

IN THE SUPREME COURT OF THE STATE OF OREGON

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

Plaintiffs-Respondents, Cross-Appellants,

and

MULTNOMAH COUNTY,

Intervenor-Plaintiff-Respondent, Cross-Appellant,

v.

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

Defendants-Appellants, Cross-Respondents,

and

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

Intervenors-Defendants-Appellants,
Cross-Respondents.

Multnomah County Circuit
Court Case No. 0403-03057

SC S51612

**PLAINTIFFS-RESPONDENTS AND CROSS-APPELLANTS'
OPENING BRIEF ON CROSS-APPEAL AND APPENDIX**

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

SEPTEMBER 2004

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PLAINTIFFS-RESPONDENTS AND CROSS-APPELLANTS’ OPENING BRIEF ON CROSS-APPEAL

INTRODUCTION

Civil marriage is both the social structure and the legal structure in which two people commit to a shared life. Civil marriage “bestows enormous private and social advantages on those who choose to marry,” advantages beyond a mere set of state-conferred economic or other tangible benefits:

“Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family. ‘It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.’ Because it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life’s momentous acts of self-definition.”¹

Plaintiffs include individuals who have formed committed relationships and loving households. They seek access to the advantages unique to marriage that would protect and strengthen their families, for themselves and for their children. This case concerns whether the advantages that can flow only from civil marriage in Oregon may continue to be reserved solely for male-female couples under state laws in light of the equal privileges and immunities clause, Article I, section 20, of the Oregon constitution.

In declaring Oregon’s marriage statutes unconstitutional vis-à-vis the tangible benefits conferred by the State through marriage, the trial court correctly ruled. But though the trial court identified no constitutionally sufficient justification for the exclusion of same-sex couples from marriage, it failed to extend the right to marry to same-sex couples. This was error.

¹ Goodridge v. Department of Public Health, 798 NE2d 941, 954-55 (Mass 2003) (quoting Griswold v. Connecticut, 381 US 479, 486 (1965)).

STATEMENT OF THE CASE

I. NATURE OF THE ACTION

On March 3, 2004, having determined through careful analysis of the law that limiting issuance of marriage licenses to opposite-sex couples violates the Oregon constitution, Multnomah County, by order of Commission Chair Diane Linn, began issuing licenses to qualified same-sex couples who wanted to marry (ER 54 at ¶ 11; ER 59-ER 63). Marriages of gay and lesbian couples began immediately (ER 54 at ¶ 11).

Within days, the first of several lawsuits seeking to halt issuance of marriage licenses to same-sex couples in Oregon was filed (*id.* at ¶ 12). On March 24, 2004, this action was filed on behalf of lesbian and gay couples, Basic Rights Oregon (“BRO”), and the American Civil Liberties Union of Oregon (“ACLU”) to obtain a definitive judicial ruling that to deny same-sex couples the right to enter into marriage is to violate the constitutional guarantee of equal privileges and immunities granted to all citizens (CR 1).

In the First Claim for Relief against the State of Oregon and various state officials, the plaintiff couples sought a declaration that the failure of the Oregon statutory code to permit marriages of same-sex couples violates Article I, section 20 of the Oregon constitution (ER 37; ER 41). Plaintiffs also sought to require the State Registrar to register the marriage records of lesbian and gay couples who obtained licenses from Multnomah County and entered into solemnized marriages (ER 38-ER 43). Four of the plaintiff couples, all Multnomah County residents, married after receiving marriage licenses from Multnomah County (ER 56-ER 57 at ¶¶ 26, 29). The married and the unmarried plaintiff couples and the two organizational plaintiffs, BRO and the ACLU, variously asserted three alternative claims concerning registration of the marriage records (ER 38-ER 41).

In the Second Claim for Relief, the married and the unmarried couples sought a declaration that the failure to file and register marriage records of same-sex couples whose marriages were licensed and solemnized in Oregon violates Article I, section 20 of the Oregon constitution (ER 41). They also sought to enjoin defendants from directing or

counseling Oregon administrative agencies to refuse to recognize the marriages of same-sex couples, and from refusing to file and register the marriage records (id.).

The married couples brought their alternative Third Claim for Relief under the Administrative Procedures Act (ER 39). They sought to require the head of the Oregon Department of Human Services, Gary Weeks, and the State Registrar, Jennifer Woodward, to file and register the records of marriages of same-sex couples licensed and solemnized in Oregon (ER 42). They also sought declarations concerning the unconstitutionality of the Oregon statutory code limiting marriages to opposite-sex couples and the failure of defendants Weeks and Woodward to file and register the marriage records (id.).

The married and the unmarried couples, BRO, and the ACLU brought their Fourth Claim for Relief as a final alternative to the second and third claims. They sought a writ of mandamus to the State Registrar to mandate her registration of the marriage records in accordance with her non-discretionary duties (ER 40-ER 41).

By agreement, respondent Multnomah County, aligned with plaintiffs, and appellants Defense of Marriage Coalition and several individuals opposed to marriage for same-sex couples, Cecil Michael Thomas, Nancy Jo Thomas, Dan Mates, and Dick Osborne (collectively, “DOMC”), aligned with defendants, were permitted to intervene (ER 8-ER 9). Also by agreement, DOMC dismissed their earlier actions against Multnomah County and various county officials to halt the issuance of licenses and for other relief (ER 56 at ¶ 22; ER 96-ER 97).

Then, based on an expedited litigation and briefing schedule agreed to by the parties, the trial court received and heard oral argument on cross-motions for summary judgment on the constitutionality of Oregon’s marriage statutes from all parties (ER 424 at ¶ 14). The trial court required the parties in the briefs and at oral argument to address only the constitutionality of the exclusion of same-sex couples from marriage by virtue of the parties’ agreement, which was designed to permit a decision on the constitutional issue to be heard as soon as possible by this Court (ER 294-ER 295; ER 423 at ¶ 12).

II. NATURE OF THE JUDGMENT

On April 20, 2004, the trial court issued an opinion and order on the pending cross-motions for summary judgment (ER 426-ER 442). Among other things, the trial court stated in its opinion that the exclusion of same-sex couples from marriage denied those couples “certain substantive benefits” but that it would extend ORS Chapter 106, relating to the definition of and eligibility for marriage, to same-sex couples only with respect to the “right to benefits,” and not with respect to the right to marry (ER 437).

On May 6, 2004, the trial court entered a Revised Limited Judgment pursuant to ORCP 67 B (ER 421-ER 425). The trial court granted judgment in favor of plaintiffs and the County, and against the State and DOMC, on plaintiffs’ First Claim for Relief and their alternative Fourth Claim for Relief (ER 424). On plaintiffs’ First Claim for Relief, the trial court’s judgment declared that, “to the extent that ORS Chapter 106 acts as a bar to the rights and privileges guaranteed by Article I, section 20 of the Oregon constitution, that portion of Chapter 106 is unconstitutional” (ER 424).

Instead of requiring that qualified same-sex couples be issued marriage licenses upon request, though, the trial court deferred to Oregon’s Legislative Assembly to redress the violation and enjoined Multnomah County from further issuing licenses to same-sex couples (ER 424 at ¶ (4); ER 425 at ¶ (5)). The judgment directed the legislature to provide “substantive rights of same-sex domestic partners” that would “balance” those of married couples within 90 days of the beginning of its next session, and, failing that, directed that Multnomah County resume issuing licenses to same-sex couples (ER 425 at ¶ (5)). The trial court stated the remedy for the constitutional violation as follows:

“The Court will allow the legislature until ninety days after the commencement of the next regular or special session, whichever comes first, to produce legislation that would balance the substantive rights of same-sex domestic partners with those of married couples or the County will be required to issue marriage licenses to same-sex couples to avoid further violating Article I, section 20. Until that time, the County is enjoined from further issuing marriage licenses to same-sex couples.”

(ER 425 at ¶ (5)).

The trial court also entered judgment on the Fourth Claim for Relief “in the alternative to the plaintiffs’ and intervenor-plaintiff’s Second and Third Claims for Relief” (ER 424 at ¶ (4)). The judgment provided that “the Court hereby issues a writ of mandamus ordering defendant Woodward, within thirty days of the judgment entered in this case, to record the marriages of same-sex couples licensed and solemnized in Oregon” (*id.*).

On June 2, 2004, the trial court entered an order staying all litigation on the remaining counterclaims filed by the State and DOMC pending appeal and deferred the issue of attorney fees until those counterclaims were resolved (ER 493-ER 494).

III. APPELLATE JURISDICTION

All parties filed notices of appeal or cross-appeal from the limited judgment (CR 122; CR 123; CR 124; CR 127; CR 129; CR 130). The Court has jurisdiction based on an appealable judgment, timely notices of appeal and cross-appeal, and certification of the appeal directly to this Court.

A. The Revised Limited Judgment is appealable.

The judgment disposed of all of plaintiffs’ claims in the Amended Complaint (ER 421-ER 425). In addition to noting that the judgment was a limited one, the trial court stated that “[t]here is no just reason for delaying appeal on these claims, and so this limited judgment shall be entered as an appealable judgment pursuant to ORCP 67 B forthwith” (ER 425). The Revised Limited Judgment is a final judgment resolving all of plaintiffs’ claims, entered in accordance with ORCP 67 B (ER 421). As such, it is appealable. ORS 19.205(2)(e).

B. Plaintiffs filed a timely notice of cross-appeal.

The State filed and served the first notice of appeal from the limited judgment on June 1, 2004 (CR 122). Plaintiffs filed and served a notice of cross-appeal from the limited judgment on June 4, 2004 (CR 123). Thereafter, the County filed its notice of appeal on

June 7, 2004 (CR 124). DOMC followed, filing a notice of cross-appeal on June 8, 2004 (CR 129).

On June 9, 2004, the State filed an Amended Notice of Appeal, including Benton County as a party (CR 127). On June 14, 2004, the County filed an Amended Notice of Appeal, also including Benton County as a party (CR 130). Plaintiffs, though, did not file an amended notice of cross-appeal. That was because Benton County was not allowed as a party to the action.

To explain, on March 24, 2004, Benton County sought to intervene (CR 31; CR 32). Although the motion to intervene was improvidently allowed, briefly, the order was vacated on April 8, 2004 (CR 33; CR 39). The Honorable Dale R. Koch, presiding judge of the Multnomah County Circuit Court, vacated the order allowing intervention, which mistakenly contained his signature stamp, and denied Benton County permission to appear as a party for any proceedings (CR 39).

The State's June 1 notice of appeal was filed within 30 days of the May 6, 2004 entry of the limited judgment and was timely pursuant to ORS 19.255(1). Plaintiffs' June 4 notice of cross-appeal was timely pursuant to ORS 19.255(3).

C. Certification of the appeal.

On July 27, 2004, this Court accepted the appeal upon its certification by the Court of Appeals. The case is properly pending before the Court pursuant to ORS 19.405.

IV. QUESTIONS PRESENTED ON CROSS-APPEAL

Plaintiffs' cross-appeal presents the following questions:

1. Is the right to marry a "privilege" or "immunity" for purposes of the equal privileges and immunities guaranteed by Article I, section 20 of the Oregon constitution?
2. If so, what is the proper remedy for unconstitutional denial of the right to marry to same-sex couples in violation of the equal privileges and immunities guarantee?

V. SUMMARY OF ARGUMENT

The trial court erred in failing to recognize that the right to marry constitutes a “privilege” and “immunity” under Article I, section 20. A “privilege” or “immunity” is any “advantage” that flows from state action. While the trial court acknowledged that a marriage confers a tangible advantage because the State grants numerous important benefits to married couples, it failed to acknowledge that a marriage also confers a tangible advantage because non-governmental and other governmental entities also grant numerous important benefits to married couples. Moreover, the trial court failed to appreciate that a marriage confers a unique intangible advantage because only married couples express a level of commitment that is universally recognized as a commitment of the highest order and only married couples and their children enjoy a common respect for the integrity of their family unit. Thus, in issuing its opinion and order and entering its limited judgment on cross-motions for summary judgment in favor of plaintiffs and the County and against the State and intervenor-defendants, the trial court should have declared that the exclusion of same-sex couples from marriage, not just the exclusion of same-sex couples from the state-conferred benefits of marriage, violates Article I, section 20.

Compounding its error, the trial court fashioned a remedy that allows the legislature to decide whether to extend the right to marry to same-sex couples or to shunt same-sex couples into a separate and unequal institution. Remedies law required the trial court to apply the established framework for redressing an Article I, section violation, not to cede its constitutional function to the legislative branch. Moreover, constitutional law precluded the trial court from fashioning a remedy that allows for “civil unions.” The protections afforded by “civil unions” could not equal those afforded by marriage. Regardless, shunting same-sex couples into “civil unions” would constitute impermissible segregation. Thus, in issuing its opinion and order and entering its limited judgment on cross-motions for summary judgment in favor of plaintiffs and the County and against the State and intervenor-defendants, the trial court should have remedied the Article I, section 20 violation at issue

by extending the right to marry to same-sex couples consistent with established remedies and constitutional law.

VI. STATEMENT OF FACTS FOR CROSS-APPEAL

The facts regarding the individual plaintiffs are most relevant to plaintiffs' cross-appeal. For context, however, plaintiffs first provide an overview of the parties and the events that have brought the case to this juncture.

A. Background to the litigation.

The description of the background to the litigation comes primarily from the parties' stipulated facts concerning the events leading to the litigation (see ER 52-ER 108).

1. The Oregon marriage statutes and Multnomah County's issuance of marriage licenses to same-sex couples.

Defendant State of Oregon has a statute that describes marriage as a "civil contract entered into in person by males at least 17 years of age and females at least 17 years of age, who are otherwise capable, and solemnized in accordance with ORS 106.150." ORS 106.010. In a legal opinion, the Multnomah County Attorney concluded that a court would likely construe ORS 106.010 as limiting marriages to those between one man and one woman (ER 59-ER 60), but she and independent counsel for the County concluded that the statute and the County's practice of denying marriage licenses to same-sex couples violated Article I, section 20 of the Oregon constitution (ER 54 at ¶ 11; ER 63; ER 64-ER 65; ER 107-ER 108).

By order of Commission Chair Diane Linn, Multnomah County began issuing marriage licenses to same-sex couples on March 3, 2004, based on the Multnomah County Attorney's legal opinion (ER 54 at ¶ 11; ER 59-ER 63; ER 64-ER 65). The marriages of gay and lesbian couples who obtained licenses from Multnomah County began to take place the same day (ER 54 at ¶ 11). No other county has issued marriage licenses to same-sex couples (ER 56 at ¶ 27).

2. DOMC files actions against Multnomah County and its officials.

Intervenor-defendant Defense of Marriage Coalition alleges that it is an “umbrella organization” that formed in reaction to the issuance of marriage licenses to same-sex couples in Multnomah County (ER 179). It was established by the Oregon Family Council (ER 328-ER 329). On or about March 5, 2004, it and several individuals who are intervenors-defendants in this case filed a lawsuit against the County and some of its officials, Defense of Marriage Coalition, et al. v. Multnomah County, et al., Multnomah County Circuit Court No. 0403-02362, seeking declaratory and injunctive relief to halt the issuance of marriage licenses to same-sex couples (ER 54 at ¶ 12).

The DOMC plaintiffs in that case also sought a temporary restraining order, which was denied at the conclusion of a hearing on March 8, 2004 (ER 54 at ¶¶ 12-13). On or about March 10, 2004, the DOMC plaintiffs then filed a second action, State ex rel. Defense of Marriage Coalition, et al. v. Multnomah County, et al., Multnomah County Circuit Court No. 0403-02538, seeking an alternative writ of mandamus requiring Multnomah County to halt the issuance of licenses to same-sex couples (ER 54-ER 55 at ¶ 14).

3. State officials react.

Defendant Hardy Myers, Oregon’s Attorney General, is responsible for enforcing the laws of the State of Oregon (ER 53 at ¶ 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 marriage (ER 55 at ¶ 17; ER 74-ER 84). In his opinion, the Attorney General concluded that ORS 106.010 “sets out the legal significance of and basic qualifications for marriage” (ER 75), and that the context of ORS 106.010 made evident that marriage “must consist of a man and a woman” (ER 75-ER 76). The public legal opinion issued by Oregon’s Legislative Counsel, Gregory Chaimov, on March 8, 2004, was in accord (ER 55 at ¶ 16; ER 66-ER 67).

On March 15, 2004, defendant Theodore Kulongoski, Oregon’s Governor responsible for executing state laws (ER 52 at ¶ 2), informed the public as follows: “Pending

a decision by the Oregon Supreme Court, and in accord with the Attorney General's advice, I have directed all state agencies to adhere to current state statutes, which do not recognize same-sex marriages" (ER 86). Attorney General Myers so informed all 36 Oregon counties by letter on March 18, 2004 (ER 55 at ¶ 20; ER 92). The Attorney General further told Oregon's counties that on his advice, and "in accordance with the Governor's policy, the State Registrar has been directed to decline to file or register same sex marriage records" (ER 92).

Defendant Gary Weeks is the Director of the Department of Human Services of the State of Oregon, and he is responsible for overseeing the Center for Health Statistics (ER 53 at ¶ 4). The Center for Health Statistics is an agency within the Department of Human Services of the State of Oregon and maintains vital records, including marriage records, for the State of Oregon (ER 53 at ¶ 5). Defendant Jennifer Woodward is the State Registrar in the Center for Health Statistics (ER 53 at ¶ 6). Director Weeks and State Registrar Woodward did not file and register the marriage records of same-sex couples whose marriages were licensed and solemnized in Oregon, and relied as justification on the Oregon statutory code barring marriages of same-sex couples (ER 57 at ¶ 28).

On March 17, 2004, Multnomah County tendered to the State Registrar the marriage records of the married plaintiffs, along with the marriage records of opposite-sex married couples (ER 57 at ¶ 29). The State Registrar identified, filed, and registered the marriage records of the opposite-sex couples and identified but did not file and register the marriage records of the married plaintiffs (ER 57 at ¶ 29). The State Registrar then sent letters to the married plaintiffs confirming that she had rejected each of their marriage records as failing to "constitute a 'marriage record' as described in ORS 432.405" and returned them "to the county official who issued the marriage license" (ER 103-ER 106).

On March 18 and 19, 2004, at the suggestion of the trial court and the urging of the Department of Justice, the parties to the DOMC cases in the Multnomah County Circuit Court and the State of Oregon entered into settlement negotiations facilitated by Circuit

Court Judge Henry Kantor (CR 86 at ¶¶ 2, 3). Thereafter, the parties and the Attorney General announced an agreement (ER 96-ER 97).

In summary, DOMC agreed to dismiss their two actions against Multnomah County and its officials (ER 96). Upon the filing of a new action by the plaintiffs in this case against the State and state officials to challenge the constitutionality of the marriage statutes, the DOMC parties and Multnomah County could intervene without objection (ER 96). All parties then would prepare immediate cross-motions for summary judgment directed to the constitutionality of the marriage statutes so as to speed a trial court ruling to an appeal and, ultimately, to this Court (ER 96).

B. The lawsuit is filed.

1. The parties.

On March 24, 2004, eighteen individuals, BRO, and the ACLU filed the complaint in this action against the State of Oregon and Governor Kulongoski, Attorney General Myers, Director Weeks, and State Registrar Woodward, all in their official capacities (CR 1). The First Claim for Relief, brought by the individual plaintiffs, was the primary claim seeking a declaration that the exclusion of same-sex couples from marriage is unconstitutional under Article I, section 20.

The four plaintiff couples from Multnomah County who married (ER 59 at ¶ 29; ER 57 at ¶ 29) are Mary Li and Rebecca Kennedy (ER 157 at ¶¶ 3, 5); Stephen Knox, M.D. and Eric Warshaw, M.D. (ER 479 at ¶¶ 3, 6); Kelly Burke and Dolores Doyle (ER 162 at ¶¶ 3, 6); and Pam Moen and Katie Potter (ER 172 at ¶¶ 3, 6). Eight other individual plaintiffs who live elsewhere in the state wanted to obtain marriage licenses from their home counties. Four individual plaintiffs are Lane County residents who were refused marriage licenses by Lane County, Irene Farrera and Nina Korican (ER 332 at ¶ 4; ER 333 at ¶ 13), and Sally Sheklow and Enid Lefton (ER 485 at ¶ 3; ER 486 at ¶ 12). Another four individual plaintiffs, Benton County residents Julie Williams and Coleen Belisle (ER 169 at ¶¶ 4, 6),

and Walter Frankel and Curtis Kiefer (ER 282 at ¶ 3; ER 283 at ¶ 12), want marriage licenses issued by their own county of residence.

The remaining individual plaintiffs, Dominick Vetri and Douglas DeWitt, reside in Linn County. Vetri and DeWitt want to secure the choice to marry in the future, should they decide that is the right course for them (ER 489 at ¶¶ 4, 6-9).

The two organizational plaintiffs, BRO and ACLU, joined all of the individual plaintiffs in bringing the fourth claim for mandamus relief against defendants Weeks and Woodward (ER 11; ER 40). Plaintiffs and the County alleged, and the State admitted, that BRO is a statewide civil rights organization dedicated to advocacy for equal rights for lesbian, gay, bisexual, and transgender Oregonians (ER 29; ER 45; ER 289). Plaintiffs and the County alleged, and the State admitted, that ACLU is a statewide, nonprofit, non-partisan organization dedicated to defending civil liberties and advancing civil rights for all Oregonians and is an affiliate of the national American Civil Liberties Union (*id.*).

Multnomah County was permitted to intervene on March 24, 2004 (ER 3). The same day, March 24, DOMC was permitted to intervene (ER 8-ER 9). The trial court denied Benton County (CR 33; CR 39) and a group of Oregon legislators (CR 49) leave to intervene.

2. The litigation.

The litigation was highly compressed. On April 2, 2004, plaintiffs filed an amended complaint by consent of the parties (ER 10-ER 43). The same day, April 2, Multnomah County filed Intervenor-Plaintiff's Complaint (ER 44-ER 45). On April 5, 2004, DOMC filed Intervenor-Defendant Defense of Marriage Coalition's Amended Answer in Intervention and Counterclaims (ER 178-ER 199). On April 5, 2004, the State filed its answer and affirmative defenses with respect to the initial complaint (CR 11). The State filed Defendant's Answer and Affirmative Defenses (in Response to Plaintiff's First Amended Complaint) on April 12, 2004 (ER 288-ER 293). The same day, April 12, the State filed Defendant's Answer, Affirmative Defenses, and Counterclaim (in Response to Intervenor-Plaintiff Multnomah County's Claims in Intervention) (ER 363-ER 369).

By agreement, on April 5, 2004, all parties filed cross-motions for summary judgment (ER 46-ER 48; ER 49-ER 51; ER 112-ER 129; ER 149-ER 151). Plaintiffs and the County moved for partial summary judgment on the First Claim for Relief (ER 149-ER 151). Plaintiffs also moved to dismiss DOMC's first counterclaim for lack of standing (id.). The County also moved to dismiss DOMC's first, second, third, fourth, and fifth counterclaims for lack of standing, and intervenor-defendants' fifth counterclaim for mootness and failure to state a claim (ER 112-ER 129).

In the State's motion for summary judgment, the State sought judgment on all claims (ER 50), yet as to the First Claim for Relief, the State did not specify whether the declaration ultimately should state that Oregon statutes governing marriage are constitutional, or that they are unconstitutional (id.). Among other things, though, the State requested a judgment that ordered Multnomah County to "comply with current Oregon statutes governing the licensing of civil marriage pending final resolution of this case" and that "gives the Oregon legislature a reasonable time to enact remedial legislation, if necessary, during its next regular session before any further remedy is ordered by the court" (ER 50). DOMC moved for summary judgment on the First and Second Claims for Relief and on DOMC's first and fourth counterclaims (ER 47).

By April 9, 2004, several amici had filed applications and briefs, including the Juvenile Rights Project, National Association of Social Workers, the Oregon Chapter of the National Association of Social Workers, and Open Adoption & Family Services, Inc. in support of plaintiffs and the County (CR 93; CR 94; CR 95), and the Family Research Council in support of DOMC (CR 91; CR 92).

On April 12, 2004, the parties filed their responses to the summary judgment motions (ER 422-ER 423 at ¶¶ 8-11; CR 53 [State, joint]; CR 57 [Pls v. State]; CR 58 [Pls v. DOMC]; CR 64 [DOMC, joint]; CR 74 [County v. State]; CR 80 [County v. DOMC]). Plaintiffs opposed the State's and DOMC's motions for summary judgment with respect to the First Claim for Relief only (ER 422-ER 423 at ¶ 8). In light of the fact that the State's motion went beyond the First Claim for Relief and the State's briefing of the issue of

whether the County had the authority to issue marriage licenses to same-sex couples, plaintiffs filed Plaintiffs' Rule 21 E Motion to Strike and Motion for Stay or Extension of Time and Continuance Under ORCP 15 D and 47 F (ER 296-ER 298). Plaintiffs also moved to dismiss DOMC's fourth counterclaim for lack of standing (ER 422-ER 423 at ¶ 8). The County opposed the State's and intervenor-defendants' motions for summary judgment (ER 423 at ¶ 9).

The State opposed plaintiffs' and the County's motions for partial summary judgment on the First Claim for Relief (ER 423 at ¶ 10). DOMC opposed plaintiffs' and the County's motions for partial summary judgment on the First Claim for Relief and, in doing so, briefed the county authority issue (ER 423 at ¶ 11). In addition, DOMC opposed plaintiffs' and the County's motions to dismiss counterclaims for lack of standing (*id.*). DOMC also moved to dismiss plaintiffs' and the County's claims for relief for lack of standing (*id.*).

On April 13, 2004, the trial court sent a letter to the parties stating that "new issues have been raised by defendants and intervenors which are beyond the agreed upon scope" and in which it stated that "[its] focus and [its] ruling will be on the constitutionality issue only and all other issues will be separated and dealt with later if need be" (ER 294-ER 295).

On April 14, 2004, the parties filed replies that were limited to the constitutional issue (including the issue of remedy, but not including the county authority issue), with the exception of plaintiffs' and the County's oppositions to intervenor-defendants' motion to dismiss plaintiffs' and the County's claims for relief for lack of standing, and plaintiffs' and the County's briefing of the issue of whether an interlocutory ruling would be certifiable and appealable (ER 423 at ¶ 13). In light of the Court's letter of April 13, 2004, plaintiffs reserved further argument on other issues (ER 423 at ¶ 13).

On April 16, 2004, the trial court held oral argument limited to the constitutional issue (ER 424 at ¶ 14; *see* Tr 4/16). The trial court issued a written Opinion and Order on April 20, 2004 (ER 424 at 15; ER 427-ER 442), and on May 6, 2004, entered the limited judgment from which the parties appeal (ER 421-ER 425).

On May 17, 2004, the trial court held a status conference regarding the judgment and outstanding counterclaims (Tr 5/17). On June 2, 2004, the trial court entered an order staying litigation on remaining counterclaims pending the appeal and, pursuant to the stipulation of counsel, permitting the filing of attorney fee statements until after final judgment disposing of the remaining counterclaims (ER 493-ER 494).

C. The individual plaintiffs established that they are qualified to marry and that they and their families are harmed by their exclusion from the right to marry.

In support of their motion for partial summary judgment, plaintiffs submitted nine declarations on behalf of the individual plaintiffs (ER 156 [Li]; ER 161 [Burke]; ER 168 [Williams]; ER 171 [Potter]; ER 281 [Frankel]; ER 331 [Farrera]; ER 478 [Knox]; ER 484 [Sheklow]; ER 488 [Vetri]). Their declarations were uncontroverted.

1. Plaintiffs include individuals who have formed committed, loving relationships of significant duration and who have children.

Plaintiffs include individuals who have been in committed relationships of significant duration and who have children. Mary Li and Rebecca Kennedy were the first same-sex couple married in Portland on March 3, 2004 (ER 157 at ¶ 3). Li and Kennedy met in 2000, fell in love and started a family (ER 157-ER 158 at ¶¶ 7-9). In 2003, their daughter was born to Kennedy and adopted by Li (ER 158 at ¶¶ 11, 12). They married to reflect their lifetime commitment to each other and to protect their family (ER 158 ¶ 10). Li is a Multnomah County employee and provides the sole financial support for the family; Kennedy is a stay-at-home mom (ER 158 at ¶ 15). They want to retain access to legal protections and benefits that other families receive through marriage (ER 158; ER 159 at ¶¶ 10, 12, 14, 16).

The couple with the longest relationship is Dom Vetri, age 65, a law professor, and Doug DeWitt, age 53, a fitness trainer, who have been in a committed, caring, and loving relationship together for over 26 years (ER 489 at ¶¶ 3, 6). Frankel, age 65, and Kiefer, age 52, both librarians, have been in a loving relationship for over two decades as well, since 1981 (ER 282 at ¶¶ 3, 7). Frankel and Kiefer come from families that believe in and value

marriage as a symbol of lifetime commitment (ER 282 at ¶ 5), and their families want to share in their marriage (ER 283 at ¶ 11). They intend to spend the rest of their lives together (ER 282 at ¶ 5).

Kelly Burke, a stay-at-home mom, and Dolores Doyle, an apprentice electrician, met in 1987, registered in 1991 as domestic partners in the city of Berkeley, California, as a declaration of their commitment to each other and of their intention to be a family, and have been in a committed relationship ever since (ER 162-ER 163 at ¶¶ 7-9). On their tenth anniversary, they held a ceremony attended by family and friends to celebrate their union (ER 163 at ¶ 9). They obtained a marriage license from Multnomah County and married on March 3, 2004, which also marked their sixteenth anniversary together (ER 162 at ¶ 3). They have a son, born to Burke and adopted by Doyle (ER 163 at ¶¶ 10-12).

Steve Knox, M.D., an anesthesiologist, and Eric Warshaw, M.D., an obstetrician-gynecologist, have been together for over ten years, including a three-year period when Warshaw supported them while Knox did a second medical residency (ER 479-ER 480 at ¶¶ 7, 9). Knox converted to Judaism so that he could share a religious faith with Warshaw as an important part of their family (ER 480 at ¶¶ 10-11). Knox and Warshaw were married on March 3, 2004 (ER 479 at ¶ 3). Knox and Warshaw have three children, two sons and a daughter, adopted individually by Knox first and then adopted by Warshaw (ER 480 at ¶¶ 11-15).

Julie Williams and Coleen Belisle met in 1999 at Corvallis High School, where Williams teaches health (ER 169 at ¶ 4). Belisle, a home health registered nurse, and Williams are committed to each other and intend to spend the rest of their lives together (ER 169 at ¶¶ 4-5). Both Williams and Belisle are the primary caretakers for Williams' parents, who suffer health problems (ER 169 at ¶ 7).

Sally Sheklow, a self-employed writer and part-time teacher (ER 486 at ¶ 9), and her partner, Enid Lefton, have been in a committed, caring, loving relationship since 1987 (ER 485 at ¶ 3). In 1998, they had a religious wedding ceremony (ER 485 at ¶ 6), and they each consider the other as her spouse (ER 485 at ¶ 7). They received the William Sloat Memorial

Valued Family Award in recognition of their strong example of a loving, same-sex couple (ER 485 at ¶ 4.)

Irene Farrera, a musician and translator, and Nina Korican, an employee of Temple Beth Israel in Eugene, began their relationship in 1992 and committed to sharing their lives together in 1993 (ER 332 at ¶ 4). For a decade, Korican worked and traveled with Farrera as her agent and manager (ER 333 at ¶ 8). They celebrated a religious wedding attended by family and friends in 1994 (ER 332 at ¶ 5).

Pam Moen and Katie Potter met in 1990, fell in love, and have been in a committed relationship for 13 years (ER 172 at ¶ 7). Moen and Potter are both police officers for the City of Portland (ER 172 at ¶ 8). They have two daughters, both born to Potter and adopted by Moen (ER 172-ER 174 at ¶¶ 7, 13, 14, 15). Potter and Moen were married on March 3, 2004 (ER 172 at ¶ 3).

2. The individual plaintiffs are qualified to marry, but for the fact that their desired spouse is of the same sex.

But for the fact that their desired spouse is of the same sex, all of the individual plaintiffs qualify to marry in that they do not have another living wife or husband, are not first cousins or nearer of kin, and have the legal age and capacity needed to enter a marriage (ER 157 at ¶ 6; ER 172 at ¶ 5; ER 479 at ¶ 5; ER 162 at ¶ 5; CR 20 at Ex A, p 18; ER 486-87 at ¶ 14; ER 170 at ¶ 12; ER 283 at ¶ 13; ER 490 at ¶ 10).

The married plaintiffs seek affirmation of their right to marry (ER 158 at ¶¶ 10, 14; ER 174-ER 175 at ¶¶ 10-12, 16-23; ER 481 at ¶¶ 17-19; ER 164 at ¶¶ 14-18). All of the unmarried plaintiffs seek the right to marry they are now denied (ER 489 at ¶¶ 6-9; ER 333 at ¶¶ 11-14; ER 485-ER 486 at ¶¶ 7-13; ER 169-ER 170 at ¶¶ 5, 9-11; ER 282-ER 283 at ¶¶ 5-6, 10-12).

3. The individual plaintiffs and their families are stigmatized by Oregon's exclusion of same-sex couples from marriage.

Li and Kennedy recognize that they will benefit from social recognition of their relationship through marriage (ER 158-ER 159 at ¶¶ 17-18). Marriage not only provides

access to a multitude of legal protections and benefits, but it allows the couple to express their commitment in a way that is universally respected, recognized, and understood, and exclusion from civil marriage and recognition of their marriage has branded them with a stigma of inferiority, in much the same way that racial minorities were stigmatized when they were barred from marrying Caucasians a generation ago (*id.*).

Despite a religious wedding ceremony for which they dutifully prepared, Sheklow and Lefton lament their exclusion from the recognition of a relationship that comes with legal marriage (ER 485 at ¶¶ 6, 7). Farrera and Korican have also believed that, by not permitting or recognizing marriages of same-sex couples, the State sends a message that they are less worthy than other Oregonians (ER 332 at ¶ 6). Williams and Belisle feel stigmatized by their exclusion from marriage (ER 170 at ¶ 11). Potter and Moen feel the same, having realized that the opportunity to be registered domestic partners is no match for the right to marry (ER 174-ER 175 at ¶¶ 20-23).

The individual plaintiffs with children also fear for their children's well-being as a result of exclusion from marriage. One of Potter and Moen's biggest concerns has been the possible stigmatization of their children because they have same-sex parents. They know that their children may 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 recognition as a family sends a harmful message to their children and encourages those who may harass them (ER 174-ER 175 at ¶¶ 21-22). They seek a legally recognized marriage to enable their children to feel like they belong to the community that Potter and Moen serve as police officers, and they strongly believe that legal recognition of their marriage will have a positive impact on their children's physical and emotional well-being (*id.*).

Although Knox and Warshaw now have that "piece of paper" and are married, they are unable to tell their son Adam that the State of Oregon recognizes their marriage. They hope that their children will not have to feel that their family is less worthy because they cannot enter into a legally recognized marriage (ER 481 at ¶ 16). Li and Kennedy want

their daughter to grow up in a family that is legally recognized by the community in which she lives and by the laws of her state (ER 159 at ¶ 18). Burke and Doyle want a recognized marriage to protect them and their son Avery from discrimination and economic hardship (ER 164 at ¶ 18).

Because of the public refusal of the Governor and the State of Oregon to recognize same-sex marriages, in addition to the nature of the judgment entered by the trial court, the married plaintiffs' marriages remain under a cloud of uncertainty. The lack of recognition of same-sex marriages also causes dignitary harm to the unmarried plaintiffs (ER 170 at ¶ 11). The shadow of doubt cast on these marriages places a serious burden on the married plaintiffs, emotionally, in terms of dignitary harm, and in terms of real benefits (ER 174-ER 175 at ¶¶ 19-22; ER 158-ER 159 at ¶ 17; ER 481 at ¶ 19; ER 164 at ¶¶ 14-18).

4. The individual plaintiffs are ineligible for protections and benefits dependent upon legally recognized marriage.

Until their marriage, Burke and Doyle could not qualify for employer-sponsored health benefits for Burke, a stay-at-home mom (ER 164 at ¶¶ 14-15). As a result, their family had financial hardship because of the cost of individual health benefits for Burke. (ER 164 ¶¶ 14-16). Without a legally recognized marriage, Farrera was not eligible for health benefits from Korican's employer (ER 333 at ¶ 11). Similarly, Sheklow is not eligible for health benefits from Lefton's employer, and as a result, Sheklow has no health insurance (ER 486 at ¶ 9).

Frankel has been unable to designate Kiefer as the beneficiary of several of his retirement funds because they are not a married couple (ER 283 at ¶ 8).

Potter and Moen are police officers for the City of Portland (ER 172 at ¶ 8), and so are witnesses in legal proceedings. They are not able to take advantage of the privilege afforded to legally recognized married couples that would allow each to claim the right to abstain from testifying against the other, an important privilege because of their profession (ER 174 at ¶ 18).

Without a legal marriage, Potter and Moen are also not eligible for state death benefits designed for surviving spouses of police officers killed in the line of duty, including a \$25,000 payment, and health, educational, and mortgage benefits, should one of them be killed in the line of duty (ER 173 at ¶¶ 10-11). Potter and Moen have also had to go out of their way to ensure that they are eligible for a federal benefit in the event of a police officer's death in the line of duty; such benefits are assured for spouses in legally recognized marriages (ER 173 at ¶12).

5. The individual plaintiffs face non-recognition of their relationships.

Frankel and Kiefer have experienced non-recognition of their family relationship in the medical context when Kiefer's mother, who lived with Frankel and Kiefer for 13 years, was dying in the intensive care unit. Frankel is now apprehensive about him and Kiefer having access to one another in a medical crisis (ER 283 at ¶ 9). Similarly, Burke and Doyle were afraid that the integrity of their family unit would not be respected when Burke had a serious health condition just after their son's birth, before Doyle had any legal relationship to her own son. Although they have since made arrangements for Doyle to adopt him, a legally recognized marriage will allow them to feel less vulnerable (ER 163-ER 164 at ¶¶ 10-12, 17-18).

Sheklow and Lefton have the same worry about recognition of their family in the event of a medical emergency and in other aspects of their lives, including what might happen if one of them dies (ER 485-ER 486 at ¶¶ 8, 10, 11). Farrera and Korican had worries about recognition in the medical context (ER 333 at ¶¶ 8-9, 12).

Even the individual plaintiffs who have had the benefit of domestic partnership benefits know they have to think about the possibility of losing those benefits because other employers may not cover domestic partners (ER 158 at ¶ 16; ER 170 at ¶ 10).

Other individual plaintiffs desire an increased sense of security through a legally recognized marriage, including Knox and Warshaw (ER 481 at ¶¶ 17-18), Li and Kennedy

(ER 158-ER 159 at ¶ 17); Williams and Belisle (ER 170 at ¶ 9), and Potter and Moen (ER 173-ER 174 at ¶¶ 12-13, 16-18).

D. The parties are in agreement that marriage has changed over time.

Plaintiffs alleged (ER 12 at ¶ 3), and DOMC agreed (ER 182 at ¶ 4), that in the past, marriage was a much more exclusive and restrictive institution than it is today. The State admitted that, historically, the right to marry and rights associated with marriage were restricted, but stated that the historical laws speak for themselves (ER 290 at ¶ 7).

Plaintiffs alleged (ER 12 at ¶ 3), and DOMC acknowledged (ER 182 at ¶ 4), the following history of American marriage laws generally:² Marriage equality was selectively denied to disfavored groups based on disability, religion, class, and race (*id.*). The history of the nation includes laws prohibiting epileptics from marrying and laws restricting interfaith marriage (*id.*). It also includes prohibitions on marriages of slaves and indentured servants (*id.*). And, little more than half a century ago, laws prohibiting interracial marriages were still on the books in thirty states (*id.*). Moreover, as a historical matter, marriage was far from an equal partnership (*id.*). Married women were legally incapable in matters of property and finance, and married men were legally less capable in matters of child rearing (*id.*). The historical subordination of women to men within the institution of marriage was further reflected in laws ranging from the marital exception to rape, to the inability to sue for loss of consortium, to the inability to retain a maiden name (*id.*). Both socially and legally, marriage has evolved to redress such exclusions, restrictions, and inequalities (*id.*).

FIRST ASSIGNMENT OF ERROR ON PLAINTIFFS' CROSS-APPEAL

In issuing an opinion and order that holds that the exclusion of same-sex couples from the state-conferred benefits of marriage, as opposed to the exclusion of same-sex

² Plaintiffs acknowledge that not every state's laws have reflected all of these prohibitions, restrictions, and inequalities. For example, Article XV, section 5 of the Oregon constitution has protected certain property rights of married women.

couples from marriage itself, violates Article I, section 20, the trial court erred by implicitly denying in part plaintiffs’ motion for partial summary judgment on the First Claim for Relief.

SECOND ASSIGNMENT OF ERROR ON PLAINTIFFS’ CROSS-APPEAL

The trial court erred by entering a limited judgment declaring that the exclusion of same-sex couples from the state-conferred benefits of marriage, as opposed to the exclusion of same-sex couples from marriage itself, violates Article I, section 20.

THIRD ASSIGNMENT OF ERROR ON PLAINTIFFS’ CROSS-APPEAL

In issuing an opinion and order that holds that the exclusion of same-sex couples from the state-conferred benefits of marriage, as opposed to the exclusion of same-sex couples from marriage itself, violates Article I, section 20, if the trial court implicitly granted in part the State’s motion for summary judgment on all claims for relief, then the trial court erred in doing so.

COMBINED ARGUMENT IN SUPPORT OF FIRST, SECOND, AND THIRD ASSIGNMENTS OF ERROR ON PLAINTIFFS’ CROSS-APPEAL

In light of the tangible and intangible advantages unique to marriage, the right to marry constitutes a “privilege” under Article I, section 20.

I. Preservation and the standard of review.

Plaintiffs alleged that they sought access to “marriage, the social validation that it confers, and the hundreds of rights, responsibilities, benefits, and obligations that it affords” (ER 12 at ¶ 5); that the Oregon statutory code does not permit marriages of same-sex couples (ER 37 at ¶ 111); that Article I, section 20 of the Oregon constitution prohibits the unjustified denial of a privilege or immunity based on sexual orientation or gender (ER 37 at ¶ 113); and that the failure to permit marriages of same-sex couples constitutes an unjustified denial of a privilege and therefore constitutes a violation of the Oregon constitution (ER 37 at ¶ 114). Plaintiffs’ motion for partial summary judgment stated that the trial court should declare that the failure of the Oregon statutory code to permit marriages of same-sex couples violates Article I, section 20 of the Oregon constitution (ER

150). Among other things, plaintiffs both argued in support of their motion (CR 19; Tr 4/16 at pp 8-20, 64-78) and in opposition to the State’s motion for summary judgment (CR 57; Tr 4/16 at pp 8-20, 64-78) that marriage itself, and not just the benefits that the State affords married couples, is a privilege under Article I, section 20. Plaintiffs preserved the assigned errors.

Plaintiffs cross-appeal the implicit denial in part of their motion for partial summary judgment. To the extent the Court construes the order and opinion to grant in part the State’s motion for summary judgment, which plaintiffs contest, plaintiffs also cross-appeal from that ruling. And, plaintiffs’ cross-appeal from the declaration the trial court then issued in the limited judgment. On a motion for summary judgment, the moving party has the burden of showing that it is entitled to judgment as a matter of law, given undisputed facts. To v. State Farm Mut. Ins., 319 Or 93, 104, 873 P2d 1072 (1994). To defeat summary judgment, the adverse party bears the burden of adducing evidence establishing genuine issues of material fact for trial if that adverse party would bear the burden of proof on the issue at trial. ORCP 47 C.

This Court reviews cross-motions for summary judgment to determine whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. ORCP 47 C; Jones v. General Motors Corp., 325 Or 404, 420, 939 P2d 608 (1997). The Court views the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the party opposing the motion. Jones, 325 Or at 408. The Court reviews the declaratory judgment *de novo*. ORS 19.415(3); Safeway, Inc. v. Jane Does 1 through 50, 141 Or App 541, 543, 920 P2d 169 (1996).

II. The analytical framework of Article I, section 20 reflects the specific wording of Article I, section 20, the case law surrounding Article I, section 20, and the historical circumstances that led to the creation of Article I, section 20.

Article I, section 20 guarantees that “[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.” Or Const Art I, § 20. The analytical framework applicable to Article

I, section 20 is distinct from that applicable to its federal analog. In Priest v. Pearce, 314 Or 411, 840 P2d 65 (1992), the Court formally articulated the criteria by which it independently interprets a provision of the Oregon constitution: “[i]ts specific wording, the case law surrounding it, and the historical circumstances that led to its creation.” Id. at 415-16. While the criteria were not formally articulated until Priest, they were effectively applied to Article I, section 20 in the seminal case State v. Clark, 291 Or 231, 630 P2d 810, cert denied, 454 US 1084 (1981). Thus, “the existing case law surrounding section 20 has already considered that provision’s specific wording and the circumstances of its adoption. The second item in the Priest list of levels therefore incorporates the other two.” Cox ex rel. Cox v. State, 191 Or App 1, 6, 680 P3d 514 (2003) (Schuman, J., concurring) (citing Clark); see also State ex rel. Juvenile Dep’t v. Reynolds, 317 Or 560, 565, 857 P2d 842 (1993) (noting that Clark examined the historical circumstances that led to the creation of Article I, section 20).

In Clark, the Court noted that “[the] language [of Article I, section 20] reflects early egalitarian objections to favoritism and special privileges for a few rather than the concern of the Reconstruction Congress about discrimination against disfavored individuals or groups” and that “the original concern of article I, section 20” was “with special privileges or ‘monopolies.’” Clark, 291 Or at 236 (citation and footnote omitted). The Court, however, went on to make the following observation:

“Because the clause would ordinarily be invoked by persons who wanted a privilege or immunity for themselves rather than to withdraw it from others, its protective effect was soon held to extend to rights against adverse discrimination as well as against favoritism * * * and its use against discriminatory or otherwise ‘unequal’ adverse treatment is long established.”

Id. at 237 (citations omitted). Such a check on majoritarian oppression is fully consistent with the concerns debated by the framers of the Oregon constitution:

“The history of the world teaches us that the majority may become fractious in their spirit and trample upon the rights of the minority; that through the madness of party spirit they may infringe upon the rights of individual citizens. Then, if the

individual is to be protected in this point in which he is endangered, there must be restrictions put into the constitution. The people must say we will limit ourselves in certain principles.”

David Schuman, The Creation of the Oregon Constitution, 74 Or L Rev 611, 625 (1995) (quoting Charles Henry Carey, ed., The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857, at 102 (1926)). Moreover, as the Court “often has stated,” despite the differences between the Article I, section 20 and its federal analog, “for most purposes[,] analysis under Article I, section 20 and under the federal equal protection clause will coincide.” Clark, 291 Or at 243 (citations omitted).

In light of the analysis in Clark, the analytical framework of Article I, section 20 that follows from Clark reflects the specific wording of Article I, section 20, the case law surrounding Article I, section 20, and the historical circumstances that led to the creation of Article I, section 20.

III. The right to marry constitutes a “privilege” under Article I, section 20.

In identifying the privilege at issue, the trial court addressed only whether marriage confers a tangible advantage because the State grants numerous important benefits to married couples. The trial court failed to address whether marriage also confers a tangible advantage because non-governmental and other governmental entities also grant numerous important benefits to married couples. Moreover, notwithstanding its express acknowledgement of “social benefits which inure to being the spouse or child of a married couple,” the trial court failed to address whether marriage confers a unique intangible advantage because only married couples express a level of commitment that is universally recognized as a commitment of the highest order and only married couples and their children enjoy a common respect for the integrity of their family unit (ER 434). The trial court sidestepped any analysis of any such advantages:

“The State recognizes that there are two levels of benefits to marriage as plaintiffs have consistently argued. At one level lie tangible benefits such as health insurance, death benefits, testimonial rights, etc. and at the other level are the social

benefits which inure to being the spouse or child of a married couple. It is not clear how our appellate courts would analyze and resolve the issue of extension of privileges beyond the more tangible benefits. It does appear that based on prior appellate decisions the courts would likely extend the privileges required by Article I, section 20 to the tangible benefits married couples now enjoy and that same-sex couples cannot access.”

(ER 434) (proceeding to analyze only the latter type of benefits). This was error.

A. A “privilege” under Article I, section 20 is broadly defined.

The Court has broadly defined the privileges that are subject to Article I, section 20: “Whenever a person is denied some advantage to which he or she would be entitled but for a choice 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 applied.”³ City of Salem v. Bruner, 299 Or 262, 268-69, 702 P2d 70 (1985) (quotation omitted) (emphasis added). In a leading law review article on Article I, section 20, then law professor and now Court of Appeals Judge David Schuman confirmed the breadth of the definition in his review of the case law:

“The significant words in the court’s definition * * * are not ‘entitle,’ but ‘whenever’ and ‘some advantage.’ The definition is expansive enough to implicate article I, section 20 whenever the state might unequally deprive a citizen of something potentially desirable. * * * “Potential” advantages, ‘whether or not they are advantageous in a particular instance,’ are sufficient.”

David Schuman, The Right to “Equal Privileges and Immunities:” A State’s Version of “Equal Protection,” 13 Vt L Rev 221, 230 (1988); see also Opinion No. 8260, 49 Or Op Att’y Gen 112, 1998 WL 549987 at *6 (1998) (“The Oregon Supreme Court has indicated that the denial of ‘some advantage’ to which a person otherwise would be entitled is

³ Clark specifies that any “advantage” must flow from state action. Here, because the grant of the right to marry constitutes state action, whatever “advantage” flows from the grant of the right to marry necessarily flows from state action.

sufficient to implicate Article I, section 20. That language suggests that even a slight advantage might constitute a ‘privilege’ or ‘immunity’ for this purpose.”) (citing Bruner).

Oregon is not the only jurisdiction to interpret its equal privileges and immunities guarantee in such an expansive manner. See, e.g., In re Adoption of K.A.S., 499 NW2d 558, 563 (ND 1993) (“A ‘privilege’ * * * has been defined as a particular and peculiar benefit or advantage enjoyed by a person, company or class beyond the common advantage of other citizens.”) (quotation and citation omitted); Idaho Water Resources Bd. v. Kramer, 548 P2d 35, 68 (Idaho 1976) (“A ‘privilege’ is a particular or peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantages of others.”) (footnote omitted); Thomas v. Daughters of Utah Pioneers, 197 P2d 477, 507 (Utah 1948), appeal dismissed, 336 US 930 (1949) (“A privilege, as defined by the Standard dictionary, is ‘a peculiar benefit, favor, or advantage, a right * * * not enjoyed by all, * * * a special right or power conferred on or possessed by one or more individuals, in derogation of the general right.’”) (quotation omitted); Daigh v. Schaffer, 73 P2d 927, 930 (Cal Ct App 1937) (“A privilege is a particular and peculiar benefit or advantage enjoyed by a person, company or class beyond the common advantage of other citizens.”) (citation omitted); see also Leatherwood v. Hill, 89 P 521, 523 (Ariz Terr 1906) (defining a “privilege” in the same way under a federal statute prohibiting territorial legislatures from enacting laws granting special or exclusive privileges); Guthrie Daily Leader v. Cameron, 41 P 635, 639 (Okla Terr 1895) (same). Indeed, the privileges that are subject to Article I, section 23 of the Indiana constitution – the provision on which Article I, section 20 is based – are broadly defined as “exemptions from otherwise common burdens, or advantages.” Hammer v. State, 89 NE 850, 852-53 (Ind 1909).

In light of the tangible and intangible advantages unique to marriage discussed below, the right to marry constitutes a “privilege” under Article I, section 20.⁴

B. A marriage confers a tangible advantage on a married couple and their children.

1. The State grants numerous important benefits to married couples and their children.

Through its legislature, its agencies, its courts, its officers, and its political subdivisions, the State bestows hundreds of important benefits on couples who marry in Oregon, both as a matter of statutory, regulatory, and common law and as a matter of practice. Such state-conferred benefits include private benefits bestowed by private entities on married couples and their children by operation of state law. As illustrated by the harms that individual plaintiffs and their children suffer, such benefits touch every aspect of life, from health benefits (ER 489 at ¶ 8), to death benefits (ER 173 at ¶ 11), to parent-child relationships (ER 163 at ¶¶ 11-12). Many such benefits are intended to protect families in their times of greatest need, such as sickness and death. See, e.g., ORS 112.025, 112.035 (the safeguard of intestate succession when a spouse dies without a valid will); ORS 30.020 (the ability of one spouse to sue for the wrongful death of the other); ORS 414.105 (the exception that permits the spouse of a Medicaid beneficiary to keep his or her house when the state seeks to foreclose on the house to recoup the cost of the Medicaid beneficiary’s long-term care); see also Partial List of Legal Rights, Responsibilities, Benefits, Obligations, and Protections of Marriage Under Oregon Law (App 3-App 6). As the trial court

⁴ Black’s Law Dictionary defines a “privilege” as “[a] special right, exemption, or immunity granted to a person or a class of persons; an exception to a duty. A privilege grants someone the legal freedom to do or not do a given act. It immunizes conduct that, under ordinary circumstances, would subject the actor to liability.” Bryan A. Garner, ed., Black’s Law Dictionary (8th ed 2004). The right to a marriage license is just such a “special right.” See ORS 106.990(2) (criminalizing the improper issuance of a marriage license); see also Clark, 291 Or at 236-37 (noting that the earliest case law interpreting Article I, section 20 concerned the issuance of various types of licenses).

recognized, all such benefits constitute a tangible “advantage” that flows from the grant of the right to marry.

2. Non-governmental and other governmental entities grant numerous important benefits to married couples and their children.

The trial court failed to recognize that private entities, other state governments, and the federal government bestow hundreds of additional important benefits on couples who marry in Oregon. Such benefits also constitute a tangible “advantage” that flows from the grant of the right to marry.

First, marriage confers a tangible advantage on married couples because in-state and out-of-state private entities routinely use marriage as a touchstone in granting private benefits. Although plaintiffs Frankel and Kiefer had lived with and cared for Kiefer’s mother for thirteen years, a private hospital did not recognize Frankel as a member of Kiefer’s mother’s family when he sought to visit her in the intensive care unit as she was dying because Frankel and Kiefer are not married (ER 283 ¶ 9). Plaintiff Lefton’s private employer will not allow plaintiff Sheklow to enroll in the employer-sponsored health plan because they are not married (ER 486 at ¶ 9). Until their marriage, plaintiffs Burke and Doyle were in a similar bind (ER 164 at ¶ 15).

Moreover, other state governments recognize the relationships of couples who marry in Oregon, an advantage that unmarried couples do not enjoy. Plaintiffs Farrera and Korican worried that Farrera, a professional musician who traveled for a living, would experience a medical emergency on the road that would land her in an out-of-state public hospital that would grant Korican neither visitation nor decision making rights because they were not married (ER 333 at ¶ 9). Plaintiff Williams is a public school teacher who enjoys far fewer career options than her married colleagues because she has no assurance that a comparable out-of-state government employer would allow her unmarried partner to enroll in the employer-sponsored health plan (ER 158 at ¶ 16; ER 170 at ¶ 10). All such benefits

bestowed on couples who marry in Oregon by other state governments are far from assured for unmarried couples.

The federal government also recognizes the relationships of couples who marry in Oregon. By its own count, the federal government grants 1,138 benefits to married couples. Letter from United States General Accounting Office to Majority Leader Bill Frist (Jan 23, 2004) (<http://www.gao.gov/new.items/d04353r.pdf>). Some of these benefits are illustrated by individual plaintiffs' life stories. Plaintiff Farrera fully appreciates the importance of the right of one spouse to sponsor the other for permanent residency in the United States (ER 332 at ¶ 3). In their retirement, plaintiffs Frankel and Kiefer are increasingly concerned about their ineligibility for certain Social Security benefits because they are not married (ER 282 at ¶ 6). And, because plaintiffs Potter and Moen are not married, they are disadvantaged in their federal tax burden (ER 174 at ¶ 17). Again, all such federal benefits constitute a tangible "advantage" that flows from the grant of the right to marry.

While it is true that such state and federal benefits would be far from assured for a same-sex married couple, marriage would nevertheless confer an advantage on such a couple. A married same-sex couple would be positioned to enjoy such benefits should state or federal law precluding recognition of their marriage be repealed or invalidated. See Schuman, The Right to "Equal Privileges and Immunities:" A State's Version of "Equal Protection," supra at 230 ("'Potential' advantages, 'whether or not they are advantageous in a particular instance,' are sufficient."). Indeed, such change in the law is already afoot. Massachusetts now recognizes same-sex marriages. Goodridge v. Department of Public Health, 798 NE2d 941, 954-55 (Mass 2003). And, in Washington, Oregon's neighbor, two trial courts recently struck down a state statute precluding recognition of same-sex marriages. Castle v. State, No 04-2-00614-4, 2004 WL 1985215 (Wash Super Ct Sept 7, 2004) (appeal pending); Andersen v. King County, No 04-2-04964-4-SEA, 2004 WL 1738447 (Wash Super Ct Aug 4, 2004) (appeal pending).

Thus, the tangible "advantage" that flows from the grant of the right to marry is not solely a function of the grant of benefits by the State.

C. A marriage confers a unique intangible advantage on a married couple and their children.

Marriage is much more than a set of tangible benefits. It has singularly powerful social, cultural, and personal significance. See Goodridge, 798 NE2d at 955 (recognizing that such “intangible benefits flow from marriage”). Only married couples have what is universally honored as an unparalleled expression of commitment. Moreover, only married couples and their children enjoy a common respect for the integrity of their family unit. In rejecting a legislative attempt to substitute “civil unions” for marriage following its ruling in Goodridge, the Massachusetts Supreme Judicial Court confirmed that the mere social status of being a married couple has immeasurable value: “If * * * the proponents of the bill believe that no message is conveyed by eschewing the word ‘marriage’ and replacing it with ‘civil union’ for same-sex ‘spouses,’ we doubt that the attempt to circumvent the court’s decision in Goodridge would be so purposeful.” In re Opinions of the Justices to the Senate, 802 NE2d 565, 580 (Mass 2004); see also Goodridge, 798 NE2d at 954-55. In doing so, the Massachusetts Supreme Judicial Court echoed the United States Supreme Court’s characterization of marriage in Maynard v. Hill, 125 US 190 (1888), a case concerning the regulation of marriage in Oregon:

“[Marriage] is * * * a social relation like that of parent and child * * * a relation the most important, as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life, and the true basis of human progress. * * * [Marriage] [is] the most elementary and useful of all the social relations.”

Id. at 211-12 (quotation omitted). The United States Supreme Court went on to quote the Indiana Supreme Court as follows:

“At common law, marriage as a status had few elements of contract about it. * * * [D]istinctive elements will readily suggest themselves, which rob it of most of its characteristics as a contract, and leave it simply as a status or institution. * *
* In this light, marriage is more than a contract. It is not a mere matter of pecuniary consideration. It is a great public institution, giving character to our whole civil polity.

Id. at 213 (quoting Noel v. Ewing, 9 Ind 37, 1857 WL 3556 at *8 (1857)) (emphasis in original).

Individual plaintiffs seek the intangible benefits of marriage for themselves and especially for their children. Plaintiffs Knox and Warshaw fear that, without such intangible benefits, the welfare of their children will be compromised:

“Prior to our marriage, Adam began inquiring whether ‘Dad’ and ‘Daddy’ were married. We had to explain to him that we were ‘almost’ married in that we share our love, home, and family, but had to acknowledge to him that we lacked ‘the piece of paper’ that he knew that married couples have. In light of our marriage, we can now tell our kids that we no longer lack ‘the piece of paper.’ Even so, we recognize that it is something that the State of Oregon will not recognize. Our hope is that our children no longer need to feel that their family is less worthy in the eyes of others because we cannot enter into a legally recognized marriage.”

(ER 481 at ¶ 16). Plaintiffs Potter and Moen express a similar concern:

“One of our biggest concerns has been the stigmatization of our children because they have same-sex parents. We know they may, at times, endure harassment because their family does not represent the majority. The fact that our state says we are both different and not worthy of acknowledgment or recognition as a family sends a harmful message to our children and encourages those who may harass them. My mother, upon learning of our intent to marry, said she thought a marriage would be good for our children for this very reason. Our hope is that, with a legally recognized marriage, [our] children can feel like they belong to our community because our family has been valued equally with those of their friends. I know that a legally recognized marriage would, throughout their lives, have a positive impact on their physical and emotional well-being.”

(ER 171 at ¶ 22).

Indeed, all individual plaintiffs are harmed by the denial of the intangible benefits of marriage. Plaintiff Li observes that “[m]arried people enjoy social recognition of their relationship every day” because “[o]ther people can relate to and understand what a marriage is,” something that she and Plaintiff Kennedy and their daughter are denied (ER

158-ER 159 at ¶ 17). Plaintiff Frankel makes a similar observation (ER 283 at ¶ 10). Plaintiff Sheklow laments the fact that she and Plaintiff Lefton do not enjoy “the uniform recognition of [their] relationship by others that married couples enjoy” (ER 485 at ¶ 7). Plaintiffs Williams and Belisle “feel stigmatized because [they] cannot marry and enjoy the uniform recognition of a relationship that comes with marriage” (ER 170 at ¶ 11). Plaintiffs Farrera and Korican have felt the same way (ER 332 at ¶ 6). And Plaintiff Burke notes that she and Plaintiff Doyle need such benefits, “just like other families in Oregon do, to protect [them] and [their] child from discrimination” (ER 165 at ¶ 18).

Marriage is not the only context in which mere social status can confer an intangible advantage. The “Oregon Teacher of the Year” award (<http://www.ode.state.or.us/groups/teachers/awards/teacheroftheyear>) brings with it no apparent remuneration. Nevertheless, the mere social status of being the “Oregon Teacher of the Year” confers a significant albeit intangible advantage by ensuring that the recipient commands an extraordinary level of respect from other teachers, principals, students, parents, and others in the community. It also greatly enhances his or her standing with prospective employers. If confronted with invidious discrimination on the part of the Department of Education in the selection of the recipient (e.g., “African-American teachers need not apply,” “female teachers need not apply,” “lesbian and gay teachers need not apply”), it is difficult to imagine that a court would find that Article I, section 20 provides no recourse, for lack of a privilege conferring an advantage.

In sum, the grant of the right to marry confers a unique intangible advantage on a married couple and their children, and therefore constitutes a “privilege” under Article I, section 20.

IV. Question a – What attributes of marriage under Oregon law establish that it is a “privilege” or an “immunity” within the meaning of Article I, section 20?

As discussed above, in light of the tangible and intangible advantages unique to marriage, the right to marry constitutes a “privilege” under Article I, section 20. See supra at pp 25-33 (Argument on First, Second, and Third Assignments of Error, § III).

For similar reasons, marriage also constitutes an “immunity” under Article I, section 20. See, e.g., In re Marriage of Crocker, 332 Or 42, 54-55, 22 P3d 759 (2001) (holding that certain married parents, but not certain divorced or separated parents, are immune from certain child support obligations). Although, for the sake of simplicity, plaintiffs argued below that marriage constitutes only a “privilege” under Article I, section 20, they noted that “privileges” and “immunities” under Article I, section 20 share a common definition, and that marriage satisfies this common definition (CR 19 at 19-21). See Bruner, 299 Or at 268-69 (“Whenever a person is denied some advantage to which he or she would be entitled but for a choice 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 applied.”) (quotation omitted); see also Hammer, 89 NE at 851 (noting that “[i]mmunity’ and ‘privilege’ are synonymous terms” under the federal privileges and immunities clause) (citations omitted).

Regardless, on appeal, the Court may rule that marriage constitutes an “immunity” as well as a “privilege” under Article I, section 20 because such a ruling would address a pure question of law. The other parties to the litigation would not be prejudiced by such a ruling because they would not have made a different factual record below. See Outdoor Media Dimensions, Inc. v. State, 331 Or 634, 659, 20 P3d 180 (2001) (appellate court will consider unraised arguments for affirmance where the issue is purely one of law); State v. Lecaros, 187 Or App 105, 108, 66 P3d 543 (2003) (new constitutional argument raised in support of affirmance by prevailing party in the trial court permitted because factual record would not have been affected by issue of law).

V. Question b – If Oregon law allows only certain persons to marry, what characteristics of those persons demonstrate that they are a favored “class of citizens” within the meaning of Article I, section 20 of the Oregon Constitution? Does the history of Article I, section 20, including its predecessors in other states, assist in answering this question?

As discussed above, from its earliest case law, Article I, section 20 has been interpreted to apply to favored and disfavored classes alike. See supra at pp 24-25 (Argument on First, Second, and Third Assignments of Error, § II); see also Clark, 291 Or at 237 (citing State v. Wright, 53 Or 344, 100 P 296 (1909)). Regardless, as discussed above, those persons who are allowed to marry constitute a favored class in light of the numerous significant advantages, both tangible and intangible, that a marriage confers on a married couple and their children. See supra at pp 25-33 (Argument on First, Second, and Third Assignments of Error, § III).

As discussed above, the analytical framework of Article I, section 20 accounts for the historical circumstances that led to the creation of Article I, section 20. See supra at pp 23-25 (Argument on First, Second, and Third Assignments of Error, § II). As for predecessor provisions in other state constitutions, Article I, section 20 is derivative of Ind Const of 1851, art I, § 23, which in turn is derivative of Iowa Const of 1846, art I, § 6, Mich Const of 1835, art I, § 3, and Tenn Const of 1834, art XI, § 7. See Clark, 291 Or at 236 & n7. Like the privileges that are subject to Article I, section 20, those that are subject to Article I, section 23 of the Indiana constitution are broadly defined.⁵ Hammer, 89 NE at 852-53 (defining such privileges as “exemptions from otherwise common burdens, or

⁵ In Iowa, the definition of a “privilege” under state law is the same as that under federal law. Shaw v. City Council, 104 NW 1121, 1123 (Iowa 1905). Plaintiffs have identified no case law on point in Michigan or Tennessee. But see In re Lawyers’ Tax Cases, 55 Tenn 565, 1875 WL 4575 at *4 (1875) (defining a privilege subject to taxation under Article II, section 28 of the Tennessee Constitution as “an exception to a general prohibition” that is often evidenced by a penalty); see also State v. Louisville & N.R. Co., 201 SW 738, 739 (Tenn 1918) (noting that a privilege may exist in a context other than a commercial one); Cate v. State, 35 Tenn 120, 1855 WL 2427 at *1 (1855) (noting that a privilege is often evidenced by a license).

advantages”). Amicus curiae Adamson, however, suggests that the historical circumstances that led to the creation of Article I, section 23 of the Indiana constitution preclude such a broad definition. In doing so, Adamson misconstrues and mischaracterizes Collins v. Day, 644 NE2d 72 (Ind 1994). Adamson quotes extensively from Collins up to and including the following passage:

“From all available indications, we conclude that at the time of the adoption of Section 23 and its ratification as part of the 1851 Indiana Constitution, the principal purpose was to prohibit the state legislature from affirmatively granting any exclusive privilege or immunity involving the state’s participation in commercial enterprise. Section 23 does not appear to have been enacted to prevent abridgement of any existing privileges or immunities, nor to assure citizens the equal protection of the laws.”

Id. at 77. Adamson, however, fails to quote the passage that immediately follows:

“However, in reviewing historical underpinnings to reinterpret Section 23 and reformulate a standard for its practical application our inquiry does not necessarily end with a literal reading of the provision and of the expressed purposes and intent of its framers and ratifiers. Early decisions of this Court interpreting our Constitution, particularly those contemporaneous with its adoption and practiced and acquiesced in for a period of years, have been accorded strong and superseding precedential value. Prior cases construing and applying Article 23 independently from federal equal protection analyses are important sources for our consideration.”

Id. (quotation omitted). In doing so, Adamson neglects to inform the Court that Collins affirms that the ambit of Article I, section 23 is far greater than he would have the Court believe:

“During the years following the adoption of the 1851 Constitution, Section 23 was often applied to invalidate enactments which, rather than granting special privileges, imposed special burdens. * * * We are unaware of any cases in which this Court has expressly declined to apply Section 23 protection simply because an enactment created a special burden rather than a special privilege. However, this is not surprising, because implicit in an enactment that imposes an unequal burden is the grant of a special privilege or immunity to persons or classes exempted from the new burden. Longstanding decisions of this Court have expanded the function of Section 23 not only by failing to restrict its application to legislation granting, rather than abridging, privileges or immunities, but also by repeatedly applying Section 23 to matters unconnected with the state’s involvement in commercial enterprise, thereby giving preference to the literal language of Section 23 rather than to the intent of its framers.”

Id. at 77-78 (citations omitted). Thus, Collins itself expressly contradicts Adamson’s thesis that the privileges subject to Article I, section 23 of the Indiana constitution are limited to those that favor classes engaged in commercial enterprise.⁶

Regardless, Adamson misapprehends the criteria by which the Court interprets a provision of the Oregon constitution. While it is true that “historical circumstances” are a criterion, they are not the sole criterion. Priest, 314 Or at 416. As in Indiana, “specific wording” and “case law” are additional criteria. Id. at 415-16. Thus, even if it were true that the framers of the Oregon constitution understood Article I, section 23 of the Indiana

⁶ Significantly, Collins ends its analysis by suggesting that the analytical framework of Article I, section 23 of the Indiana constitution is a work in progress: “This Court anticipates that our independent state privileges and immunities jurisprudence will evolve in future cases facing Indiana courts to assure and extend protection to all Indiana citizens in addition to that provided by the federal Fourteenth Amendment.” Id. at 81; see also id. at 80-81 (noting that the Court has not yet had occasion to consider whether gender discrimination should be subject to heightened scrutiny under Article I, section 23 because all cases involving gender discrimination to date have been resolved without resort to heightened scrutiny); cf. Hooper v. Bernalillo County Assessor, 472 US 612, 618 (1984) (declining to address whether the classification at issue was subject to strict scrutiny under the federal equal protection clause because, “if the statutory scheme cannot pass even the minimum rationality test, our inquiry ends”).

constitution in the way that Adamson describes,⁷ it would not necessarily circumscribe the ambit of Article I, section 20 in the way that he seeks.⁸

For the foregoing reasons, in light of the tangible and intangible advantages unique to marriage, the right to marry constitutes a “privilege” under Article I, section 20.

FOURTH ASSIGNMENT OF ERROR ON PLAINTIFFS’ CROSS-APPEAL

In issuing an opinion and order that remedies the Article I, section 20 violation by allowing the legislature to shunt same-sex couples into a separate and unequal institution, as opposed to extending the right to marry to same-sex couples, the trial court erred by implicitly denying in part plaintiffs’ motion for partial summary judgment on the First Claim for Relief.

⁷ To the contrary, the historical record suggests that the framers of the Oregon constitution embraced the Indiana constitution precisely because they understood it to be especially progressive. See State v. Rogers, 330 Or 282, 298, 4 P3d 1261 (2000) (“[T]he bill of rights in the Indiana Constitution was described during the Oregon constitutional convention as being ‘gold refined’ and as ‘assert[ing] the civil rights of the citizens as ascertained in those 70 years of progress [since the United States Constitution was adopted].’”) (quoting Carey, supra, at 101-02); see also State v. Clark, 291 Or 231, 236 n7, 630 P2d 810, cert denied, 454 US 1084 (1981) (noting that Article I, section 23 of the Indiana constitution and its “direct predecessors” in the Iowa, Michigan, and Tennessee constitutions were more expansive than “[t]he original state declarations of rights” in the Virginia and Massachusetts constitutions).

⁸ Adamson also argues that Article I, section 20 provides no recourse because Article I, section 20 applies only to laws that have been “passed” by the legislature since 1857. Putting aside the obvious rejoinder that, as Adamson himself concedes, ORS 106.010 has been the subject of enactment and re-enactment – and therefore the subject of consideration and ratification – by the legislature on multiple occasions since 1857, it is enough to note that the Court has held that Article I, section 20 applies to more than just laws that have been “passed” by the legislature: “It was * * * early established that the guarantee reaches forbidden inequality in the administration of laws under delegated authority as well as in legislative enactments.” Clark, 291 Or at 815 (noting that the original concern of the framers of the Oregon constitution with exclusive licenses could not have been addressed otherwise). Moreover, Adamson’s argument echoes intervenor-defendant’s radically regressive argument that the types of invidious discrimination that were rampant in 1857 are immune from redress today.

FIFTH ASSIGNMENT OF ERROR ON PLAINTIFFS' CROSS-APPEAL

The trial court erred by entering a limited judgment remedying the Article I, section 20 violation by allowing the legislature to shunt same-sex couples into a separate and unequal institution, as opposed to extending the right to marry to same-sex couples.

SIXTH ASSIGNMENT OF ERROR ON PLAINTIFFS' CROSS-APPEAL

In issuing an opinion and order that remedies the Article I, section 20 violation by allowing the legislature to shunt same-sex couples into a separate and unequal institution, as opposed to extending the right to marry to same-sex couples, if the trial court implicitly granted in part the State's motion for summary judgment on all claims for relief, then the trial court erred in doing so.

COMBINED ARGUMENT IN SUPPORT OF FOURTH, FIFTH, AND SIXTH ASSIGNMENTS OF ERROR ON PLAINTIFFS' CROSS-APPEAL

The only permissible and appropriate way to remedy the Article I, section 20 violation at issue is to allow same-sex and different-sex couples to marry on equal terms.

I. Preservation and the standard of review.

Plaintiffs argued, both in support of their own motion (CR 19; Tr 4/16 at pp 8-20, 64-78) and in opposition to the State's motion (CR 57; Tr 4/16 at pp 8-20, 64-78), that the proper remedy for the constitutional violation under Article I, section 20 was to extend the right to marry to same-sex couples, not to defer to the legislature to remedy the violation or to allow same-sex couples to be shunted into a separate and unequal institution.

The Court reviews the remedy the trial court ordered in the limited judgment *de novo*. ORS 19.415(3); see also Hewitt v. SAIF, 294 Or 33, 50-54, 653 P2d 970 (1982) (reviewing decision of Court of Appeals on remedy).

II. Remedies law requires the Court to extend the right to marry to same-sex couples.

A. There are only two permissible ways in which to remedy an Article I, section 20 violation – extend the privilege to the disfavored class or, where appropriate, nullify the privilege for the favored class.

In fashioning the remedy at issue, the trial court ignored fundamental principles of remedies law and ceded its constitutional function to the legislative branch. In doing so, the trial court ignored binding precedent that directs a trial court confronting an Article I, section 20 violation either to extend the privilege to the disfavored class or, where appropriate, to nullify the privilege for the favored class. This was error; a trial court may neither concoct its own extra-judicial means of redress for a constitutional breach of this type, nor abdicate its role in the system of checks and balances that is essential to a Madisonian democracy.

In the seminal case Hewitt, the Court concluded that the denial of workers' compensation benefits to male partners of female workers injured or killed on the job, but not female partners of male workers injured or killed on the job, violated Article I, section 20. Id. at 51. In fashioning the remedy for the Article I, section 20 violation, the Court held that, "[w]here a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." Hewitt, 294 Or at 52 (quotation omitted); see also Crocker, 332 Or at 54; Zockert v. Fanning, 310 Or 514, 524, 800 P2d 773 (1990); Employment Div. v. Rogue Valley Youth for Christ, 307 Or 490, 497, 770 P2d 588 (1989).

The two remedial alternatives set forth by the Hewitt Court are fully consistent with separation-of-powers principles. A core function of the judiciary is to fashion a remedy where it finds a breach of the law. Such a core function may not be surrendered to the legislature:

“Not only does Art. III, § 1 of the constitution prohibit the legislature from exercising the functions and powers of the judiciary, but under the principle of the separation of powers the legislature is likewise prohibited from unduly burdening or interfering with the judicial department in its exercise thereof. * * * The judicial power thus conferred is generally held to include not merely that of deciding cases but also incidental powers necessary to the effective performance of that primary function.”

State ex rel. Bushman v. Vandenberg, 203 Or 326, 334-35, 280 P2d 344 (1955) (quotations and internal quotation omitted); see also Or Const art III, § 1 (“The powers of the Government shall be divided into three separate [sic] departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of the other, except as in this Constitution expressly provided.”); Marbury v. Madison, 5 US 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

Significantly, the two remedial alternatives set forth by the Hewitt Court contemplate neither the creation of a parallel set of comparable benefits for the disfavored class, nor the referral of the question to the legislature. Indeed, the Hewitt Court specifically considered and emphatically rejected the very consideration on which the trial court relied in fashioning the remedy at issue: “The dissent suggests alternate remedies the legislature may choose were we to invalidate the statute. Those remedies are no less available to the legislature by the extension of the statute to the excluded males should it decide to amend the law.” Hewitt, 294 Or at 53 n18; see also id. at 55-56 (Peterson, J., dissenting) (listing the legislative responses that were possible). In other words, the Court recognized that the possibility of a legislative response is no reason to defer to the legislature to fashion a remedy; a legislative response is not only always possible but also never precluded. Thus, in Hewitt, it was irrelevant that the legislature might have responded by eliminating or reducing the workers’ compensation benefits at issue, or by adopting a scheme in which surviving male partners were paid in cash but female surviving partners were paid in

coupons of “equal” value.⁹ The same is true here. It is irrelevant that the legislature might respond by eliminating or reducing benefits conditioned on marriage, or by creating a system in which different-sex couples enter into marriage but same-sex couples enter into “civil unions.”¹⁰ There are only two permissible ways in which to remedy an Article I, section 20 violation – extend the privilege to the disfavored class or, where appropriate, nullify the privilege for the favored class.

B. There is only one permissible and appropriate way to remedy the Article I, section 20 violation at issue – extend the right to marry to same-sex couples.

In Hewitt, the Court looked to the purpose of the workers’ compensation benefits at issue – the stabilization of partners of workers killed or injured on the job – to decide between the two remedial alternatives: “Invalidation here would deprive all cohabitants of unmarried workers of benefits. This is in clear conflict with legislative intent. * * * Extension of benefits in this case advances the purpose of the legislation and comports with the overall statutory scheme.” Hewitt, 294 Or at 52-53. The Court “[saw] no reason why * * * the entitlements of female cohabitants and their families should be eliminated so that the rights of male cohabitants and their families may be vindicated.” Id. at 53 (footnote omitted). Accordingly, the Court extended the workers’ compensation benefits at issue to male partners of female workers injured or killed on the job. Id. at 54; see also Zockert, 310 Or at 524; Rogue Valley, 307 Or at 497.

Here, as in Hewitt, nullifying the privilege for the favored class would defeat the purpose of the law. Nullifying the right to marry for different-sex couples would negate the social good that results when a couple makes a commitment of the highest order to each other, e.g., a stable household. Moreover, here, as in Hewitt, extending the privilege to the

⁹ As discussed below, the latter legislative response would have been unconstitutional. See infra at pp 28-31 (Argument on Fourth, Fifth, and Sixth Assignments of Error, § III.B.).

¹⁰ Again, as discussed below, the latter legislative response would be unconstitutional. See infra at pp 28-31 (Argument on Fourth, Fifth, and Sixth Assignments of Error, § III.B.).

excluded class would advance the purpose of the law. Same-sex couples and their children are just as likely as different-sex couples and their children to be protected and strengthened by marriage. Thus, the only appropriate way to remedy the Article I, section 20 violation at issue is to extend the right to marry to same-sex couples.¹¹

III. Constitutional law requires the Court to extend the right to marry to same-sex couples.

A remedy fashioned by a court constitutes state action. Thus, it, too, must observe the equality guarantee of the state constitution.

A. The protections afforded by “civil unions” could not equal those afforded by marriage.

As discussed above, the tangible advantage that flows from the grant of the right to marry is not solely a function of the grant of benefits by the State – private entities, other state governments, and the federal government bestow hundreds of additional important benefits on couples who marry in Oregon, all of which are far from assured for unmarried couples. See supra at pp 28-30 (Argument on First, Second, and Third Assignments of Error, § III.B.2.). Moreover, as discussed above, a marriage confers a unique intangible advantage because only married couples express a level of commitment that is universally recognized as a commitment of the highest order and only married couples and their children enjoy a common respect for the integrity of their family unit. See supra at pp 30-33 (Argument on First, Second, and Third Assignments of Error, § III.C.). If the legislature were to shunt same-sex couples into “civil unions,” it would extend neither of these

¹¹ Significantly, the legislature has considered and rejected proposed legislation that would have expressly precluded marriages of same-sex couples. See, e.g., 1999 HJR 4, 70th Leg Assem, Reg Sess (Or 1999) (voted down in the Senate); 1999 HJR 29, 70th Leg Assem, Reg Sess (Or 1999) (tabled in the House).

significant advantages to same-sex couples.¹² In short, “civil unions” would be practically inferior to marriage.

In light of the fact that the trial court identified no constitutionally sufficient justification for the exclusion of same-sex couples from marriage, the disparity that would result if the legislature were to shunt same-sex couples into “civil unions” would not reflect “intrinsic differences” between same-sex and different-sex couples; rather, it would reflect only “assumptions about [their] relative social roles.” Hewitt, 294 Or at 49. Indeed, the disparity would be “palpably arbitrary.” City of Klamath Falls v. Winters, 289 Or 757, 776, 619 P2d 217 (1980), appeal dismissed, 451 US 964 (1981); see also Delgado v. Souders, 334 Or 122, 146, 46 P3d 729 (2002) (“Article I, section 20, prohibits ‘[h]aphazard’ or ‘standardless’ administration of laws.”) (quotation omitted). Thus, it would be unconstitutional.

B. Even if the protections afforded by “civil unions” could equal those afforded by marriage, shunting same-sex couples into “civil unions” would constitute impermissible segregation.

Although the trial court identified no constitutionally sufficient justification for the exclusion of same-sex couples from marriage, it expressly sanctioned “civil unions” as an alternative to marriage (see ER 437 at 11 (“[T]he court is not extending ORS Chapter 106 to same-sex couples’ right to marriage but to their right to benefits, and thus finding that alternative means should be provided to address this disparity.”) (emphasis added); ER 439 (“It is incumbent upon the legislature to evaluate the substantive rights afforded to married

¹² For example, the Connecticut Court of Appeals has held that Connecticut does not recognize the relationships of same-sex couples with Vermont “civil unions.” Rosengarten v. Downes, 802 A2d 170 (Conn Ct App 2002), appeal dismissed, 806 A2d 1066 (Conn 2002). At the same time, the Connecticut Attorney General has expressly left open whether Connecticut recognizes the relationships of same-sex couples with Massachusetts marriages. Letter from Attorney General Richard Blumenthal to Governor Mitt Romney (May 17, 2004) (<http://www.cslib.org/attygenl/press/2004/other/governorromneyletter.pdf>); see also Schuman, The Right to “Equal Privileges and Immunities:” A State’s Version of “Equal Protection,” supra at 230 (“‘Potential’ advantages, ‘whether or not they are advantageous in a particular instance,’ are sufficient.”).

couples and to provide similar access to same-sex domestic partners.”) (emphasis added)). This was error. Even if “civil unions” could extend all of the advantages of marriage to same-sex couples, they would nevertheless be unequal and therefore unconstitutional. The equality guarantee of the state constitution does not tolerate segregation for its own sake. A “separate but equal” institution is inherently unequal.

“[T]he right to equal treatment guaranteed by the Constitution is not co-extensive with any substantive rights to the benefits denied the party discriminated against.” Heckler v. Mathews, 465 US 728, 739 (1984). Indeed, the United States Supreme Court has long recognized that the Constitution proscribes “discrimination itself” against “those persons who are personally denied equal treatment solely because of their membership in a disfavored group” because such discrimination “stigmatiz[es] members of the disfavored group as ‘innately inferior’ and therefore less worthy participants in the political community” and thereby “cause[s] serious non-economic injuries.” Id. at 739-40 (quotation and footnote omitted). Such discrimination is inherently injurious, causing immeasurable dignity harm to members of the disfavored group. See Allen v. Wright, 468 US 737, 755 (1984) (“[T]he stigmatizing injury often caused by * * * discrimination * * * is one of the most serious consequences of discriminatory government action.”). Such discrimination not only diminishes the sense of self-worth of those persons who are denied equal treatment but also invites and justifies private discrimination against them. See Lawrence v. Texas, 123 S Ct 2472, 2482 (2003) (“When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and the private spheres.”); Strauder v. West Virginia, 100 US 303, 308 (1879) (“The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.”). It thereby denies them full participation

in civic life. Unequal treatment marking the members of a disfavored group with a badge of inferiority betrays the constitutional promise of equality no less than more tangible forms of discrimination.

The starkest examples of such betrayal are found in our nation's history of racial segregation. In Brown v. Board of Educ., 347 US 483 (1954), the United States Supreme Court recognized that the segregation of African-American students “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to be undone” and that “the impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the [African-American] group.” Id. at 494 (quotation omitted). In light of the profound detriment to African-American students occasioned by such governmental endorsement of inequality, the Court famously held that “separate educational facilities are inherently unequal” and therefore unconstitutional.¹³ Brown, 347 US at 495; see also Watson v. City of Memphis, 373 US 526, 538 (1963) (“The sufficiency of [African-American] facilities is beside the point; it is the segregation by race that is unconstitutional.”).

The constitutional concern with the psychological and social harm engendered by such invidious discrimination was first articulated in response to racial segregation, but the United States Supreme Court has long recognized that it is just as pressing where members of other disfavored groups are subjected to comparable inequalities. For example, the Court has long held that laws and policies that relegate women to a separate sphere because they are presumed to be “innately inferior” are unconstitutional. Mississippi Univ. for Women v. Hogan, 458 US 718, 725 (1982); see also Roberts v. United States Jaycees, 468 US 609, 625

¹³ This same concern about harm caused by stigma motivated Justice Harlan's passionate dissent from the Court's sanction of “separate but equal” institutions in the infamous case Plessy v. Ferguson, 163 US 537 (1896): “What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?” Id. at 560 (Harlan, J., dissenting).

(1984) (“[Gender discrimination] deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.”) (citations omitted). In United States v. Virginia, 518 US 515 (1996), the Court held that relegating women to a separate military academy would constitute impermissible segregation. In doing so, the Court emphasized that the proposed “parallel program” was “unequal in tangible and intangible facilities,” including “those qualities which are incapable of objective measurement but which make for greatness in a school, including * * * standing in the community, traditions and prestige.” Id. at 547-48, 554 (quotations omitted). It would therefore have “denie[d] to women, simply because they are women, full citizenship stature – equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.”¹⁴ Id. at 532 (citations omitted).

Harm caused by stigma also figured prominently in Lawrence. In striking down a law criminalizing same-sex intimate relationships, the United States Supreme Court emphasized the “stigma” imposed by the law, which “demeaned the lives of homosexual persons” and denied them “dignity as free persons.” Lawrence, 123 S Ct at 2478, 2482. In doing so, the Court confirmed that, where lesbian and gay people constitute the disfavored class marked with the badge of inferiority that inhibits full participation in civic life, the Constitution makes no exception.

Oregon case law similarly recognizes that “separate but equal” institutions are inherently unequal. Oregon courts have made clear that “separate but equal” public accommodations for African-Americans, King v. Greyhound Lines, Inc., 61 Or App 197,

¹⁴ Significantly, the Court fashioned a remedy by reference to the following principle: “A remedial decree, this Court has said, must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in “the position they would have occupied in the absence of [discrimination].” * * *

* A proper remedy for an unconstitutional exclusion, we have explained, aims to ‘eliminate [so far as possible] the discriminatory effects of the past’ and to ‘bar like discrimination in the future.’” Id. at 547 (quotations omitted). Applying this principle, the Court held that integration was the appropriate remedy, noting that “[t]here is no reason to believe that the admission of women capable of all the activities required of VMI cadets would destroy the Institute rather than enhance its capacity to serve the ‘more perfect Union.’” Id. at 558.

656 P2d 349 (1982), and “parallel” institutions for women, Lahmann v. Grand Aerie of Fraternal Order of Eagles, 180 Or App 420, 43 P3d 1130, rev denied, 334 Or 631, 54 P3d 1041 (2002), are unacceptable. The case law does not allow for any principled exception where “separate but equal” institutions for lesbian and gay people are concerned. See also State v. Linde, 179 Or App 553, 556, 41 P3d 440 (2002) (recognizing “stigma” as a type of injury).

Relegating same-sex couples to “civil unions” would contravene the principle that “separate but equal” is not equal. As the Massachusetts Supreme Judicial Court explained, the exclusion of same-sex couples from marriage “confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently * * * inferior to opposite-sex relationships and are not worthy of respect.” Goodridge, 798 NE2d at 962. Shunting same-sex couples into “civil unions” “would have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits.” In re Opinions of the Justices to the Senate, 802 NE2d 565, 570 (Mass 2004). Indeed, “[t]he dissimilitude between the terms ‘civil marriage’ and ‘civil union’ is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status.” Id. In light of “[t]he history of our nation [which] has demonstrated that separate is seldom, if ever, equal,” the Court held that “civil unions” for same-sex couples are unacceptable. Id. at 569 (footnote omitted).

The British Columbia Court of Appeal similarly observed that the exclusion of same-sex couples from marriage “conveys the ominous message that they are unworthy of marriage.” Barbeau v. Attorney General, 2003 BCCA 251 at ¶ 130 (BC Ct App 2003). Accordingly, the Court held that “[a]ny other form of recognition for same-sex relationships, including the parallel institution of [registered domestic partnerships] falls short of true equality. This Court should not be asked to grant a remedy which makes same-sex couples ‘almost equal,’ or to leave it to governments to choose amongst less-than-equal solutions.” Id. at ¶ 156. The Ontario Court of Appeal likewise concluded that shunting same-sex couples into an alternative institution would be unconstitutional, noting that the

exclusion of same-sex couples from marriage “perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships” and that this “offends the dignity of persons in same-sex relationships.” Halpern v. Attorney General, 172 OAC 276 ¶ 107 (2003) (Ontario Court of Appeal 2003).

This Court should not resurrect the “separate but equal” fallacy that was repudiated fifty years ago. Rather, it should be guided by the following principle:

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

Railway Express Agency v. New York, 336 US 106, 112 (1949) (Jackson, J., concurring); see also Cruzan v. Director, Mo. Dep’t of Health, 497 US 261, 300 (1990) (Scalia, J., concurring) (“[T]he Equal Protection Clause * * * requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.”). Constitutional law requires the Court to extend the right to marry to same-sex couples.¹⁵

¹⁵ The fact that some people disapprove of marriage for same-sex couples does not justify “civil unions” for same-sex couples. The United States Supreme Court has long recognized that governmental discrimination is especially pernicious where it accommodates societal prejudice. Palmore v. Sidoti, 466 US 429, 433 (1984) (“The 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.”); see also City of Cleburne v. Cleburne Living Center, Inc., 473 US 432, 448 (1985) (“[T]he [government] may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic”); Watson, 373 US at 535 (“[C]onstitutional rights may not be denied simply because of hostility to their assertion or exercise.”) (citations omitted).

IV. Question c – If Oregon marriage laws improperly grant privileges or immunities to certain persons, what is the appropriate remedy and what characteristics, if any, would define the persons to whom the State of Oregon must extend the privileges or immunities of marriage “upon the same terms?”

As discussed above, the only permissible and appropriate way to remedy the Article I, section 20 violation at issue is to allow same-sex and different-sex couples to marry on equal terms. See supra at pp 40-49 (Argument on Fourth, Fifth, and Sixth Assignments of Error, §§ II, III). In other words, the State must extend the right to marry to same-sex couples who are otherwise qualified to marry. Their marriage must be properly licensed and solemnized. See ORS 106.010, 106.041. Neither may have a living spouse and, with limited exception, they may not be first cousins or any nearer of kin to each other. See ORS 106.020 (listing void marriages). Neither may be incapable for want of legal age or sufficient understanding, and they must consent freely to marry each other. See ORS 106.030 (listing voidable marriages). In sum, the State must extend the right to marry to couples whom it would allow to marry but for the fact that they are same-sex couples.

In allowing same-sex and different-sex couples to marry on equal terms, the State need not extend the right to marry to people whom it would not allow to marry for other reasons. Plaintiffs do not – and indeed cannot – seek a ruling in this case with respect to people whose marriages are not properly licensed or solemnized, who have living spouses, who are first cousins or any nearer of kin to their prospective spouses, who are incapable for want of legal age or sufficient understanding, or who do not consent freely to marry their prospective spouses. Whether any such people would challenge any such restriction – and, more to the point, whether they would succeed in any such challenge – is entirely speculative at best. The ruling in this case suggests neither that such people would be deemed members of a suspect class or even members of a true class, nor that the proffered justification for any such restriction would be deemed constitutionally insufficient. In short, questions concerning unlicensed, unsolemnized, polygamous, incestuous, underage, incompetent, and nonconsensual marriages are not before the Court. See TVKO v. Howland, 335 Or 527, 537, 73 P3d 905 (2003) (“Deciding hypothetical cases is not a

judicial function. Neither can courts, in the absence of constitutional authority, render advisory opinions. A declaratory judgment has the force and effect of an adjudication. Hence, to invoke this extraordinary statutory relief there must be an actual controversy existing between parties. Particularly should this be so when a court is asked to declare that a co-ordinate branch of government has exceeded its power by passing a statute in violation of the fundamental or basic law. No court should declare an act unconstitutional unless it is necessary to do so.”) (quotation and emphasis omitted).

For the foregoing reasons, the only permissible and appropriate way to remedy the Article I, section 20 violation at issue is to allow same-sex and different-sex couples to marry on equal terms.¹⁶

CONCLUSION

The judgment in favor of plaintiffs and intervenor-plaintiff on the First Claim for Relief should be modified to declare that in barring same-sex couples from the right to marry, ORS 106.010 *et seq.* violate Article I, section 20 of the Oregon constitution.

The remedy for such violation also should be modified. The Court should vacate the requirements that (a) the legislature have a 90-day period in which to pass legislation addressing the issue of the rights of same-sex couples during its next session and (b) Multnomah County stop issuing marriage licenses to same-sex couples until the end of that period. The Court should instead extend the right to marry to same-sex couples.

¹⁶ Because Question d – Do Oregon’s marriage laws deny equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution? – implicates what plaintiffs anticipate to be the State’s and intervenor-defendants’ assignments of error on appeal, plaintiffs will answer Question d in the course of responding to the State’s and intervenor-defendants’ briefs on appeal.

The judgment should be affirmed as modified.

DATED this 20th day of September, 2004.

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Cross-Appellants

IN THE SUPREME COURT OF THE STATE OF OREGON

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

Plaintiffs-Respondents, Cross-Appellants,

and

MULTNOMAH COUNTY,

Intervenor-Plaintiff-Respondent, Cross-Appellant,

v.

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

Defendants-Appellants, Cross-Respondents,

and

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

Intervenors-Defendants-Appellants,
Cross-Respondents.

Multnomah County Circuit
Court Case No. 0403-03057

SC S51612

APPENDIX

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

TEXT OF STATUTES

“ORS 106.010. Marriage contract; age of parties

Marriage is a civil contract entered into in person by males at least 17 years of age and females at least 17 years of age, who are otherwise capable, and solemnized in accordance with ORS 106.150.”

“ORS 106.020. Prohibited marriages

The following marriages are prohibited; and, if solemnized within this state, are absolutely void:

(1) When either party thereto had a wife or husband living at the time of such marriage.

(2) When the parties thereto are first cousins or any nearer of kin to each other, whether of the whole or half blood, whether by blood or adoption, computing by the rules of the civil law, except that when the parties are first cousins by adoption only, the marriage is not prohibited or void.”

“ORS 106.030. Voidable marriages

When either party to a marriage is incapable of making such contract or consenting thereto for want of legal age or sufficient understanding, or when the consent of either party is obtained by force or fraud, such marriage shall be void from the time it is so declared by judgment of a court having jurisdiction thereof.”

“ORS 106.041. Marriage license required; application; contents

(1) All persons wishing to enter into a marriage contract shall obtain a license therefor from the county clerk upon application, directed to any person or religious organization or congregation authorized by ORS 106.120 to solemnize marriages, and authorizing such person, organization or congregation to join together as husband and wife the persons named in the license.

(2) No license shall be issued by the county clerk until the provisions of this section, ORS 106.050 and 106.060 are complied with.

(3) Each applicant for marriage license shall file with the county clerk from whom the license is sought a written application for the license on forms provided for this purpose by the Department of Human Services which shall include the applicant's Social Security number, certain statistical data regarding age, place of birth, sex, occupation,

residence and previous marital status of the applicant and, if required, the name and address of the affiant under ORS 106.050.

(4) * * * .”

“ORS 106.050. Proof of age; when affidavit required

(1) The county clerk may accept any reasonable proof of the applicant's age satisfactory to the clerk. * * * .

(2) If an applicant for a marriage license is less than 18 years of age, the applicant must file with the county clerk an affidavit of some person other than either of the parties seeking the license showing the facts other than age necessary to be shown under ORS 106.060 in the particular case, except the consent of the parent or guardian required by ORS 106.060 shall not be part of the affidavit. The affidavit is sufficient authority to the clerk, so far as the facts stated therein, for issuing the license.”

“ORS 106.060. Consent of parent or guardian if party under 18

A marriage license shall not be issued without the written consent of the parent or guardian, if any, of an applicant who is less than 18 years of age, nor in any case unless the parties are each of an age, as provided in ORS 106.010, capable of contracting marriage. If either party under 18 years of age has no parent or guardian resident within this state and either party has resided within the county in which application is made for the six months immediately preceding the application, the license may issue, if otherwise proper, without the consent of the nonresident parent or guardian.”

“ORS 106.150. Form of solemnization; solemnization pursuant to religious ritual or form

(1) In the solemnization of a marriage no particular form is required except that the parties thereto shall assent or declare in the presence of the clergyperson, county clerk or judicial officer solemnizing the marriage and in the presence of at least two witnesses, that they take each other to be husband and wife.

(2) All marriages, to which there are no legal impediments, solemnized before or in any religious organization or congregation according to the established ritual or form commonly practiced therein, are valid. * * * In such case, the person presiding or officiating in such religious organization or congregation shall make and deliver to the county clerk who issued the marriage license the certificate described in ORS 106.170.”

**PARTIAL LIST OF LEGAL RIGHTS, RESPONSIBILITIES, BENEFITS,
OBLIGATIONS, AND PROTECTIONS OF MARRIAGE UNDER OREGON LAW**

Right to make health care decisions for spouse. ORS 127.550.

Right to sue for wrongful death if spouse negligently killed. ORS 30.020.

Right to consent or refuse consent to an autopsy of spouse's body. ORS 97.082.

Right to be buried in cemetery plot with spouse. ORS 97.570.

Right to inherit cemetery plot from spouse. ORS 97.600.

Right to make arrangements for funeral or dispose of deceased spouse's body.
ORS 97.130.

Right to donate spouse's body or organs after death. ORS 97.954.

Right to inherit deceased spouse's estate as next of kin. ORS 112.025 - 112.035.

Prior will is automatically revoked upon remarrying. ORS 112.305.

Right to be notified in a public notice before spouse's will is destroyed by an
attorney. ORS 112.820.

Preference to be appointed personal representative of deceased spouse's estate.
ORS 113.085.

Right to continue to live in the deceased spouse's home for one year after
spouse's death. ORS 114.005.

Right to notice in matters involving deceased spouse's estate. ORS 116.013.

Right to support from deceased spouse's estate. ORS 115.025.

Right to demand one-quarter share of spouse's estate if will leaves less than that.
ORS 114.105.

Right to notice that a conservatorship or guardianship is being filed against spouse
unless currently living together. ORS 125.060.

Receives highest preference by court to be appointed as guardian or conservator
for incapacitated spouse. ORS 125.060.

Right to private visits in long-term care facility. ORS 441.605(14).

Right to share a room in long-term care facility. ORS 441.605(14).

Right to file joint tax returns. ORS 316.367.

Right to maintain deceased veteran's property tax exemption. ORS 307.250(c).

Right to require suppliers to repurchase deceased retailer's inventory. ORS 646.435.

Right as "authorized driver" on spouse's rental car. ORS 646.857, 646.859.

Right to transfer a franchise or dealership to spouse. ORS 650.162.

Right to be a designated successor in deceased spouse's retail dealership. ORS 650.380.

Right to spouse's Oregon Medical Insurance Pool coverage. ORS 735.615, 735.720.

Automotive personal injury protection benefits for spouse. ORS 742.504.

Right to coverage under spouse's health benefit plan. ORS 743.405.

Right to obtain life insurance on spouse. ORS 743.027.

Uninsured motorist insurance coverage for spouse. ORS 742.504.

Right to spousal cash surrender valuation of term life insurance on spouse. ORS 743.210.

Right to coverage under deceased spouse's group health insurance plan. ORS 743.600.

Protection for spouse's home in bankruptcy. ORS 18.395.

Private conversations with spouse are protected in court. ORS 40.255.

Conversations with a marriage counselor are protected in court. ORS 40.262.

Education on fetal alcohol syndrome. ORS 106.081.

Court-ordered counseling upon divorce. ORS 107.510 - 107.610.

Court-ordered life insurance upon divorce. ORS 107.820.

Spouse responsible for family expenses. ORS 108.040.

Presumption of parenthood and parental rights to children of marriage. ORS 109.070.

Not required to testify against spouse in a court case. ORS 136.655.

Not required to surrender home to satisfy lien for spouse's unpaid medical treatment in long-term care facility. ORS 18.395.

Right to sue long-term care facility that fails to discharge lien in a timely manner once overdue charges for spouse are paid. ORS 87.539.

Right to maintain a dwelling on exclusive farm use (EFU) property in certain counties if occupied by farm operator's spouse. ORS 215.213.

Right to maintain a dwelling on EFU property in other counties if occupied by farm operator's spouse. ORS 215.283.

Right to examine or get copy of autopsy or medical examiner's report as to deceased spouse. ORS 146.035(5).

Access to spouse's death record. ORS 432.124.

Right of survivorship for jointly owned real property. ORS 91.030.

Right to loss of support payments from the state crime victims' compensation fund if spouse killed in a crime. ORS 147.035.

Right to family therapy from state crime victims' compensation fund in case of child sexual abuse. ORS 147.035(1a).

Right to crisis counseling through state crime victims' compensation fund if spouse is a victim of international terrorism. ORS 147.035(1a).

Right to work on spouse's farm for less than minimum wage. ORS 653.020.

Right to sue for spouse's death that was a result of an unsafe workplace. ORS 654.325.

Right to workers' compensation benefits if spouse disabled or killed on the job. ORS 656.204.

Right to sue non-employer for negligently killing spouse on the job. ORS 656.578.

Right to special retirement benefit after death of spouse who was a police officer or a firefighter. ORS 238.405.

Right to receive deceased spouse's unemployment benefits. ORS 657.255.

Not required to comply with farm labor contractor regulations when working only with spouse. ORS 658.405(4)(d).

Protection through emergency court orders in case of divorce. ORS 107.065.

Dividing retirement plans upon divorce. ORS 107.105(1f).

Right to receive spouse's judicial retirement pension. ORS 238.565(2).

Right to make retirement selection from deceased spouse's public employee retirement benefit. ORS 238.400.

Right to spouse's pre-Medicare insurance benefit provided by public retirement system. ORS 238.415.

Right to spouse's Medicare supplemental insurance paid for by public retirement system. ORS 238.420.

Right to approve spouse's public employee retirement choices. ORS 238.462.

Right to special pre-retirement public employee retirement benefit after death of spouse who was a judge. ORS 238.565(2).

Right for spouse of disabled or killed public safety officer to Public Safety Memorial Fund benefits. ORS 243.956.

Right to receive spouse's public employment benefits. ORS 243.291(1).

Right to retired spouse's health insurance offered by local government employers. ORS 243.303.

CERTIFICATE OF SERVICE AND FILING

I hereby certify that I served the foregoing **PLAINTIFFS-RESPONDENTS AND CROSS-APPELLANTS' OPENING BRIEF ON CROSS-APPEAL AND APPENDIX** on September 20, 2004, by sending VIA U.S. FIRST CLASS MAIL two true, exact and full copies thereof addressed to:

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I further certify that I filed the foregoing **PLAINTIFFS-RESPONDENTS AND CROSS-APPELLANTS' OPENING BRIEF ON CROSS-APPEAL AND APPENDIX** on September 20, 2004, by sending VIA U.S. FIRST CLASS MAIL an original and 15 copies addressed to:

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