults who exercise sound judgment” and that they “must
10 have the interest, motivation, and ability to nurture, support, and meet the mental,
11 physical, and emotional needs of children in SOSCF custody.” OAR 413-200-0308(1).
12 SOSCF is the Oregon State Office for Services to Children and Families, an agency of
13 the Department whose “primary mission” is “to ensure the safety and well being of
14 Oregon’s children.” OAR 413-200-0301(1). The Department, through SOSCF, approves
15 and certifies foster parents for children in its custody. OAR 413-200-0381, 413-200-
16 0390 to 413-200-0395. The Department, through SOSCF, also approves and certifies
17 adoptive parents for children in its custody. OAR 413-120-0190 to 413-120-0240.

18 When a child is in the custody of the State of Oregon, the State of Oregon has a
19 practice of treating lesbian and gay couples and heterosexual couples equally under the
20 regulations for purposes of foster care placement and adoption. The State of Oregon
21 places children within its care in foster care families when the foster parents are known to
22

23 The department, upon request by the petitioner, may waive the
24 home study requirements described in paragraph (a)(C) of this subsection
25 in an adoption in which one of the child’s biological or adoptive parents
26 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.

1 be lesbian or gay. The State of Oregon also permits adoptions of foster children by
2 couples whom it knows to be lesbian or gay. (Stip Between Pls and Defs ¶ 2.)

3 **C. Material facts regarding the plaintiffs.**

4 **1. Plaintiffs are lesbian and gay couples from Oregon.**

5 The plaintiffs who bring the first claim for relief are nine lesbian and gay couples.
6 Four of the couples, all Multnomah County residents, married after receiving marriage
7 licenses from Multnomah County. (Stip ¶¶ 26, 29.) They are Mary Li and Rebecca
8 Kennedy, (Li Decl ¶¶ 3, 5); Stephen Knox, M.D. and Eric Warshaw, M.D., (Knox Decl
9 ¶¶ 3, 6); Kelly Burke and Dolores Doyle, (Burke Decl ¶¶ 3, 6); Pam Moen and Katie
10 Potter, (Potter Decl ¶¶ 3, 6).

11 Two of the plaintiff couples are Lane County residents who were refused
12 marriage licenses by Lane County, Irene Farrera and Nina Korican, (Farrera Decl ¶¶ 4,
13 13), and Sally Scheklow and Enid Lefton, (Sheklow Decl ¶¶ 3, 12).

14 Two of the plaintiff couples are Benton County residents who want to obtain
15 marriage licenses from Benton County, Julie Williams and Coleen Belisle, (Williams
16 Decl ¶¶ 4, 6), and Walter Frankel and Curtis Kiefer, (Frankel Decl ¶¶ 3, 12).

17 The remaining plaintiff couple, Dominick Vetri and Douglas DeWitt, resides in
18 Linn County. Vetri and DeWitt want to secure the choice to marry in the future, should
19 they decide that is the right course for them. (Vetri Decl ¶¶ 4, 6-9.)

20 **2. Plaintiffs are in committed, loving relationships of significant**
21 **duration.**

22 All of the plaintiffs have been in committed relationships of significant duration.
23 Mary Li and Rebecca Kennedy were the first same-sex couple married in Portland on
24 March 3, 2004. (Li Decl ¶¶ 3.) Li and Kennedy met in 2000, fell in love, started a
25 family, and had their daughter in 2003. (Li Decl ¶¶ 7-9, 11.) Li is a Multnomah County
26 employee and provides the sole financial support for the family, and Kennedy is a stay-

1 at-home mom. (Li Decl ¶ 15.) Marriage is a strong value of the couple, and they want to
2 retain access to legal protections and benefits that other families receive through
3 marriage. (Li Decl ¶¶ 10, 12, 14, 16.)

4 The couple with the longest relationship is Dom Vetri, a 65 year old law
5 professor, and Doug DeWitt, a 53 year old fitness trainer, who have been in a committed,
6 caring, and loving relationship together for over 26 years. (Vetri Decl ¶¶ 3, 6.) Frankel,
7 age 65, and Kiefer, age 52, both librarians, have been together over two decades as well,
8 since 1981. (Frankel Decl ¶¶ 3, 7.) They look forward to spending the rest of their lives
9 together. (Frankel Decl ¶ 5.)

10 Kelly Burke, a stay-at-home mom, and Dolores Doyle, an apprentice electrician,
11 met in 1987, registered in 1991 as domestic partners in the city of Berkeley as a
12 declaration of their commitment to each other and of their intention to be a family, and
13 have been in a committed relationship ever since. (Burke Decl ¶¶ 7-9.) Steve Knox,
14 M.D. and Eric Warshaw, M.D. have been together for over ten years, including a three-
15 year period when Warshaw supported them while Knox did a second medical residency.
16 Knox also converted to Judaism, Warshaw's faith; a shared religious faith is an important
17 part of their family. (Knox Decl ¶¶ 7, 9, 10-11.)

18 Julie Williams and Coleen Belisle met in 1999 at Corvallis High School, where
19 Williams teaches health. Belisle, a home health registered nurse, and Williams love each
20 other deeply and intend to spend the rest of their lives together. (Williams Decl ¶¶ 4-5.)
21 Sally Sheklow and Enid Lefton have been in a committed, caring, loving relationship
22 since 1987. They take great pride in having received the William Sloat Memorial Valued
23 Family Award in recognition of their strong example of a loving, same-sex couple.
24 (Sheklow Decl ¶¶ 3-4; 6-7.)

25 Pam Moen and Katie Potter met at work in 1990, fell in love that year, and have
26 been together in a committed partnership for 13 years. (Potter Decl ¶ 7.) Irene Farrera

1 and Nina Korican began their relationship in 1992 and committed to sharing their lives
2 together in 1993, and they celebrated their religious wedding in 1994. (Farrera Decl ¶¶
3 4, 5.)

4 **3. Plaintiffs are otherwise qualified to be married and want to**
5 **have legally recognized marriages, or want to preserve the**
6 **option to marry.**

7 But for the fact that they are same-sex couples, all of the plaintiffs qualify to
8 marry in that they do not have another living wife or husband, are not first cousins
9 nearer of kin, have the legal age and capacity needed to enter a marriage. (Li Decl ¶ 6;
10 Potter Decl ¶ 5; Knox Decl ¶ 5; Burke Decl ¶ 5; Farrera Decl ¶ 15; Sheklow Decl ¶ 14;
11 Williams Decl ¶ 12; Frankel Decl ¶ 13; Vetri Decl ¶ 10.)

12 The married couples and the four unmarried couples from Lane County and
13 Benton County want to have legally recognized marriages now. (Li Decl ¶¶ 10, 14);
14 Potter Decl ¶¶ 10-12, 16-23; Knox Decl ¶¶ 17-18; Burke Decl ¶¶ 14-18; Farrera Decl ¶¶
15 11-14; Sheklow Decl ¶¶ 7-13; Williams Decl ¶¶ 5, 9-11; Frankel Decl ¶¶ 5-6, 10-12.)
16 Vetri and DeWitt, by virtue of not being allowed a legally recognized marriage, are
17 disadvantaged, but want time to think about marriage and want to have a choice. (Vetri
18 Decl ¶¶ 6-9.)

19 **4. Some plaintiffs have one or more children.**

20 All of the married couples have children. Li and Kennedy have a daughter, born
21 to Kennedy and adopted by Li. (Li Decl ¶¶ 11, 12.) Burke and Doyle have a son, born to
22 Burke and adopted by Doyle. (Burke Decl ¶¶ 10-12.) Knox and Warshaw have three
23 children, two sons and a daughter, adopted individually by Knox first and then adopted
24 by Warshaw. (Knox Decl ¶¶ 11-15.) Potter and Moen have two daughters, both born to
25 Potter and adopted by Moen. (Potter Decl ¶¶ 7, 13, 14.).

1 **5. All plaintiffs are presently harmed by Oregon’s exclusion of**
2 **same-sex couples from marriage.**

3 **a. The State of Oregon’s refusal to recognize plaintiffs’**
4 **relationships by state statute stigmatizes plaintiffs and**
5 **diminishes their ability to benefit from social**
6 **recognition of marriage.**

7 Li and Kennedy recognize that they will benefit by social recognition of their
8 relationship through marriage. (Li Decl ¶¶ 17-18.) Marriage not only provides access to
9 a multitude of legal protections and benefits, but it allows the couple to express their
10 commitment in a way that is universally respected, recognized, and understood, and
11 exclusion from civil marriage and recognition of their marriage has branded them with a
12 stigma of inferiority, in much the same way that racial minorities were barred from
13 marrying Caucasians a generation ago. (Li Decl ¶¶ 17-18.)

14 Despite a religious wedding ceremony they dutifully prepared for, Sheklow and
15 Lefton lament their exclusion from the recognition of a relationship that comes with legal
16 marriage. (Sheklow Decl ¶¶ 6, 7.) Farrera and Korican also believe that by not
17 permitting or recognizing marriages of same-sex couples, the state sends a message that
18 they are less worthy than other Oregonians and their relationship is inferior to those of
19 other Oregonians. (Farrera Decl ¶ 6.) Williams and Belisle feel stigmatized by their
20 exclusion from marriage. (Williams Decl ¶ 11.) Potter and Moen feel the same, having
21 realized that the opportunity to be registered domestic partners was no match for
22 marriage. (Potter Decl ¶¶ 20-23.)

23 **b. Plaintiffs with children fear for their children’s well-**
24 **being as a result of exclusion from marriage.**

25 One of Potter and Moen’s biggest concerns has been the stigmatization of their
26 children because they have same-sex parents. They know that their children will likely
endure harassment because they have same-sex parents. The State of Oregon’s stance
through the statutory code that they are different and not worthy of acknowledgment or

1 recognition as a family sends a harmful message to their children and encourages those
2 who may harass them. (Potter Decl ¶ 21.) They seek a legally recognized marriage to
3 enable their children to feel like they belong to the community that Potter and Moen
4 serve as police officers, and they strongly believe that legal recognition of their marriage
5 will have a positive impact on their children's physical and emotional well-being. Id.

6 Although Knox and Warshaw now have that piece of paper and are married and
7 were able to tell their son Adam that, the State of Oregon is not recognizing their
8 marriage. They hope that their children will not have to feel that their family is less
9 worthy because they cannot enter into a legally recognized marriage. (Knox Decl ¶ 16.)
10 Li and Kennedy want their daughter to grow up in a family that is legally recognized by
11 the community she lives in and by the laws of her state. (Li Decl ¶ 18.) Burke and Doyle
12 want a recognized marriage to protect them and Avery from discrimination and economic
13 hardship. (Burke Decl ¶ 18.)

14 **c. Plaintiffs are ineligible for employer-provided spousal**
15 **health care coverage and other benefits and privileges**
dependent upon legally recognized marriage.

16 Without a legally recognized marriage, Burke and Doyle cannot qualify for
17 employer-sponsored health benefits for Burke, a stay-at-home mom. Their family has
18 had financial hardship because of the cost of individual health benefits for Burke. (Burke
19 Decl ¶¶ 14-16.) Without a legally recognized marriage, Farrera is not eligible for health
20 benefits from Korican's employer, although they want that benefit. (Farrera Decl ¶ 11.)
21 Similarly, Sheklow is not eligible for health benefits from Lefton's employer, and as a
22 result, Sheklow has no health insurance. (Sheklow Decl ¶ 9.)

23 Frankel has been unable to put Kiefer down as the beneficiary of several of his
24 retirement funds because they are not a married couple. (Frankel Decl ¶ 8.)

25 Potter and Moen are police officers for the City of Portland, (Potter Decl ¶ 8), and
26 so are witnesses in legal proceedings. They are not able to take advantage of the

1 privilege afforded to legally recognized married couples that would allow each to claim
2 the right to abstain from testifying against the other, an important privilege because of
3 their profession. (Potter Decl ¶ 18.)

4 Without a legal marriage, Potter and Moen are also not eligible for state death
5 benefits designed for surviving spouses of police officers killed in the line of duty,
6 including a \$25,000 payment, health insurance, educational, and mortgage benefits,
7 should one of them be killed in the line of duty. (Potter Decl ¶¶ 10-11.) Potter and Moen
8 have also had to go out of their way to ensure that they are eligible for a federal benefit in
9 the event of a police officer's death in the line of duty; such benefits are assured for
10 spouses in legally recognized marriages. (Potter Decl ¶12.)

11 **d. Plaintiffs fear non-recognition of their relationships.**

12 Frankel and Kiefer have experienced non-recognition of their family relationship
13 in the medical context when Kiefer's mother, who lived with Frankel and Kiefer for 13
14 years, was dying in the intensive care unit. Frankel is now apprehensive about him and
15 Kiefer having access to one another in a medical crisis. (Frankel Decl ¶ 9.) Similarly,
16 Burke and Doyle were afraid that Burke had a serious health condition just after their
17 son's birth, before Doyle had any legal relationship to her son. Although they made
18 arrangements for Doyle to adopt him, a legally recognized marriage will allow them to
19 feel less vulnerable. (Burke Decl ¶¶ 10-12, 17-18.)

20 Sheklow and Lefton have the same worry about recognition of their family in the
21 event of a medical emergency and in other aspects of their lives, including what might
22 happen if one of them dies. (Sheklow Decl ¶¶ 8, 10, 11.) Farrera and Korican have long
23 had worries about recognition of their family in the medical context and with respect to
24 retirement. (Farrera Decl ¶¶ 8-9, 12.)

1 Even the plaintiffs who have had the benefit of domestic partnership benefits
2 know they have to think about the possibility of losing those benefits because other
3 employers may not cover domestic partners. (Li Decl ¶ 16; Williams Decl ¶ 10.)

4 Other plaintiffs desire an increased sense of security through a legally recognized
5 marriage, including Knox and Warshaw, (Knox Decl ¶¶ 17-18), Li and Kennedy, (Li
6 Decl ¶ 17); Williams and Belisle, (Williams Decl ¶ 9), and Potter and Moen, (Potter Decl
7 ¶¶ 12-13, 16-18).

8 **e. Unmarried plaintiffs cannot obtain marriage licenses**
9 **from their own county of residence with 35 out of 36**
counties not issuing licenses to same-sex couples.

10 All Oregon counties except Multnomah County are refusing to issue marriage
11 licenses to same-sex couples because the Oregon statutory code does not permit
12 marriages of same-sex couples. (Stip ¶ 27.) Washington County's website specifically
13 features that same-sex couples cannot obtain marriage licenses. (Nakamoto Decl ¶ 3; Ex
14 B thereto.)

15 Benton County was initially set to include lesbian and gay couples in the issuance
16 of marriage licenses as of March 24, 2004 after a 2-1 vote of the Board of Commissioners
17 in favor of directing the County Clerk to begin issuing marriage licenses to same-sex
18 couples on the same terms as those issued to different-sex couples. (Stip ¶ 18; Jaramillo
19 Decl ¶¶ 3-4.) However, thereafter, the Attorney General urged the Board to reverse or
20 suspend its decision and to refuse to issue marriage licenses to same-sex couples.
21 (Jaramillo Decl ¶ 5.) On March 22, 2004, the Board of Commissioners voted
22 unanimously to stop issuing licenses to all couples to ensure compliance with Oregon
23 constitutional requirements, pending a court ruling from the Multnomah County Circuit
24 Court. (Stip ¶ 23; Jaramillo Decl ¶¶ 8-10.) This occurred after a legal action filed by
25 intervenor-defendant Defense of Marriage Coalition and others, a threat of litigation from
26 the Attorney General, and discussion with the Attorney General confirming that counties

1 may choose not to issue marriage licenses at all. (Stip ¶¶ 20, 21, 23, 24; Exs 15, 14;
2 Jaramillo Decl ¶¶ 6-8.)

3 Williams and Belisle were going to obtain a marriage license from Benton County
4 in the presence of Williams' parents, whom Williams and Belisle provide care to since
5 they have serious health problems. It would be a burden on their family to travel
6 elsewhere to get the license. (Williams Decl ¶ 7.) And, Williams (a life-long native of
7 Corvallis) and Belisle, like Frankel and Kiefer, feel strongly that their own community
8 should recognize their relationships and issue marriage licenses to them. (Williams Decl
9 ¶¶ 6, 8; Frankel Decl ¶ 12.)

10 In Lane County, the Lane County Counsel issued a public legal opinion regarding
11 same-sex marriages on March 17, 2004. (Stip ¶ 19; Ex 8.) On March 22, 2004, Lane
12 County residents Sheklow and Lefton and Farrera and Korican presented completed
13 applications and fees for marriage licenses to Lane County but were refused licenses
14 because they are same-sex couples. The supervisor of the office that issues licenses told
15 all of them that licenses could not issue for the reasons stated in the Lane County Counsel
16 opinion and provided a copy. (Sheklow Decl ¶ 12; Farrera Decl ¶ 13.) Sheklow and
17 Lefton and Farrera and Korican feel strongly that their own community in Lane County
18 should recognize their relationship and issue them marriage licenses. (Sheklow Decl ¶
19 13; Farrera Decl ¶ 14.)

20 **f. Married plaintiffs' marriages remain under a cloud, to**
21 **the detriment of the married couples and the other**
22 **plaintiffs.**

23 On March 17, 2004, Multnomah County tendered to the State Registrar the
24 marriage records of married plaintiffs Donna Potter and Pamela Moen, Stephen Knox,
25 M.D. and Eric Warshaw, M.D., Mary Li and Rebecca Kennedy, and Kelly Burke and
26 Dolores Doyle, along with the marriage records of different-sex married couples. (Stip ¶
29.) The State Registrar identified, filed, and registered the marriage records of the

1 different-sex couples and identified but did not file and register the marriage records of
2 the married plaintiffs. (Stip ¶ 29.)

3 On March 23, 2004, the State Registrar confirmed in writing the Attorney
4 General's conclusion that under Oregon statutes, "a man cannot marry a man, nor can a
5 woman marry a woman," the Governor's directive, and the fact that she had rejected the
6 records of marriages of married plaintiffs Potter and Moen, Knox and Warshaw, Li and
7 Kennedy, and Burke and Doyle and returned them "to the county official who issued the
8 marriage license." (Ex 17.)

9 Marriage licenses, when filed and registered with the State Registrar, are publicly
10 available for official confirmation of the existence of a couple's marriage. (Stip ¶ 28.)
11 Because the marriage records of same-sex couples are not being registered, and because
12 of the public refusal of the Governor and the State of Oregon to recognize the marriages,
13 the married couples' marriages remain under a cloud. The lack of recognition of same-
14 sex marriages due to the Oregon statutory causes dignitary harm to the unmarried
15 plaintiffs. (E.g., Williams Decl ¶ 11.) Moreover, the shadow of doubt cast on these
16 marriages places a serious burden on the married plaintiffs, emotionally, in terms of
17 dignitary harm, and in terms of real benefits. (Potter Decl ¶¶ 19-22; Li Decl ¶ 17; Knox
18 Decl ¶ 19; Burke Decl ¶¶ 14-18.)

19 **D. The State of Oregon recognizes that lesbian and gay people as a class**
20 **have been the subject of social and political stereotyping and**
21 **prejudice.**

22 The State of Oregon recognizes that lesbian and gay people, and other sexual
23 minorities, suffer prejudice and discrimination. That is acknowledged through the
24 Department of Human Services and its public health services, primarily in the area of
25 health issues for youth.

26 The Department gives an overview of its public health function as follows:

"Public health touches every person, every day, and helps
Oregon communities create healthy environments so those

1 who live there can be well. Public health is based on
2 science and focuses on population groups rather than on the
3 individual. It emphasizes preventing illness and injury
rather than treating a medical condition that has already
occurred.

4 “Many public health activities are invisible to the public
5 but they quickly become apparent when there are wide-
6 scale health threats, such as a communicable disease
outbreak, bioterrorist threat, contamination in the air, food
or water, or escalating chronic disease.

7 “Public health is carried out through a system of federal,
8 state and local agencies, private organizations and other
9 diverse partners. The state Department of Human Services
10 (DHS) sets public health policy and provides administrative
and technical assistance to county health departments and
other local partners who deliver services in their
communities.”

11 www.dhs.state.or.us/publichealth/overview.cfm.

12 The Adolescent Health Section reports that it is within the Office of Family
13 Health, www.dhs.state.or.us/publichealth/ah/index.cfm, which in turn is part of the
14 Oregon Department of Human Services. The Adolescent Health Section states that its
15 mission “is to promote the health of all adolescents in Oregon” and provides “guidance
16 and technical assistance to schools, counties, health providers and non-governmental
17 organizations.” Id. The Office of Family Health “administers programs aimed at
18 improving the overall health of Oregon's women, infants, and children through preventive
19 health programs and services.” This statement of its duties is found on the Department’s
20 website at www.dhs.state.or.us/publichealth/ofhs/index.cfm.

21 The Department of Human of Services, through the Adolescent Health Section,
22 recognizes that lesbian, gay, bisexual, and transgendered youth “often have unmet health
23 care needs” and have to live “in a culture that is often not accepting.”

24 www.dhs.state.or.us/publichealth/ah/sexuality/glbt.cfm. The Department of Human
25 Services, through the Adolescent Health Section, posts on its website a report entitled
26 Just the Facts About Sexual Orientation & Youth: A Primer for Principals, Educators &

1 School Personnel and suggests it as a resource for those working with sexual minority
2 youth. www.dhs.state.or.us/publichealth/ah/sexuality/glbtcfm. A copy of that report
3 from the Department's website is attached as Exhibit C to the Affidavit of Lynn R.
4 Nakamoto.

5 The Department of Human Services also has an Injury Prevention and
6 Epidemiology Program, which is described as follows:

7 "The Injury Prevention and Epidemiology Program focuses
8 on the identification and prevention of morbidity and
9 mortality due to injury among Oregonians. The data,
10 education, consultation and technical assistance we provide
11 through our partnerships as well as our work with policy
12 makers, is intended to reduce the economic, social, and
13 personal burden due to injury in Oregon."

14 www.dhs.state.or.us/publichealth/ipe/.

15 The State of Oregon, through the Injury Prevention and Epidemiology Program,
16 recognizes that there is a youth suicide problem in the state and has developed a plan with
17 15 strategies for communities to use to reduce youth suicide.

18 www.dhs.state.or.us/publichealth/ipe/suicidecfm. The Oregon plan, entitled A Call to
19 Action, includes a strategy to "reduce harassment in schools and communities."

20 www.dhs.state.or.us/publichealth/ipe/2000plan/sectn2-4cfm. The rationale for and
21 efficacy of the strategy is described as follows:

22 "Students must feel safe in school and other learning
23 environments if they are to achieve their maximum
24 potential. Lack of physical and emotional safety can result
25 in negative educational outcomes linked to risk behaviors.

26 "Students may be marginalized for a wide variety of
27 reasons, including physical characteristics, disability,
28 medical conditions, religion, gender, race, ethnic/cultural
29 identity, sexual orientation, and gender identity.

30 "Studies have established a link between victimization at
31 school with an elevated risk of suicidal ideation and
32 behavior in adolescents. Nearly one-third of Oregon high
33 school students responding to the 1997 Youth Risk
34 Behavior Survey (YRBS) reported being harassed at school
35 during the previous 30 days. These students were three

1 times more likely to report a prior suicide attempt. At
2 greatest increased risk were victims of sexual harassment
3 and those who were perceived to be gay, lesbian, or
4 bisexual.”

5 www.dhs.state.or.us/publichealth/ipe/2000plan/sectn2-4.cfm (citations omitted; emphasis
6 added). At page 40 of the plan, Appendix A entitled “The Epidemiology of Youth
7 Suicide in Oregon,” the plan reports on studies that indicate that lesbian and gay youth
8 have significantly higher suicide attempt rates than heterosexual youth and that
9 “environmental factors” play a major role in predicting distress for lesbian and gay youth.

10 The Oregon Department of Human Services, through its Injury Prevention and
11 Epidemiology Program, also posts on its website a report entitled Adolescent
12 Maltreatment: Youth as Victims of Abuse and Neglect by Hutchinson, J. and Langlykke,
13 K. written in 1998. A posted excerpt from the report notes that “[a]mong the most
14 ignored, underserved, and mistreated of the adolescent population are gay, lesbian, and
15 bisexual youth” and that adolescents “who reveal same-sex interests publicly are subject
16 to harassment, abandonment, and even assault.”

17 www.dhs.state.or.us/publichealth/ipe/2000plan/sectn2-4.cfm

18 **III. ARGUMENT**

19 **A. Marriage is a privilege for purposes of Article I, section 20 of the** 20 **Oregon constitution.**

21 Article I, section 20 guarantees that “[n]o law shall be passed granting to any
22 citizen or class of citizens privileges, or immunities, which, upon the same terms, shall
23 not equally belong to all citizens.” The Oregon Supreme Court has defined the terms
24 “privilege” and “immunities” for purposes of Article I, section 20 as follows: “Whenever
25 a person is denied some advantage to which he or she would be entitled but for a choice
26 made by a government authority, article I, section 20 requires that the government
decision to offer or deny the advantage be made by permissible criteria and consistently

1 applied.” City of Salem v. Bruner, 299 Or 262, 268-69, 702 P2d 70, 74 (1985) (quotation
2 omitted). In the leading law review article on Article I, section 20, then law professor
3 and now Oregon Court of Appeals Judge David Schuman analyzed the application of this
4 definition in the case law: “The significant words in the court’s definition, then, are not
5 ‘entitle,’ but ‘whenever’ and ‘some advantage.’ The definition is expansive enough to
6 implicate Article I, section 20 whenever the state might unequally deprive a citizen of
7 something potentially desirable.” David Schuman, The Right to “Equal Privileges and
8 Immunities:” A State’s Version of “Equal Protection,” 13 Vt L Rev 221 (1988); see also
9 49 Or Op Att’y Gen 112, No. 8260, at *6 (Aug. 26, 1998) (“The Oregon Supreme Court
10 has indicated that the denial of ‘some advantage’ to which a person otherwise would be
11 entitled is sufficient to implicate Article I, section 20. That language suggests that even a
12 slight advantage might constitute a ‘privilege’ or ‘immunity’ for this purpose.”) (citing
13 Bruner).

14 By reserving marriage to different-sex couples, the State of Oregon has denied
15 same-sex couples the substantial advantages that come with marriage. See ORS 106.010.
16 Marriage is the established social structure in which two people commit to a shared life.
17 (Am Answer in Intervention ¶ 4; see also Answer ¶ 5.) When two people enter into a
18 marriage, they express their commitment in a way that is universally honored as a
19 commitment of the highest order. (Id.) Moreover, when two people enter into a
20 marriage, they and their children are assured uniform recognition as a family unit. (Id.)
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1 Such social recognition is at the core of the substantial advantages that come with
2 marriage.³

3 Marriage is also a complex legal structure that reflects the extraordinary
4 commitment made by married couples. (Am Answer in Intervention ¶ 4.) There are
5 hundreds of ways in which laws have been built up around marriage to protect married
6 couples and their children. (Id.) Indeed, marriage often functions as a safety net for
7 families in times of need such as illness and death. (See id.) The State of Oregon has
8 also denied these substantial advantages to same-sex couples by tying hundreds of rights,
9 responsibilities, benefits, and obligations to marriage. (See Answer ¶ 6; Stip Facts, Ex 5
10 (Attorney General opinion at 4).)

11 Accordingly, marriage is a privilege for purposes of Article I, section 20.⁴ (See
12 also Stip Facts, Exs 2 (Multnomah County Counsel opinion at 3), 4 (Legislative Counsel
13 opinion at 2), 5 (Attorney General opinion at 3-4).)

19 ³ Intervenors-defendants miss the point of this action when, in their first
20 affirmative defense, they note that the state statutory code permits individual plaintiffs to
21 enter into marriages with persons of a different sex. Individual plaintiffs do not dispute
22 that this is so. Individual plaintiffs, however, do not seek to enter into marriages with
23 persons of a different sex. Rather, each of them seeks to enter into a marriage with his or
24 her partner, who is a person of the same sex. The opportunity to enter into a marriage is
meaningless to each of them if it does not encompass the opportunity to enter into a
marriage with the person whom he or she loves. Indeed, it is the fact that the state
statutory code does not permit individual plaintiffs to marry persons of the same-sex that
is the point of this action.

25 ⁴ Religious marriages are distinct from civil marriages. The definition of the term
26 “marriage” for religious purposes may differ from the definition of the term “marriage”
for civil purposes. Plaintiff couples do not – and indeed may not – seek to alter the
definition of the term “marriage” for religious purposes. They seek only to alter the
definition of the term “marriage” for civil purposes.

1 **B. The denial of marriage to lesbian and gay couples but not**
2 **heterosexual couples constitutes sexual orientation discrimination and**
3 **is therefore subject to an exacting level of scrutiny under Article I,**
4 **section 20 of the Oregon constitution.**

5 In Tanner v. Oregon Health Scis. Univ., 157 Or App 502, 971 P2d 435 (1998), the
6 Oregon Court of Appeals held that the denial of employment benefits by a state
7 university to the domestic partners of its lesbian and gay employees but not to the
8 spouses of its heterosexual employees violated Article I, section 20. In doing so, the
9 Court applied an analytical framework that controls in this case.

10 Article I, section 20 guarantees that “[n]o law shall be passed granting to any
11 citizen or class of citizens privileges or immunities, which, upon the same terms, shall not
12 equally belong to all citizens.” See State v. Clark, 291 Or 231, 236-37, 630 P2d 810, 814
13 (1981) (noting “the original concern of article I, section 20, with special privileges or
14 ‘monopolies’” as well as the fact that “its use against discriminatory or otherwise
15 ‘unequal’ adverse treatment is long established”) (quotation and citations omitted).
16 Article I, section 20 applies to “both legislative enactments and the administration of laws
17 under delegated authority.” Tanner, 157 Or App at 519, 971 P2d at 445 (citation
18 omitted); see also Clark, 291 Or at 239, 630 P2d at 815 (“It also was early established
19 that the guarantee reaches forbidden inequality in the administration of laws under
20 delegated authority as well as in legislative enactments.”).

21 Where one class of people is favored over another class of people, Article I,
22 section 20 applies only if the disfavored class of people is a “true class.” Tanner, 157 Or
23 App at 520, 971 P2d at 445 (citation omitted). A true class is a class that is “defined in
24 terms of characteristics that are shared apart from the challenged law or action.” Id. at
25 521, 971 P2d at 445. In other words, a true class is defined by “*ad hominem*
26 characteristic,” “personal characteristic,” or “antecedent personal or social characteristics

1 or societal status,” e.g., gender, ethnic background, legitimacy, past or present residency,
2 and military service. Id., 971 P2d at 445-46 (quotations and citation omitted).

3 Where one true class is favored over another true class, the level of scrutiny to be
4 applied depends on whether the disfavored true class is a “suspect class.” Id. at 521-22,
5 971 P2d at 446. A suspect class is a class that is “defined in terms of ‘immutable’
6 characteristics and ‘can be suspected of reflecting “invidious” social or political premises,
7 that is to say prejudice or stereotyped prejudgments.”’ Id. at 522, 971 P2d at 446
8 (quoting Hewitt v. State Accident Ins. Fund Corp., 294 Or 33, 45, 653 P2d 970, 977
9 (1982)).

10 [I]mmutability – in the sense of inability to alter or change – is not
11 necessary * * *. [T]he focus of the suspect class definition is not
12 necessarily the immutability of the common, class-defining
13 characteristics, but instead the fact that such characteristics are
historically regarded as defining distinct, socially-recognized groups
that have been the subject of adverse social or political stereotyping or
prejudice.

14 Tanner, 157 Or App at 522-23, 971 P2d at 446 (noting that alienage, religious affiliation,
15 and gender may be changed but are nonetheless suspect classes).

16 Where governmental action disfavors a suspect class, such governmental action is
17 “subject to a particularly exacting scrutiny.” Id. at 522, 971 P2d at 446 (citing Hewitt,
18 294 Or at 45, 653 P2d at 977). Such governmental action is justified “only if the failure
19 to make the privileges or immunities available to that class can be justified by genuine
20 differences between the disparately treated class and those to whom the privileges and
21 immunities are granted.” Tanner, 157 Or App at 523, 971 P2d at 446.

22 Applying this analytical framework, the Oregon Court of Appeals concluded that
23 lesbian and gay couples constitute a true class: “There is no question but that plaintiffs
24 are members of a true class * * *. [T]he class clearly is defined in terms of *ad hominem*,
25 personal and social characteristics.” Id. at 523-24, 971 P2d at 447. The Court then
26 concluded that lesbian and gay couples constitute a suspect class:

1 “[W]e have no difficulty concluding that plaintiffs are
2 members of a suspect class. Sexual orientation, like
3 gender, race, alienage, and religious affiliation is widely
4 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.”

5 Id. at 524, 971 P2d at 447. Then, applying an exacting level of scrutiny, the Court
6 concluded that there was no genuine difference between lesbian and gay couples and
7 heterosexual couples that justified the denial of employment benefits by a state university
8 to the domestic partners of its lesbian and gay employees but not the spouses of its
9 heterosexual employees. Id. As the Court stated, “we can envision none.”⁵ Id.

10 In light of Tanner, the denial of marriage to lesbian and gay couples but not
11 heterosexual couples implicates both a true class and a suspect class and is therefore
12 subject to an exacting level of scrutiny. See also In re Marriage of Collins, 183 Or App
13 354, 359, 51 P3d 691, 693 (2002) (citing Tanner for the proposition that sexual
14 orientation discrimination violates Article I, section 20); Gunn v. Lane County, 173 Or
15 App 97, 103, 20 P3d 247, 251 (2001) (citing Tanner for the proposition that sexual
16 orientation is a suspect class); 49 Or Op Att’y Gen 197, No. 8268, at *2 (May 25, 1999)
17 (“We see no reason why, under Tanner, the state would not have the same constitutional
18 obligation when it acts in its capacity as a taxing authority.”). As discussed below, there
19 is no genuine difference between lesbian and gay couples and heterosexual couples that
20 justifies the denial of marriage to the former but not the latter. See § III.D., infra. Thus,
21 the denial of marriage to lesbian and gay couples but not heterosexual couples violates
22 Article I, section 20. (See also Stip Facts, Exs 2 (Multnomah County Counsel opinion at
23 2-5), 4 (Legislative Counsel opinion at 2-5), 5 (Attorney General opinion at 4-10).)

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26 ⁵ The Court went on to reaffirm that it is irrelevant to the analysis whether
governmental action disfavoring a true class is intentional. Id. at 524-25, 971 P2d at 447.

1 **C. The denial of marriage to same-sex couples but not different-sex**
2 **couples constitutes gender discrimination and is therefore subject to**
3 **an exacting level of scrutiny under Article I, section 20 of the Oregon**
4 **constitution.**

5 In Hewitt, the Oregon Supreme Court held that the denial of workers'
6 compensation to males and their children upon on-the-job death or injury of their
7 unmarried female partners but not females and their children upon on-the-job death or
8 injury of their unmarried male partners violated Article I, section 20. In doing so, the
9 Court held that gender is both a true class and a suspect class. Thus, where governmental
10 action favors one class of people over another class of people based on gender, such
11 governmental action is subject to an exacting level of scrutiny and must be justified by a
12 genuine difference between the classes of people.

13 The denial of marriage to same-sex couples but not different-sex couples favors
14 one class of people over another class of people based on gender. To exclude a person
15 from marriage based on whether the person seeks to marry a person of the same sex or a
16 person of a different sex is by definition to exclude the person from marriage based on
17 gender. A female who seeks to marry a female is excluded from marriage, but a male
18 who seeks to marry a female is not. Similarly, a male who seeks to marry a male is
19 excluded from marriage, but a female who seeks to marry a male is not.

20 Defendants and/or intervenors-defendants may attempt to argue that, because a
21 male who seeks to marry a person of the same sex is excluded from marriage to the same
22 extent that a female who seeks to marry a person of the same sex is excluded from
23 marriage, the denial of marriage to same-sex couples but not different-sex couples is not
24 based on gender. The reasoning of the Oregon Supreme Court in Hewitt is fatal to any
25 such argument. In Hewitt, the Court understood that, where couples are concerned, one
26 can always re-characterize the comparative analysis to suggest that there is no disparity

1 based on an impermissible consideration. Thus, the Court recognized that it is enough
2 that the disparity is defined by reference to an impermissible consideration:

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

19 Hewitt, 294 Or at 42-43, 653 P2d at 975-76 (footnote omitted) (emphasis added). In
20 other words, the Court recognized that, notwithstanding the fact that the law
21 disadvantaged both males who survived their female partners vis-à-vis females who
22 survived their male partner and females who worked to ensure the security of their male
23 partners vis-à-vis males who worked to ensure the security of their female partners, it was
24 enough that the law was defined by reference to gender. See also, e.g., Frontiero v.
25 Richardson, 311 US 677 (1973) (arguably no disparity between males and females – the
26 policy disadvantaged servicewomen vis-à-vis servicemen to the same extent that it
disadvantaged the husbands of servicewomen vis-à-vis the wives of servicemen – yet the
United States Supreme Court had no trouble seeing that the policy discriminated based on
gender); Loving v. Virginia, 388 US 1 (1967) (arguably no disparity between whites and
non-whites – the law penalized the white party to an interracial marriage to the same
extent that it penalized the non-white party to the interracial marriage – yet the United
States Supreme Court had no trouble seeing that the law discriminated based on race).

1 This analysis is confirmed by the analysis of the Hawaii Supreme Court in Baehr
2 v. Lewin, 852 P2d 44 (Haw 1993), a case also concerning the exclusion of same-sex
3 couples from marriage. In Baehr, the Court adopted this very reasoning in reaching its
4 conclusion that “the state’s regulation of access to the status of married persons
5 [discriminated] on the basis of the applicants’ sex.” Id. at 60.

6 “We understand that Judge Heen disagrees with our view in
7 this regard based on his belief that “HRS § 572-1 treats
8 everyone alike and applies equally to both sexes[.]” with
9 the result that “neither sex is being *granted* a right or
10 benefit the other does not have, and neither sex is being
11 *denied* a right or benefit that the other has.” Dissenting
12 opinion at 71-72 (emphasis in original). The rationale
13 underlying Judge Heen’s belief, however, was expressly
14 considered and rejected in Loving:

15 ‘Thus, the State contends that, because its
16 miscegenation statutes punish equally
17 both the white and the Negro participants
18 in an interracial marriage, these statutes,
19 despite their reliance on racial
20 classifications do not constitute an
21 invidious discrimination based upon race
22 * * * . [W]e reject the notion that the
23 mere “equal application” of a statute
24 containing racial classifications is enough
25 to remove the classifications from the
26 Fourteenth Amendment’s proscriptions
27 of all invidious discriminations * * * . In
28 the case at bar, * * * we deal with statutes
29 containing racial classifications, and the
30 fact of equal application does not
31 immunize the statute from the very heavy
32 burden of justification which the
33 Fourteenth Amendment has traditionally
34 required of state statutes drawn according
35 to race.’

36 ”388 US at 8, 87 S Ct at 1821-22. Substitution of “sex” for
37 “race” and article I, section 5 for the fourteenth amendment
38 yields the precise case before us together with the
39 conclusion that we have reached.”

40 Id. at 68-69; see also Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998
41 WL 88743, at *6 (Alaska Super Ct Feb 27, 1998) (“That this is a sex-based classification
42 can readily be demonstrated: if twins, one male and one female, both wished to marry a

1 woman and otherwise met all of the Code’s requirements, only gender prevents the twin
2 sister from marrying under the present law. Sex-based classification can hardly be more
3 obvious.”).

4 In light of Hewitt, the denial of marriage to same-sex couples but not different-sex
5 couples implicates gender, which is both a true class and a suspect class and is therefore
6 subject to an exacting level of scrutiny. As discussed below, there is no genuine
7 difference between same-sex and different-sex couples that justifies the denial of
8 marriage to the former but not the latter. See § III.D., infra. Thus, the denial of marriage
9 to same-sex couples but not different-sex couples violates Article I, section 20.⁶ (See
10 also Stip. Facts, Ex. 5 (Attorney General opinion at 4-10).)

11 **D. There is no genuine difference between same-sex couples and**
12 **different-sex couples that justifies the denial of marriage to the former**
13 **but not the latter under Article I, section 20 of the Oregon**
14 **constitution.**

14 The denial of marriage to same-sex couples but not different-sex couples is
15 justified only “if the reason for the classification reflects specific biological differences
16 between men and women. It is not overcome when other personal characteristic or social
17 roles are assigned to men or women because of their gender and for no other reason.”
18 Hewitt, 294 Or at 46, 653 P2d at 978 (emphasis added). In other words, the reason for
19 the exclusion of same-sex couples from marriage must be based on “intrinsic
20
21

22 ⁶ The denial of marriage to same-sex couples but not different-sex couples should
23 be subject to an exacting level of scrutiny regardless of whether it implicates sexual
24 orientation or gender. This is so because the privilege at issue is so fundamental that its
25 unequal denial should be subject to an exacting level of scrutiny. Although Article I,
26 section 20 jurisprudence has not adopted federal fundamental rights analysis, federal
fundamental rights analysis provides a useful template in this regard. See, e.e., Zablocki
v. Redhail, 434 US 374 (1978) (federal jurisprudence subjects a classification to strict
scrutiny where there is a disparate burden on the fundamental right to marry).

1 differences,” not “assumptions about * * * relative social roles.” Id. at 49, 653 P2d at
2 979.

3 There is no genuine difference between same-sex couples and different-sex
4 couples that explains why the former should be excluded from marriage but the latter
5 should not. Whatever social good results when a couple makes a commitment of the
6 highest order to each other, e.g., a stable household, it is realizable whether the couple is
7 a same-sex couple or a different-sex couple. Thus, it is entirely arbitrary to allow
8 different-sex couples to make a commitment of the highest order to each other but not to
9 allow same-sex couples to do the same. Simply put, there is no difference between same-
10 sex couples and different-sex couples where the purpose of marriage is concerned.

11 Article I, section 20 does not tolerate such “palpably arbitrary” governmental
12 discrimination. City of Klamath Falls v. Winters, 289 Or 757, 776, 619 P2d 217, 228
13 (1980); see also Delgado v. Souders, 334 Or 122, 146, 46 P3d 729, 745 (2002) (“Article
14 I, section 20, prohibits ‘[h]aphazard’ or ‘standardless’ administration of laws.”) (quoting
15 State v. Freeland, 295 Or 367, 374, 667 P2d 509, 515 (1983)). Indeed, the exclusion of
16 same-sex couples from marriage is nothing more than discrimination for its own sake,
17 something that has long been recognized as anathema in equality jurisprudence. See,
18 e.g., United States Dep’t of Agric. v. Moreno, 413 US 528, 534 (1973); Palmore v.
19 Sidoti, 466 US 429, 433 (1984); see also, e.g., Hewitt, 294 Or at 37, 653 P2d at 972
20 (repudiating the invocation of “general welfare and good morals” as a means of
21 “matching * * * individual conduct to [a] stereotype imposed upon [one’s] sex”). This
22 fundamental principle of constitutional law applies equally where lesbian and gay people
23 are concerned. See, e.g., Romer v. Evans, 517 US 620, 634-35 (1996); Lawrence v.
24 Texas, 123 S Ct 2472, 2484 (2003). Thus, the exclusion of same-sex couples from
25 marriage is a type of “social role[] [that is] assigned to [lesbian and gay people] because
26 of their [sexual orientation] and for no other reason” – a circumstance that the Oregon

Supreme Court does not permit. Hewitt, 294 Or at 46, 653 P2d at 978. Accordingly, the denial of marriage licenses to same-sex couples but not different-sex couples violates Article I, section 20.⁷

1. There is no genuine difference between same-sex couples and different-sex couples involving procreation that justifies the denial of marriage to the former but not the latter.

Defendants and/or intervenors-defendants may attempt to argue that there is a difference between same-sex couples and different-sex couples involving procreation that justifies the exclusion of same-sex couples from marriage. The State's interest in marriage, however, is not and has never been an interest in procreation. The State does not require and has never required couples to procreate in order to marry. Indeed, the State freely allows couples who cannot or choose not to procreate to marry. (See Stip. Facts, Exs. 2 (Multnomah County Counsel opinion at 5), 5 (Attorney General opinion at 9) ("[O]f course, people who wish to get married in Oregon need not promise to have children.")) Accordingly, the proposition that the State's interest in marriage is an

⁷ A ruling that the exclusion of same-sex couples from marriage violates Article I, section 20 would be consistent with an emerging trend. Every state supreme court to consider the issue of marriage equality for same-sex couples in the past decade has concluded that the exclusion of same-sex couples from marriage violates its state constitution. Goodridge v. Department of Public Health, 798 NE2d 941 (Mass 2003); Baker v. State, 744 A2d 864 (Vt 1999); Baehr v. Lewin, 852 P2d 44 (Haw 1993); see also Halpern v. Toronto, 172 OAC 276 (2003) (Ontario Court of Appeal); Barbeau v. Attorney General of Canada, 2003 BCCA 251 (2003) (British Columbia Court of Appeal); Brause v. Bureau of Vital Statistics, No. 3AN-95-6562, 1998 WL 88743 (Alaska Super Ct Feb 27, 1998). On March 19, 2004, the Quebec Court of Appeal reached a similar conclusion in Hendricks v. Attorney General of Canada. At this time, its opinion is available only in French.

1 interest in procreation is nothing more than a pretext for discrimination and must not be
2 countenanced. See Hewitt, 294 Or at 38, 653 P2d at 973 (“Surely no judge today * * *
3 would attempt * * * to hypothesize [a] statutory objective [to justify an exclusion that
4 does not otherwise have “a fair and substantial relation to the object of the legislation].”);
5 see also Goodridge, 798 NE2d at 961 (“[I]t is the exclusive and permanent commitment
6 of the marriage partners to one another, not the begetting of children, that is the sine qua
7 non of civil marriage.”).

8 Moreover, there are many ways in which couples bring children into their
9 families, only one of which is procreative sexual intercourse. Like heterosexual couples,
10 lesbian and gay couples bring children into their families in a variety of ways, including
11 assisted reproductive technology (e.g., artificial insemination, in vitro fertilization),
12 adoption, guardianship, and foster care. (Johnson Decl ¶ 6; see also Li Decl ¶¶ 11-13;
13 Knox Decl. ¶¶ 12-15; Burke Decl. ¶¶ 10-13; Potter Decl. ¶¶ 13-15.) The fact that lesbian
14 and gay couples may not bring children into their families through procreative sexual
15 intercourse does not mean that their children are less worthy. Indeed, the law ensures
16 that this is so. See, e.g., ORS 109.050 (“An adopted child bears the same relation to
17 adoptive parents and their kindred in every respect pertaining to the relation of parent and
18 child as the adopted child would if the adopted child were the natural child of such
19 parents.”); see also, e.g., ORS 109.041(1) (adopted child to be treated as natural child),
20 109.243 (child born as a result of artificial insemination to be treated as natural child),
21 112.175(1) (intestate succession rights for adopted child), 659A.150(4) (family leave for
22 adopted or foster child), 659A.159(1)(a) (same), 418.131; OAR 101-010-0005(7)(b)(A)-
23 (B) (state employee benefits for adopted child or child under guardianship), 101-020-
24 0020(5) (state employee medical and dental benefits for adopted child), 101-050-
25 0010(2)(e) (state retiree benefits for adopted child), 839-009-0210(2), (5) (family leave
26 for adopted or foster child), 839-009-0230(1) (parenting leave for adopted or foster

1 child), 839-009-0240(6) (parenting leave for adopted or foster child); Johnson Decl. ¶ 7;
2 Stip Facts, Exs 2 (Multnomah County Counsel opinion at 5), 4 (Legislative Counsel
3 opinion at 4), 5 (Attorney General opinion at 9) (“Oregon law does not disadvantage
4 those children [who are brought into families of lesbian and gay couples] in any way of
5 which we are aware, except by virtue of the marriage statutes.”). Such law is wholly
6 inconsistent with the proposition that the State has an interest in preferring children who
7 are brought into families through procreative sexual intercourse. Indeed, if there is an
8 interest at all, it is an interest in bringing children into families, regardless of the way in
9 which it is accomplished. In this regard, there is no difference between lesbian and gay
10 couples and heterosexual couples.

11 **2. There is no genuine difference between same-sex couples and**
12 **different-sex couples with respect to parenting that justifies the**
13 **denial of marriage to the former but not the latter.**

14 Defendants and/or intervenors-defendants may also attempt to argue that there is a
15 difference between same-sex couples and different-sex couples involving parenting that
16 justifies the exclusion of same-sex couples from marriage. Such an argument is not
17 credible in light of the many ways in which the State endorses parenting by lesbian and
18 gay couples on equal terms with parenting by heterosexual couples.

19 State courts and agencies routinely allow openly lesbian and gay couples to adopt
20 children to the same extent that they allow heterosexual couples to do so. (Stip Facts
21 Between Pls and Defs ¶ 2; Johnson Decl ¶¶ 9-10; see also Li Decl ¶¶ 12-13; Knox Decl
22 ¶¶ 13-15; Burke Decl. ¶ 13; Potter Decl. ¶¶ 14-15; Stip Facts., exs. 4 (Legislative Counsel
23 opinion at 5), 5 (Attorney General opinion at 9) (“[S]ame-sex couples can adopt
24 children.”).) Moreover, following either a joint adoption by a lesbian or gay couple or a
25 second-parent adoption by a lesbian or gay partner, defendant Woodward in her official
26 capacity as the State Registrar of the State of Oregon issues a birth certificate for the

1 child on which the same-sex parents are denominated “parent” and “parent” instead of
2 the standard “mother” and “father.” (Stip Facts Between Pls and Defs ¶ 1; Johnson Decl
3 ¶ 11; see also Li Decl ¶ 13; Knox Decl ¶¶ 13-15; Burke Decl ¶ 13; Potter Decl ¶¶ 14-15.)
4 With respect to children who are wards of the State, the State acts no differently. The
5 State places such children or allows such children to be placed with foster parents whom
6 it knows to be lesbian or gay.⁸ (see also Stip Facts Between Pls and Defs ¶ 2.) It further
7 allows such children to be adopted by adoptive parents whom it knows to be lesbian or
8 gay. (Id.)

9 The State’s equal regard for lesbian and gay parents and heterosexual parents has
10 long been reflected in state case law. In custody and visitation cases, the sexual
11 orientation of a parent has long been deemed irrelevant for purposes of determining the
12 best interests of a child. In re Marriage of Ashling, 42 Or App 47, 599 P2d 475 (1979);
13 see also Johnson Decl ¶ 8; Stip Facts, Ex. 4 (Legislative Counsel opinion at 4). It is
14 further reflected in state employment policies that expressly offer family leave on equal
15 terms to lesbian and gay state employees and heterosexual state employees. OAR 839-
16 009-0210(2), (5). And it was expressly endorsed by defendant Kulongoski in his official
17 capacity as Governor of the State of Oregon when he proclaimed October of 2003
18 “lesbian and gay history month,” thereby encouraging “positive affirmation of the . . .
19 families . . . of gays, lesbians, bisexual, transgender individuals” statewide. Proclamation
20 (Oct. 13, 2003).

21 As the Massachusetts Supreme Judicial Court concluded in Goodridge,
22 “[e]xcluding same-sex couples from civil marriage will not make children of opposite-
23 sex marriages more secure, but it does prevent children of same-sex couples from
24 enjoying the immeasurable advantages that flow from the assurance of a stable family

25 ⁸ Regardless of the sexual orientation of the foster parents, the State expressly
26 forbids them from making derogatory remarks about the sexual orientation of the natural
parent of a foster child. See OAR 413-200-0347(2)(c).

1 structure in which children will be reared, educated, and socialized. * * * It cannot be
2 rational under our laws, and indeed it is not permitted, to penalize children by depriving
3 them of State benefits because the State disapproves of their parents' sexual orientation.”
4 Goodridge, 798 NE2d at 964 (quotation and footnote omitted). Here, for the same
5 reasons, there is no genuine difference between same-sex couples and different-sex
6 couples that explains why the former should be excluded from marriage but the latter
7 should not. Accordingly, the denial of marriage licenses to same-sex couples but not
8 different-sex couples violates Article I, section 20.

9 **E. Oregon history confirms that marriage is an institution that evolves to**
10 **remedy inequality.**

11 In the past, marriage was a much more exclusive and restrictive institution than it
12 is today. (Am Answer in Intervention at ¶ 4; see also Answer at ¶ 7.) Marriage equality
13 was selectively denied to disfavored groups based on disability, religion, class, and race.
14 (Id.) The history of the nation includes laws prohibiting epileptics from marrying and
15 laws restricting interfaith marriage. (Id.) It also includes prohibitions on marriages of
16 slaves and indentured servants. (Id.) And, little more than half a century ago, laws
17 prohibiting interracial marriages were still on the books in thirty states. (Id.) Moreover,
18 as a historical matter, marriage was far from an equal partnership. (Id.) Married women
19 were legally incapable in matters of property and finance, and married men were legally
20 less capable in matters of child rearing. (Id.) The historical subordination of women to
21 men within the institution of marriage was further reflected in laws ranging from the
22 marital exception to rape, to the inability to sue for loss of consortium, to the inability to
23 retain a maiden name. (Id.) Both socially and legally, marriage has evolved to redress
24 such exclusions, restrictions, and inequalities. (Id.)

25 Over the course of its history Oregon has witnessed an evolution in its own notion
26 of equality. See Cox ex rel. Cox v. State, 191 Or App 1, 6-7, 80 P3d 514, 517 (2003)

1 (Schuman, J., concurring) (“[N]either this court nor the Supreme Court would say that
2 whatever Article I, section 20 meant in 1857, it means precisely the same thing today * *
3 * . That is because the framers of the Oregon Constitution, whatever else their virtues,
4 had a conception of equality that contemporary legal (and moral) principles has
5 emphatically repudiated.”) (quotation omitted); see also David Schuman, The Creation of
6 the Oregon Constitution, 74 Or L Rev 611 (1995). With respect to notions of marriage
7 equality, the Legislative Counsel for the Oregon legislature recently noted the historic
8 prohibition on interracial marriages:

9 “The parameters of a socially acceptable marriage have
10 expanded over the years. Oregon’s founders, who banned
11 “free negro[es]” from the state under *former* section 35,
12 Article I, Oregon Constitution, considered most interracial
13 marriages to be abhorrent: “If any white person, Negro,
14 Chinese, kanaka, or Indian * * * shall knowingly
15 intermarry * * * such person or persons * * * shall be
16 punished by imprisonment * * * [for] not less than three
17 months nor more than one year.” Section 1928, chapter 8,
18 General Laws of Oregon 1892 at 967. This ban remained
19 in effect for generations, see 22 Op Att’y Gen 101 (1945)
20 (county clerk could not license marriage of Hawaiian and
21 Caucasian), but is no longer the law. Section 2, chapter
22 455, Oregon Laws 1951.”

23 Stip. Facts, ex. 4 (Legislative Counsel opinion at 3). And in acknowledgment of
24 the historic inequality between men and women within the institution of marriage, ORS
25 108.010 was enacted to repeal “[a]ll laws which impose or recognize civil disabilities
26 upon a wife which are not imposed or recognized as existing to the husband.” ORS
108.010 goes on to confer upon the wife “all civil rights belonging to the husband not
conferred upon the wife prior to June 14, 1941, or which she does not have at common
law * * * including, among other things, the right of action for loss of consortium of her
husband.” Thus, in Oregon, as elsewhere, marriage has never been a static institution.
Rather, it has evolved to reflect an increasingly enlightened notion of equality.

1 **F. The only permissible remedy for the constitutional violation here is to**
2 **allow same-sex couples and different-sex couples to marry on equal**
3 **terms.**

4 The only permissible and appropriate remedy for the constitutional violation here
5 is to allow same-sex couples and different-sex couples to marry on equal terms. As the
6 Oregon Supreme Court has recognized, “[w]here a statute is defective because of
7 underinclusion there exist two remedial alternatives: a court may either declare [the
8 statute] a nullity and order that its benefits not extend to the class that the legislature
9 intended to benefit, or it may extend the coverage of the statute to include those who are
10 aggrieved by exclusion.” Hewitt, 294 Or at 52, 653 P2d at 980 (1982) (quoting Welsh v.
11 United States, 398 US 333, 361 (1970)). In Hewitt, the Court held that the denial of
12 workers’ compensation to males and their children upon on-the-job death or injury of
13 their unmarried female partners but not females and their children upon on-the-job death
14 or injury of their unmarried male partners violated Article I, section 20. The Court went
15 on to remedy the constitutional violation by extending the benefits to all surviving
16 partners and their children regardless of their gender. Id. at 52-54, 653 P2d at 981-82.
17 The Court did so because the purpose of the law was to provide benefits to families of
18 workers killed or injured on the job, and, but for his gender, the claimant and his family
19 fulfilled the statutory criteria for such benefits. Id. The Court did not deem denial of
20 benefits to all surviving partners and their children an appropriate remedy as it “saw no
21 reason why * * * the entitlements of female cohabitants and their families should be
22 eliminated so that the rights of male cohabitants and their families may be vindicated.”
23 Id. at 53, 653 P2d at 982. Thus, the Court held, “[e]xtension of benefits in this case
24 advances the purpose of the legislation and comports with the overall statutory scheme.”
25 Id., 653 P2d at 981.

1 This Court can and should remedy the constitutional violation here in the same
2 way, i.e., by extending the opportunity to marry to all couples regardless of their gender.
3 The only other permissible remedy under Hewitt – denial of the opportunity to marry to
4 all couples – is not an appropriate remedy because it defeats the purpose of the law, i.e.,
5 the social good that results when a couple makes a commitment of the highest order to
6 each other, e.g., a stable household. (See Stip Facts, Ex. 2 (Multnomah County Counsel
7 opinion at 5); see also id., Ex 4 (Legislative Counsel opinion at 7).) Moreover, as in
8 Hewitt, the inclusion of the excluded class here advances the purpose of the law.

9 The inclusion of the excluded class here means allowing same-sex couples and
10 different-sex couples to marry on equal terms. Anything short of a marriage – e.g., a
11 “civil union” or a “domestic partnership” that purports to provide the rights,
12 responsibilities, benefits, and obligations that the State of Oregon has tied to marriage –
13 does not satisfy the equality mandate of the Oregon constitution. Excluding members of
14 a class from a particular status and institution and relegating them to a separate status and
15 institution solely because they are members of the class is an inequality that Article I,
16 section 20 does not tolerate.

17 Where a suspect class is implicated, as here, an inequality is justified only by
18 “intrinsic differences,” not “assumptions about . . . relative social roles.” Hewitt, 294 Or
19 at 49, 653 P2d at 979. Excluding same-sex couples from marriage and relegating them to
20 a separate status and institution solely because they are same-sex couples cannot survive
21 such exacting scrutiny because it is not justified by any intrinsic difference. Indeed,
22 excluding same-sex couples from marriage and relegating them to a separate status and
23 institution solely because they are same-sex couples cannot survive any level of scrutiny
24 because it is entirely arbitrary. Under any level of scrutiny, Article I, section 20 does not
25 tolerate “palpably arbitrary” governmental discrimination. Winters, 289 Or at 776, 619
26

1 P2d at 228; see also Delgado, 334 Or at 146, 46 P3d at 745 (“Article I, section 20,
2 prohibits ‘[h]aphazard’ or ‘standardless’ administration of laws.”) (quoting State v.
3 Freeland, 295 Or 374, 667 P2d 515).

4
5 Moreover, Oregon case law makes clear that “separate but equal” is not equal. In
6 King v. Greyhound Lines, Inc., 61 Or App 197, 201, 656 P2d 349 (1982), a public
7 accommodations race discrimination case, the Oregon Court of Appeals held as follows:

8 “To argue that plaintiff received “full and equal” accommodations
9 even though he suffered racial slurs and animadversions in the course
10 of the transaction is analogous to arguing that separate
11 accommodations may be equal accommodations. Certainly, if plaintiff
12 was relegated to a certain section of the bus or made to wait until white
13 customers were served, it could not be seriously contended that he
14 received full and equal accommodations. See Gayle v. Browder, 352
15 US 903, 77 S Ct 145, 1 L Ed 2d 114 (1956) citing Brown v. Board of
16 Education, 347 US 483, 74 S Ct 686, 98 L Ed 873 (1954); see also
17 cases listed in Annot., 87 ALR 2d 120, 140 (1963); 26 Op Att’y Gen
18 208 (Or 1954) (it is a violation of the act to serve black customers in
19 one area of a restaurant and white customers in another area).

20 Id. at 201, 656 P2d at 351. In Lahmann v. Grand Aerie of Fraternal Order of Eagles, 180
21 Or App 420, 43 P3d 1130 (2002), a public accommodations gender discrimination case,
22 the Court similarly held that a cognizable claim for gender discrimination lies where
23 females are relegated to an auxiliary group of an all-male community association.

24 The fundamental principle that “separate but equal” is not equal is no less
25 applicable here. Courts that have considered the constitutional sufficiency of alternative
26 systems for same-sex couples have flatly rejected them. Opinions of the Justices to the
Senate, 802 NE2d 565 (Mass 2004) (holding that a bill seeking to prohibit same-sex
couples from entering into marriages but to allow them to enter into “civil unions” that
would have provided the rights, responsibilities, benefits, and obligations that the state
had tied to marriage violated the equality mandate of the state constitution); Barbeau,

1 2003 BCCA at ¶ 156 (holding that an alternative system for same-sex couples “falls short
2 of true equality”); Halpern, 172 OAC at ¶¶ 102-07 (same).

3 A marriage is much more than a set of tangible rights, responsibilities, benefits,
4 and obligations. It has powerful social, cultural, and personal significance that does not
5 attach to a “civil union” or a “domestic partnership.” In Goodridge, the Massachusetts
6 Supreme Judicial Court recognized this reality, noting that among the important
7 “intangible benefits flow[ing] from marriage” are “enormous private and social
8 advantages.” Goodridge, 798 NE2d at 955. The court explained that “[c]ivil marriage is
9 at once a deeply personal commitment to another human being and a highly public
10 celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family * * *
11 . Because it fulfils yearnings for security, safe haven, and connection that express our
12 common humanity, civil marriage is an esteemed institution, and the decision whether
13 and whom to marry is among life’s momentous acts of self-definition.” Id. Similarly, in
14 Halpern, the Ontario Court of Appeal, in holding that an alternative system for
15 cohabitating couples did not satisfy the equality mandate of the Canadian Charter of
16 Rights and Freedoms, explained that the equality mandate “guarantees more than equal
17 access to economic benefits” and emphasized the “societal significance of marriage.”
18 Halpern, 172 OAC at ¶¶ 102-07.

19 But, even if an alternative system for same-sex couples could replicate all of the
20 tangible and intangible benefits of marriage – which it cannot – it would still be
21 constitutionally deficient. Oregon case law makes clear that “separate but equal” is not
22 equal because such treatment is destructive in and of itself, branding the disfavored group
23 as inferior and less worthy members of society. Although the equality mandate of the
24 Oregon constitution and those of the federal and other state constitutions involve different
25 analytical frameworks, the proposition that “separate but equal” is equal has been
26 universally rejected. Thus, on this point, federal and other state case law is instructive.

1 The United States Supreme Court has recognized that “the right to equal treatment
2 guaranteed by the [federal] Constitution is not coextensive with any substantive rights to
3 the benefits denied the party discriminated against.” Heckler v. Mathews, 465 US 728,
4 739 (1984). “[D]iscrimination itself” is a harm the federal constitution does not tolerate
5 without justification because it “stigmatiz[es] members of the disfavored group as
6 ‘innately inferior’ and therefore less worthy participants in the political community.” Id.
7 Such governmental discrimination is inherently injurious, damaging the dignity and
8 societal standing of members of disfavored groups. See, e.g., id.; Allen v. Wright, 468
9 US 737, 755 (1984) (the “stigmatizing injury often caused by * * * discrimination * * * is
10 one of the most serious consequences of discriminatory * * * action”); Mississippi Univ.
11 for Women v. Hogan, 458 US 718, 724-25 (1982); Brown v. Board of Education, 493-94.
12 Such governmental discrimination diminishes the sense of self-worth of those against
13 whom the government discriminates and invites and justifies private discrimination
14 against them, denying them full participation in civic life. See, e.g., Lawrence, 123 S Ct
15 at 2482 (holding sodomy laws unconstitutional because the continued existence of laws
16 criminalizing private, consensual same-sex sexual relationships would be “an invitation
17 to subject homosexual persons to discrimination both in the public and the private
18 spheres”); Strauder v. West Virginia, 100 US 303, 308 (1879) (excluding black men from
19 juries “is practically a brand upon them, affixed by the law, an assertion of their
20 inferiority, and a stimulant to * * * race prejudice”). Unequal treatment that marks a
21 class with a badge of inferiority betrays the constitutional promise of equality no less than
22 more tangible forms of discrimination.

23 The starkest example of such betrayal and the profound effects of a governmental
24 stamp of inequality is this nation’s history of racial segregation. The cases that ultimately
25 abolished this form of discrimination recognized the detrimental effects of segregation
26 that had the “sanction of the law.” Brown, 347 US at 493-94 (noting that “the policy of

1 separating the races is usually interpreted as denoting the inferiority of [African-
2 Americans]”). In Brown, the United States Supreme Court recognized that establishing
3 separate schools for black students “generates a feeling of inferiority as to their status in
4 the community that may affect their hearts and minds in a way unlikely to be undone.”
5 Id. The recognition of this psychological harm is what led the Court to hold that
6 “separate educational facilities are inherently unequal” – and thus unconstitutional – even
7 when those schools have the same facilities and resources. Id. at 495; see also Watson v.
8 Memphis, 373 US 526, 538 (1963) (the sufficiency of separate recreational facilities for
9 African-Americans “is beside the point; it is the segregation by race that is
10 unconstitutional”).

11 It was this very concern about the stigmatizing effects of discrimination that led
12 Justice Harlan to dissent passionately from the Court’s endorsement of “separate but
13 equal” in the context of public accommodations in Plessy v. Ferguson, 163 US 537
14 (1896). Justice Harlan recognized that legislating “separate but equal” railroad coaches
15 for blacks and whites “proceeded on the ground that [African-Americans] are so inferior
16 and degraded that they cannot be allowed to sit in public coaches occupied by white
17 citizens.” Id. at 560 (Harlan, J., dissenting). As the Court later acknowledged in Brown
18 and subsequent cases, the equality mandate of the federal constitution does not permit a
19 state to justify discrimination against a particular class simply by claiming to provide
20 “‘equal’ accommodations.” Id. at 562.

21 The constitutional concern with the psychological and social consequences of
22 invidious discrimination was first articulated in response to racial segregation, but the
23 United States Supreme Court has rejected other forms of governmental discrimination
24 that have sent the same message that some members of the community are not as worthy
25 as others. For example, the Court now recognizes that laws and policies that relegate
26 women to a separate sphere are discriminatory and serve to reinforce stereotypes that

1 women are “innately inferior.” Hogan, 458 US at 725; Frontiero, 411 US at 684-85; see
2 also Roberts v. United States Jaycees, 468 US 609, 625 (1984) (gender discrimination
3 “deprives persons of their individual dignity”); Heckler, 465 US at 739 (discussing, in the
4 context of gender discrimination, how “discrimination itself” stigmatizes the disfavored
5 group as innately inferior). In United States v. Virginia, 518 US 515 (1996), the Court
6 rejected the state’s attempt to justify its categorical exclusion of females from an all-male
7 military academy on the grounds that it had provided a separate and purportedly “equal”
8 facility for females. The Court stressed the fact that the “parallel” institution did not
9 replicate the intangible benefits of the established institution, including its “standing in
10 the community, traditions and prestige.” Id. at 547-48, 551-55. More fundamentally, the
11 Court held that the discriminatory policy was inconsistent with the core principle that a
12 state may not exclude women from “full citizenship stature.” Id. at 532.

13 Concern about the stigma of governmental discrimination also figured
14 prominently in the Court’s decision in Lawrence last term. In striking down a law that
15 criminalized private, consensual same-sex sexual relationships, the Court emphasized the
16 “stigma” imposed by the law, and the fact that it “demeaned the lives of homosexual
17 persons” and denied them “dignity.” Lawrence, 123 S Ct at 2478, 2482. As the Court
18 recognized, this kind of stigmatization is an affront to the most basic constitutional
19 guarantees. Id. at 2484.

20 What is unmistakably clear is that, independent of any tangible harm caused by
21 the deprivation of specific rights, responsibilities, benefits, and obligations, the equality
22 mandate is offended whenever the government arbitrarily discriminates against a class.
23 Such governmental discrimination marks that class with a badge of inferiority and
24 impairs its ability to be a full participant in civic life.

25 As the United States Supreme Court recognized fifty years ago, “separate but
26 equal” is not equal. A separate but purportedly “equal” system for same-sex couples

1 offends the equality mandate because it sends an official message that lesbian and gay
2 relationships are not as worthy of respect as heterosexual relationships. It thereby
3 diminishes the status of lesbian and gay couples in the community.

4 Recognizing this reality, the Massachusetts Supreme Judicial Court held that only
5 equal access to marriage – not access to a separate but purportedly “equal” system for
6 same-sex couples – satisfies the equality mandate of the Massachusetts constitution.
7 Excluding same-sex couples from marriage, the Court explained, “[would] confer[] an
8 official stamp of approval on the destructive stereotype that same-sex relationships are *
9 * * inferior to opposite-sex relationships and are not worthy of respect.” Goodridge, 798
10 NE2d at 962. Relegating a same-sex couple to a “civil union” “would have the effect of
11 maintaining and fostering a stigma of exclusion that the [Massachusetts] Constitution
12 prohibits. It would deny to same-sex ‘spouses’ only a status that is specially recognized
13 in society and has significant social and other advantages.” Opinion of the Justices, 802
14 NE2d at 570. The difference between the words “marriage” and “union”, the court
15 understood, “is more than semantic;” it reflects the assignment of same-sex couples to
16 “second-class status.” Id. at 570. Because “[t]he history of our nation has demonstrated
17 that separate is seldom, if ever, equal,” the court rejected “civil union” as a permissible
18 substitute for marriage. Id. at 569.

19 Similarly, the British Columbia Court of Appeal, in mandating marriage equality
20 for same-sex couples, held that “[a]ny other form of recognition for same-sex
21 relationships, including the parallel institution of [registered domestic partnerships] falls
22 short of true equality. This Court should not be asked to grant a remedy which makes
23 same-sex couples ‘almost equal,’ or to leave it to governments to choose amongst less-
24 than-equal solutions.” Barbeau, 2003 BCCA at ¶ 156. Denying same-sex couples the
25 opportunity to marry, the court concluded, “conveys the ominous message that they are
26 unworthy of marriage.” Id. at ¶ 130. Likewise, the Ontario Court of Appeal held that an

1 alternative system for same-sex couples is constitutionally deficient, noting that
2 excluding same-sex couples from marriage “perpetuates the view that same-sex
3 relationships are less worthy of recognition than opposite-sex relationships,” and that this
4 “offends the dignity of persons in same-sex relationships.”⁹ Halpern, 172 OAC at ¶¶
5 102-07.

6 In deciding whether a separate system for same-sex couples achieves equality,
7 this Court need consider only how a heterosexual couple would react if they were
8 informed that they could not enter into a marriage but instead could only enter into a
9 “civil union.” As Justice Jackson recognized:

10 “The framers of the [federal] Constitution knew, and we
11 should not forget today, that there is no more effective
12 practical guaranty against arbitrary and unreasonable
13 government than to require that the principles of law which
14 officials would impose upon a minority must be imposed
15 generally. Conversely, nothing opens the door to arbitrary
16 action so effectively as to allow those officials to pick and
17 choose only a few to whom they will apply legislation and
18 thus to escape the political retribution that might be visited
19 upon them if larger numbers were affected. Courts can
20 take no better measure to assure that laws will be just than
21 to require that laws be equal in operation.”

22 Railway Express Agency v. New York, 336 US 106, 112 (1949) (Jackson, J.,
23 concurring). The guarantee of equality “requires the democratic majority to accept for

24 ⁹ That some may disapprove of marriages of same-sex couples is no justification
25 for arbitrary governmental discrimination. The United States Supreme Court has long
26 recognized that governmental discrimination is particularly destructive when it is
designed to accommodate societal prejudice. See, e.g., Palmore, 466 US at 433 (“The
[federal] Constitution cannot control such prejudices, but neither can it tolerate them.
Private biases may be outside the reach of the law, but the law cannot, directly or
indirectly, give them effect.”); City of Cleburne v. Cleburne Living Center, Inc., 473 US
432, 448 (1985) (striking down ordinance enacted in response to “negative attitudes” and
“fears” about the mentally retarded because the government “may not avoid the strictures
of [the federal equality mandate] by deferring to the wishes or objections of some fraction
of the body politic”); Watson, 372 US at 535 (“[C]onstitutional rights may not be denied
simply because of hostility to their assertion or exercise.”).

1 themselves and their loved ones what they impose on you and me.” Cruzan v. Director,
2 Mo. Dep’t of Health, 497 US 261, 300 (1990) (Scalia, J., concurring).

3 For the foregoing reasons, there is only one permissible and appropriate remedy
4 for the constitutional violation here – to allow same-sex couples and different-sex couples
5 to marry on equal terms. (See also Stip Facts, Ex 4 (Legislative Counsel opinion at 7).)

6 **G. Intervenor-defendants do not have standing to assert their first**
7 **counterclaim.**

8 Intervenor-defendants do not have standing to assert their own counterclaims
9 simply because they have been permitted to unite with defendants in resisting plaintiffs’
10 claims. The Oregon Supreme Court has made clear that “[an intervenor-defendant’s]
11 standing to [assert a counterclaim] must be determined under the rule governing
12 intervention, ORCP 33, and under the declaratory judgment law, ORS chapter 28.”
13 Rendler v. Lincoln County, 302 Or 177, 180-81, 728 P2d 21, 23 (1986) (emphasis
14 added).

15 In their first counterclaim, intervenors-defendants assert that they are entitled to
16 the following relief: (1) “a declaration that ORS 106.010 be interpreted as requiring that
17 marriages be between only one man and one woman, and that such an interpretation is
18 constitutional under Article I, Section 20 of the Oregon Constitution” (Am Answer in
19 Intervention ¶¶ 27, 32, 37, 43); (2) “an injunction prohibiting Intervenor-Plaintiff
20 Multnomah County from interpreting ORS 106.010 as unconstitutional under Article I,
21 Section 20” (Am Answer in Intervention ¶¶ 28, 33, 38, 44); (3) “an order voiding *ab*
22 *initio* the actions of Intervenor-Plaintiff Multnomah County, as they relate to issuing
23 marriage licenses to pairs of individuals of the same sex, and as they relate to any
24 subsequent ceremonies by which such individuals purported to be married” (*id.*); and (4)
25 attorney fees (Am. Answer in Intervention at 29, 34, 39, 45). Presumably, intervenors-
26 defendants assert that they are entitled to such relief under the Uniform Declaratory

Judgments Act. See ORS 28.020. Intervenor-defendants do not have standing under the Uniform Declaratory Judgments Act to assert such a counterclaim.

“[A] complaint under [the Uniform Declaratory Judgments Act] must show how plaintiff’s ‘rights, status, or other legal relations are affected’ by an instrument or enactment, the construction or validity of which he seeks to have determined.” Gruber v. Lincoln Hosp. Dist., 285 Or 3, 7, 588 P2d 1281, 1283 (1979). With respect to their first counterclaim, intervenors-defendants allege that their rights have been affected in five ways: (1) “All Intervenor-Defendants are opposed to the actions of Intervenor-Plaintiff Multnomah County, as set forth below, on political, philosophical, moral, or religious grounds” (Am. Answer in Intervention ¶ 3); (2) “Intervenor-Defendants Cecil Michael Thomas, Nancy Jo Thomas, Dan Mates, and Dick Jordan Osborne all have standing as Multnomah County residents, voters, and taxpayers with an interest in the open and public functioning of lawfully limited government, and thus have been adversely affected” (id.); (3) “Intervenor-Defendants Cecil Michael Thomas and Nancy Jo Thomas, as husband and wife, and DOMC have standing as persons and an organization with an interest in defending the traditional institution of marriage in Oregon, defined statutorily in ORS Chapter 106 as a union between one male and one female as husband and wife” (id.); (4) “Intervenor-Defendants Cecil Michael Thomas, Nancy Jo Thomas, Dan Mates, and Dick Jordan Osborne all have standing as taxpayers in Multnomah County who are concretely affected by a decision to extend marriage benefits and attendant costs to the taxpayers of the County to the same-sex partners of Multnomah County employees” (id.); and (5) “Intervenor-Defendants Cecil Michael Thomas and Nancy Jo Thomas are constituents of Multnomah County Commissioner Lonnie Roberts; Commissioner Roberts was shut out of the decision of County Commissioners in this case. These Intervenor-Defendants were therefore actually disenfranchised on the current issue, and

1 have standing on that basis as well”¹⁰ (*id.*). These allegations serve only to confirm that
2 intervenors-defendants do not have standing to assert their first counterclaim.

3 With respect to intervenors-defendants’ first, second, third, and fifth allegations, it
4 is fatal that intervenors-defendants have not alleged “some injury or other impact upon a
5 legally recognized interest beyond an abstract interest in the correct application or the
6 validity of a law.” *League of Or. Cities v. State*, 334 Or 645, 658, 56 P3d 892, 901
7 (2002) (citation omitted). In other words, it is dispositive that intervenors-defendants
8 have suffered no injury beyond general offense. Time and again, the Oregon Supreme
9 Court has held that such an injury is not sufficient to confer standing:

10 “It must be at once apparent that the plaintiffs have no
11 standing to maintain this suit. The wrong of which they
12 complain – if there be a wrong – is public in character. The
13 complaint discloses no special injury affecting the plaintiffs
14 differently from other citizens * * * even though it be
15 natural that they should feel more deeply upon the subject
16 than other members of the general public * * * . No right,
17 status, or legal relation of the plaintiffs is involved, and no
18 legal interest of theirs will be affected by the action of the
19 Governor. There is no case for declaratory relief where the
20 plaintiff seeks merely to vindicate a public right to have the
21 laws of the state properly enforced and administered. The
22 plaintiffs have a difference of opinion with the Governor,
23 but that does not of itself make a justiciable controversy.
24 They ask for no relief except that the court declare what the
25 law is. But * * * a private citizen is deemed to have an
26 insufficient interest in a declaration of what the law is. In
effect, all that the plaintiffs seek by their complaint is an
advisory opinion respecting the proper exercise of the
governor’s * * * power.”¹¹

21 ¹⁰ Intervenor-defendants were not disenfranchised. The governmental action of
22 which they complain was executive not legislative in nature. (See Stip Facts ¶ 11.)
23 Moreover, Commissioner Roberts had an opportunity to participate and did in fact
24 participate in a legislative process that resulted in an affirmation of this executive action.
(See Stip Facts ¶ 30.)

25 ¹¹ For the same reasons, intervenors-defendants’ claims for injunctive relief must
26 fail. “[S]tanding to enjoin a governmental action requires an allegation that the
challenged action injures the plaintiff in some special sense that goes beyond the injury
the plaintiff would expect as a member of the general public.” *Eckles v. State*, 306 Or
380, 386, 760 P2d 846, 850 (1988).

1 Eacret v. Holmes, 215 Or 121, 124-25, 333 P2d 741, 742-43 (1958) (quotations and
2 citations omitted) (emphasis added).

3 Intervenor-defendants' fourth allegation is an allegation of taxpayer standing.
4 The circumstances under which a taxpayer has standing to challenge governmental action
5 are not present here. "When a taxpayer relies on his or her status as a taxpayer to
6 establish standing under ORS 28.020, the complaint must show a present or foreseeable
7 financial interest; that is, the taxpayer must allege that the challenged government action
8 actually or potentially affects the taxpayer's taxes adversely." Chadwick v. Alexander,
9 310 Or 700, 704, 801 P2d 797, 799 (1990) (citing Gruber). Although intervenor-
10 defendants have alleged that their taxes may be adversely affected as a result of "a
11 decision to extend marriage benefits and attendant costs to the taxpayers of the County to
12 the same-sex partners of Multnomah County employees," facts if which the Court may
13 take judicial notice render the allegation meritless. The County already offers
14 employment benefits to the domestic partners of its lesbian and gay employees to the
15 same extent that it offers employment benefits to the spouses of its heterosexual
16 employees. See Li Decl ¶ 15. The cost to the County of such employment benefits
17 would not increase if its lesbian and gay employees were to marry their domestic
18 partners. Even if it would, it is entirely speculative and indeed improbable that
19 intervenor-defendants' taxes would increase as a result. "Standing under this section has
20 been denied when the showing of the required effect has been too speculative or entirely
21 missing." Gruber, 285 Or at 7, 588 P2d at 1283 (citations omitted); see also McKinney v.
22 Watson, 74 Or 220, 224, 145 P 266, 267 (1915) ("[I]n the absence of any showing of
23 facts from which the court can deduce the legal conclusion that [taxpayer plaintiff] is
24 about to suffer a greater burden of taxation than before, his contention appears to be a
25 mere academic proposition.").

26

Intervenors-defendants do not have standing to assert their first counterclaim. Accordingly, their first counterclaim must be dismissed. See also Utsey v. Coos County, 176 Or App 524, 32 P3d 933 (2001).

IV. CONCLUSION

For the foregoing reasons, plaintiff couples respectfully request that the Court grant their motion for partial summary judgment on their first claim. Plaintiff couples also respectfully request that the Court dismiss intervenors-defendants' first counterclaim.

DATED this 5th day of April, 2004.

MARKOWITZ, HERBOLD, GLADE
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ATTORNEY CERTIFICATE OF SERVICE

I hereby certify that I have made service of the foregoing **PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** on the parties listed below in the manner indicated:

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