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October 14, 2004

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State Court Administrator
Records Section
Supreme Court Building
1163 State Street
Salem, OR 97301

Re: Li v. State of Oregon Amicus Curiae
SC S51612

Dear Ms. Click:

Enclosed please find the original and one copy of the Application of Vermont Freedom to Marry Task Force et al. to Appear as Amici Curiae, and the original and 20 copies of the Brief of Amici Curiae Vermont Freedom to Marry Task Force et al. for the court's consideration.

Thank you.

Very truly yours,

JOHNSON RENSHAW & LECHMAN-SU PC


Mark Johnson

MJ:sp

X:\MAJ\Basic Rights 9560-00\07 LI\Appeal\SCA 10-14-04.wpd

Enclosure

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IN THE SUPREME COURT OF THE STATE OF OREGON

MARY LI and REBECCA KENNEDY; STEPHEN KNOX,) Multnomah County Circuit
M.D., and ERIC WARSHAW, M.D.; KELLY BURKE and) Court No. 0403-03057
DOLORES DOYLE; DONNA POTTER and PAMELA)
MOEN; DOMINICK VETRI and DOUGLAS DEWITT;) CA A124877
SALLY SHEKLOW and ENID LEFTON; IRENE)
FARRERA and NINA KORICAN; WALTER FRANKEL) SC S51612
and CURTIS KIEFER; JULIE WILLIAMS and COLEEN)
BELISLE; BASIC RIGHTS OREGON; and AMERICAN)
CIVIL LIBERTIES UNION OF OREGON,) APPLICATION OF
) VERMONT FREEDOM TO
Plaintiffs-Respondents, Cross-Appellants,) MARRY TASK FORCE ET
) AL. TO APPEAR AS AMICI
and) CURIAE
)
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,)
)
vs.)
)
DEFENSE OF MARRIAGE COALITION, CECIL)
MICHAEL THOMAS, NANCY JO THOMAS,)
DAN MATES, and DICK JORDAN OSBORNE,)
)
)
Intervenors-Defendants-Appellants,)
Cross-Respondents.)

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Vermont Freedom to Marry Task Force; Vermonters for Civil Unions Legislative Defense Fund; Pride at Work, AFL-CIO; Parents, Families and Friends of Lesbians and Gays (PFLAG); National Gay and Lesbian Task Force; The National Lesbian and Gay Law Association; Lambda Legal Defense and Education Fund, Inc. (Lambda Legal); National Black Justice Coalition; Heterosexuals for the Right of Gays and Lesbians to Marry; Human Rights Campaign; Human Rights Campaign Foundation; Gay and Lesbian Advocates and Defenders (GLAD); Freedom to Marry; Family Pride Coalition; and Asian Equality respectfully petition the court for leave to appear as amici curiae. If allowed to appear, proposed amici will present a position as to the correct rule of law to be applied in this case. The interests of proposed amici in this case are summarized as follows:

Vermont Freedom to Marry Task Force:

The Vermont Freedom to Marry Task Force (VFMTF) represents a coalition of individuals and organizations in Vermont who support the freedom for same-sex couples to marry. VFMTF advocates full inclusion in marriage for same-sex couples. We supported the passage of Vermont's civil union law as a first step toward that goal. VFMTF continues to

educate Vermonters about the need for full inclusion in marriage for same-sex couples. VFMTF is uniquely positioned to offer insight into the ways in which Vermont's civil union law, while a step forward for same-sex couples in Vermont, falls short of the constitutional requirements of full equality and inclusion.

Vermonters for Civil Unions Legislative Defense Fund:

Vermonters for Civil Unions Legislative Defense Fund (VCULDF) is a lobbying organization that works to protect Vermont's civil union law against repeal or erosion, and that supports the freedom to marry for same-sex couples. VCULDF was formerly named "Vermont Freedom to Marry Action Committee" (VFMAC), and, along with VFMTF (above), we lobbied the Vermont legislature during the 2000 legislative session, urging that body to pass legislation to include same-sex couples in marriage.

Faced with assaults on the civil union law that passed during that session, the Vermont Freedom to Marry Action Committee changed its name to Vermonters for Civil Unions Legislative Defense Fund. We have focused during the past three legislative sessions on preserving the advances for same-sex couples that were embodied in the civil union law. VCULDF remains committed, however, to full equality for same-sex couples through inclusion in marriage. VCULDF was integrally involved in the legislative process that led to the enactment of the civil union law, and we observed firsthand the political considerations underlying the legislation.

PridePlanners™:

PridePlanners™ is a national organization of financial planners serving the gay and lesbian community. We provide marketing, educational, and networking opportunities to financial professionals who help gay and lesbian individuals and families achieve their life goals.

Pride at Work, AFL-CIO:

Pride at Work, AFL-CIO, is the official constituency group of the AFL-CIO for lesbian, gay, bisexual, and transgendered (LGBT) workers. We work to educate the labor community about issues of importance to the LGBT community, and we also work to educate the LGBT community around the critical necessity of union representation at work.

Parents, Families, and Friends of Lesbians and Gays (PFLAG):

Parents, Families and Friends of Lesbians and Gays (PFLAG) is a national non-profit organization with over 250,000 members and supporters in all 50 states and the Commonwealth of Puerto Rico. We promote the health and well-being of gay, lesbian, bisexual, and transgendered persons, and their families and friends, through: support, to cope with an adverse society; education, to enlighten an ill-informed public; and advocacy, to end discrimination and to secure equal civil rights.

As a family-based organization, we support marriage equality for same-sex couples. To discriminate against same-sex couples by denying them the right to marry only serves to hurt

families and children. Same-sex committed relationships deserve to be honored with the same rights and responsibilities that are granted to heterosexual couples.

The National Lesbian and Gay Law Association:

The National Lesbian and Gay Law Association (NLGLA), founded in 1988, is the national association of lesbian, gay, bisexual, transgendered, and allied lawyers, judges, and other legal professionals; law students; activists; and affiliated LGBT legal organizations. NLGLA works to promote justice in and through the legal profession for the LGBT community by supporting affiliated political and legal advocacy efforts, disseminating public information, and hosting the only annual national LGBT legal issues conference. Since its inception, NLGLA has advocated equal rights for all people, including the right of same-sex couples to marry.

National Gay and Lesbian Task Force:

The National Gay and Lesbian Task Force, founded in 1973, is the oldest national lesbian, gay, bisexual and transgender civil rights and advocacy organization. The Task Force works to build the grassroots political strength of the LGBT community through research and data analysis, by training state and local activists and leaders, and by organizing broad-based campaigns to advance pro-LGBT legislation and to defeat anti-LGBT referenda. As part of a broader social justice movement, the Task Force works to create a world where all people may fully participate in society, including the ability of same-sex couples to participate in the institution of marriage.

National Black Justice Coalition:

The National Black Justice Coalition is an ad hoc coalition of black lesbian, gay, bisexual, and transgendered leaders who have come together to fight against discrimination in our communities. The goal of the organization in 2004 is to build black support for marriage equality and to educate the community on the dangers of the proposal to amend the United States constitution to discriminate against gays and lesbians.

Lambda Legal Defense and Education Fund, Inc. (Lambda Legal):

With its headquarters in New York and regional offices in Los Angeles, Chicago, Atlanta and Dallas, Lambda Legal Defense and Education Fund, Inc. (Lambda Legal), is the nation's oldest and largest non-profit legal advocate working to secure full civil rights for lesbians, gay men, bisexual and transgendered people, and those living with HIV. Lambda Legal long has been committed to winning equal marriage rights for same-sex couples because exclusion from civil marriage denies these couples and their family members both critical legal protections and equal dignity in our society. Since *Baehr v. Lewin*, Lambda Legal's groundbreaking litigation in Hawaii, began the national discussion of the unconstitutionality of civil marriage discrimination against same-sex couples, Lambda Legal has served as party or amici counsel in numerous marriage equality cases. Presently, Lambda Legal serves as counsel for same-sex couples in *Lewis v. Harris* (in New Jersey) and *Hernandez v. Robles* (New York), and as co-counsel for couples in *Anderson v. Sims* (Washington state) and *Woo v. Lockyer* (California). In addition, Lambda Legal maintains

extensive educational programs to help policymakers and the public understand the tangible and intangible harms to couples and their children of being denied the equal freedom to marry.

Human Rights Campaign:

Human Rights Campaign (HRC), the largest national lesbian, gay, bisexual, and transgender political organization, envisions an America where gay, lesbian, bisexual, and transgendered people are ensured of their basic equal rights, and can be open, honest and safe at home, at work, and in the community. Among those basic rights is equal access for same-sex couples to marriage and its related protections, rights, benefits, and responsibilities. HRC has 600,000 members, including more than 35,000 in Oregon, all committed to making this vision of equality a reality.

Human Rights Campaign Foundation:

Human Rights Campaign Foundation (HRCF) is the educational arm of the Human Rights Campaign. The foundation develops web-based resources and print publications on the many issues facing lesbian, gay, bisexual, and transgendered individuals. One foundation program, FamilyNet, is the most comprehensive and up-to-date resource for and about lesbian, gay, bisexual, and transgendered families. It provides legal and policy information about family law, including marriage and relationship recognition, as well as public education in those areas. FamilyNet provides valuable information to a broad constituency, including over 10,000 people who subscribe to a bi-weekly email newsletter on the latest developments affecting lesbian, gay,

bisexual, and transgendered families; and tens of thousands more who use the FamilyNet area of the combined HRC/HRCF website (www.hrc.org) to get critical information about family issues.

Heterosexuals for the Right of Gays and Lesbians to Marry:

Heterosexuals for the Right of Gays and Lesbians to Marry (HGLM), based in Eugene, is an organization of heterosexual people who have acquired the privileges and shouldered the burdens of marriage, or who intend to do so in the future. We believe that the legal right to marry, traditionally reserved to heterosexual people, must be extended to all, without regard to sexual orientation or the sex of either spouse.

Gay and Lesbian Advocates and Defenders (GLAD):

Founded in 1978, Gay & Lesbian Advocates & Defenders (GLAD) is New England's leading legal rights organization dedicated to ending discrimination based on sexual orientation, HIV status, and gender identity and expression. GLAD has a long history of working to end government discrimination against same-sex couples. Among its other efforts, GLAD was counsel in *Goodridge v. Department of Public Health*, in which the Supreme Judicial Court of Massachusetts ruled that excluding gay and lesbian couples from marriage was unconstitutional. GLAD also served as co-counsel in *Baker v. State of Vermont*, the Vermont Supreme Court's case holding that excluding gay and lesbian couples from the protections of marriage violated the state constitution. The Vermont legislature created civil unions in response to *Baker*.

Freedom to Marry:

Freedom to Marry is the gay and non-gay partnership working for marriage equality nationwide. Founded in 2003 and based in New York, Freedom to Marry brings together organizations -- national and local, non-gay and gay, secular and religious -- doing their part to end discrimination in marriage and to assure equal protections and responsibilities for committed same-sex couples and their loved ones.

Family Pride Coalition:

The Family Pride Coalition is the only national not-for-profit organization exclusively dedicated to securing equality for lesbian, gay, bisexual, and transgendered parents and their families.

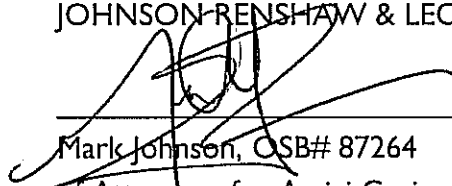
Asian Equality:

Asian Equality (formerly APACE) recognizes the historical legacy of marriage discrimination in the United States and its profound impact on Asian Pacific American (APA) families. Through community education and coalition building, we seek to empower our APA communities to challenge this legacy and to confront present-day marriage discrimination against

same-sex couples. In doing so, we want to affirm the lesbian, gay, bisexual, and transgender members of our communities and acknowledge the enriching presence of their love and lives.

DATED this 14 day of OCT, 2004.

JOHNSON RENSHAW & LECHMAN-SU PC



Mark Johnson, OSB# 87264
of Attorneys for Amici Curiae

Vermont Freedom to Marry Task Force et al.

CERTIFICATE OF SERVICE

I hereby certify that I filed the original and 1 copies of the APPLICATION OF VERMONT FREEDOM TO MARRY TASK FORCE ET AL. TO APPEAR AS AMICI CURIAE by regular first class mail on the following:

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 Records Section
 Supreme Court Building
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I further certify that I served 1 copies of the foregoing document(s) upon:

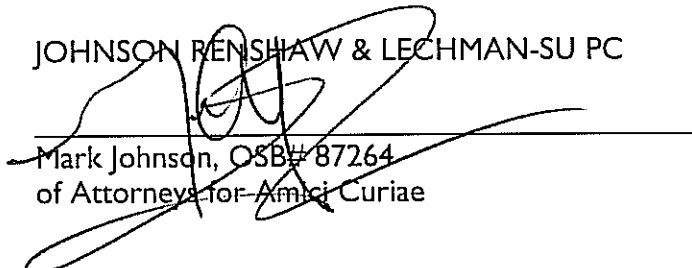
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by mailing in a sealed, first-class postage prepaid envelope, addressed to said persons' addresses as shown above and deposited in the U.S. Mail at Portland, Oregon on the date set forth below.

DATED this 14 day of OCT, 2004.

JOHNSON RENSILAW & LECHMAN-SU PC


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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,

vs.

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

Intervenors-Defendants-Appellants,
Cross-Respondents.

) Multnomah County Circuit
) Court No. 0403-03057

) CA A124877

) SC S51612

BRIEF OF AMICI CURIAE
VERMONT FREEDOM TO MARRY TASK FORCE; VERMONTERS FOR
CIVIL UNIONS LEGISLATIVE DEFENSE FUND; PRIDE AT WORK, AFL-CIO; PARENTS,
FAMILIES AND FRIENDS OF LESBIANS AND GAYS (PFLAG); NATIONAL GAY AND
LESBIAN TASK FORCE; THE NATIONAL LESBIAN AND GAY LAW ASSOCIATION;
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. (LAMBDA LEGAL); NATIONAL
BLACK JUSTICE COALITION; HETEROSEXUALS FOR THE RIGHT OF GAYS AND
LESBIANS TO MARRY; HUMAN RIGHTS CAMPAIGN; HUMAN RIGHTS CAMPAIGN
FOUNDATION; GAY AND LESBIAN ADVOCATES AND DEFENDERS (GLAD); FREEDOM
TO MARRY; FAMILY PRIDE COALITION; and ASIAN EQUALITY

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

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Defense of Marriage Coalition, et al.

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available at <http://www.state.vt.us/tax/faq.htm#CIVIL>. 28

INTEREST OF AMICI CURIAE

Vermont Freedom to Marry Task Force:

The Vermont Freedom to Marry Task Force (VFMTF) represents a coalition of individuals and organizations in Vermont who support the freedom for same-sex couples to marry. VFMTF advocates full inclusion in marriage for same-sex couples. We supported the passage of Vermont's civil union law as a first step toward that goal. VFMTF continues to educate Vermonters about the need for full inclusion in marriage for same-sex couples. VFMTF is uniquely positioned to offer insight into the ways in which Vermont's civil union law, while a step forward for same-sex couples in Vermont, falls short of the constitutional requirements of full equality and inclusion.

Vermonters for Civil Unions Legislative Defense Fund:

Vermonters for Civil Unions Legislative Defense Fund (VCULDF) is a lobbying organization that works to protect Vermont's civil union law against repeal or erosion, and that supports the freedom to marry for same-sex couples. VCULDF was formerly named "Vermont Freedom to Marry Action Committee" (VFMAC), and, along with VFMTF (above), we lobbied the Vermont legislature during the 2000 legislative session, urging that body to pass legislation to include same-sex couples in marriage.

*This brief was prepared with the assistance of Leslie Harris, Michael Moffitt, Susan M. Murray, and Beth Robinson. Ms. Harris and Mr. Moffitt are professors at the University of Oregon School of Law. Ms. Murray and Ms. Robinson are partners in the Vermont law firm of Langrock Sperry & Woll and are counsel for the plaintiffs in *Baker v. State*, 170 Vt 194, 744 A2d 864 (1999).

Faced with assaults on the civil union law that passed during that session, the Vermont Freedom to Marry Action Committee changed its name to Vermonters for Civil Unions Legislative Defense Fund. We have focused during the past three legislative sessions on preserving the advances for same-sex couples that were embodied in the civil union law. VCULDF remains committed, however, to full equality for same-sex couples through inclusion in marriage. VCULDF was integrally involved in the legislative process that led to the enactment of the civil union law, and we observed firsthand the political considerations underlying the legislation.

PridePlanners™:

PridePlanners™ is a national organization of financial planners serving the gay and lesbian community. We provide marketing, educational, and networking opportunities to financial professionals who help gay and lesbian individuals and families achieve their life goals.

Pride at Work, AFL-CIO:

Pride at Work, AFL-CIO, is the official constituency group of the AFL-CIO for lesbian, gay, bisexual, and transgendered (LGBT) workers. We work to educate the labor community about issues of importance to the LGBT community, and we also work to educate the LGBT community around the critical necessity of union representation at work.

Parents, Families, and Friends of Lesbians and Gays:

Parents, Families and Friends of Lesbians and Gays (PFLAG) is a national non-profit organization with over 250,000 members and supporters in all 50 states and the Commonwealth of Puerto Rico. We promote the health and well-being of gay, lesbian, bisexual, and transgendered persons, and their families and friends, through: support, to cope with an adverse society; education, to enlighten an ill-informed public; and advocacy, to end discrimination and to secure equal civil rights.

As a family-based organization, we support marriage equality for same-sex couples. To discriminate against same-sex couples by denying them the right to marry only serves to hurt families and children. Same-sex committed relationships deserve to be honored with the same rights and responsibilities that are granted to heterosexual couples.

National Gay and Lesbian Task Force:

The National Gay and Lesbian Task Force, founded in 1973, is the oldest national lesbian, gay, bisexual and transgender civil rights and advocacy organization. The Task Force works to build the grassroots political strength of the LGBT community through research and data analysis, by training state and local activists and leaders, and by organizing broad-based campaigns to advance pro-LGBT legislation and to defeat anti-LGBT referenda. As part of a broader social justice movement, the Task Force works to create a world where all people may fully participate in society, including the ability of same-sex couples to participate in the institution of marriage.

The National Lesbian and Gay Law Association:

The National Lesbian and Gay Law Association (NLGLA), founded in 1988, is the national association of lesbian, gay, bisexual, transgendered, and allied lawyers, judges, and other legal professionals; law students; activists; and affiliated LGBT legal organizations.

NLGLA works to promote justice in and through the legal profession for the LGBT community by supporting affiliated political and legal advocacy efforts, disseminating public information, and hosting the only annual national LGBT legal issues conference. Since its inception, NLGLA has advocated equal rights for all people, including the right of same-sex couples to marry.

National Black Justice Coalition:

The National Black Justice Coalition is an ad hoc coalition of black lesbian, gay, bisexual, and transgendered leaders who have come together to fight against discrimination in our communities. The goal of the organization in 2004 is to build black support for marriage equality and to educate the community on the dangers of the proposal to amend the United States constitution to discriminate against gays and lesbians.

Lambda Legal Defense and Education Fund, Inc. (Lambda Legal):

With its headquarters in New York and regional offices in Los Angeles, Chicago, Atlanta and Dallas, Lambda Legal Defense and Education Fund, Inc. (Lambda Legal), is the nation's oldest and largest non-profit legal advocate working to secure full civil rights for lesbians, gay men, bisexual and transgendered people, and those living with HIV. Lambda

Legal long has been committed to winning equal marriage rights for same-sex couples because exclusion from civil marriage denies these couples and their family members both critical legal protections and equal dignity in our society. Since *Baehr v. Lewin*, Lambda Legal's groundbreaking litigation in Hawaii, began the national discussion of the unconstitutionality of civil marriage discrimination against same-sex couples, Lambda Legal has served as party or amici counsel in numerous marriage equality cases. Presently, Lambda Legal serves as counsel for same-sex couples in *Lewis v. Harris* (in New Jersey) and *Hernandez v. Robles* (New York), and as co-counsel for couples in *Anderson v. Sims* (Washington state) and *Woo v. Lockyer* (California). In addition, Lambda Legal maintains extensive educational programs to help policymakers and the public understand the tangible and intangible harms to couples and their children of being denied the equal freedom to marry.

Human Rights Campaign:

Human Rights Campaign (HRC), the largest national lesbian, gay, bisexual, and transgender political organization, envisions an America where gay, lesbian, bisexual, and transgendered people are ensured of their basic equal rights, and can be open, honest and safe at home, at work, and in the community. Among those basic rights is equal access for same-sex couples to marriage and its related protections, rights, benefits, and responsibilities. HRC has 600,000 members, including more than 35,000 in Oregon, all committed to making this vision of equality a reality.

Human Rights Campaign Foundation:

Human Rights Campaign Foundation (HRCF) is the educational arm of the Human Rights Campaign. The foundation develops web-based resources and print publications on the many issues facing lesbian, gay, bisexual, and transgendered individuals. One foundation program, FamilyNet, is the most comprehensive and up-to-date resource for and about lesbian, gay, bisexual, and transgendered families. It provides legal and policy information about family law, including marriage and relationship recognition, as well as public education in those areas. FamilyNet provides valuable information to a broad constituency, including over 10,000 people who subscribe to a bi-weekly email newsletter on the latest developments affecting lesbian, gay, bisexual, and transgendered families; and tens of thousands more who use the FamilyNet area of the combined HRC/HRCF website (www.hrc.org) to get critical information about family issues.

Heterosexuals for the Right of Gays and Lesbians to Marry:

Heterosexuals for the Right of Gays and Lesbians to Marry (HGLM), based in Eugene, is an organization of heterosexual people who have acquired the privileges and shouldered the burdens of marriage, or who intend to do so in the future. We believe that the legal right to marry, traditionally reserved to heterosexual people, must be extended to all, without regard to sexual orientation or the sex of either spouse.

Gay and Lesbian Advocates and Defenders (GLAD):

Founded in 1978, Gay & Lesbian Advocates & Defenders (GLAD) is New England's leading legal rights organization dedicated to ending discrimination based on sexual orientation, HIV status, and gender identity and expression. GLAD has a long history of working to end government discrimination against same-sex couples. Among its other efforts, GLAD was counsel in *Goodridge v. Department of Public Health*, in which the Supreme Judicial Court of Massachusetts ruled that excluding gay and lesbian couples from marriage was unconstitutional. GLAD also served as co-counsel in *Baker v. State of Vermont*, the Vermont Supreme Court's case holding that excluding gay and lesbian couples from the protections of marriage violated the state constitution. The Vermont legislature created civil unions in response to *Baker*.

Freedom to Marry:

Freedom to Marry is the gay and non-gay partnership working for marriage equality nationwide. Founded in 2003 and based in New York, Freedom to Marry brings together organizations -- national and local, non-gay and gay, secular and religious -- doing their part to end discrimination in marriage and to assure equal protections and responsibilities for committed same-sex couples and their loved ones.

Family Pride Coalition:

The Family Pride Coalition is the only national not-for-profit organization exclusively dedicated to securing equality for lesbian, gay, bisexual, and transgendered parents and their families.

Asian Equality:

Asian Equality (formerly APACE) recognizes the historical legacy of marriage discrimination in the United States and its profound impact on Asian Pacific American (APA) families. Through community education and coalition building, we seek to empower our APA communities to challenge this legacy and to confront present-day marriage discrimination against same-sex couples. In doing so, we want to affirm the lesbian, gay, bisexual, and transgender members of our communities and acknowledge the enriching presence of their love and lives.

STATEMENT OF THE CASE

Questions Presented on Appeal:

Could a “civil union” or similar scheme that granted same-sex couples in Oregon the tangible benefits conferred upon marriages by state law, while reserving the term “marriage” itself exclusively to heterosexual relationships, satisfy Article I, section 20, of the Oregon Constitution? In particular:

- Is marriage itself a “privilege” within the meaning of Article I, section 20, separate and apart from the tangible benefits afforded by Oregon law to married couples?

- Could a “civil union” or similar scheme deliver to unmarried couples the same tangible benefits enjoyed by married couples?

Summary of Argument:

Opponents of marriage equality for same-sex couples sometimes advocate the creation of a separate statutory scheme that would confer tangible state-law benefits upon same-sex couples while reserving the status of “marriage” exclusively for opposite-sex couples. That position in the case before the court is argued most directly by the State of Oregon defendants, who suggest that the legislature might constitutionally extend some of the benefits of marriage to same-sex couples while withholding others, and who submit that “other options—like the Vermont ‘civil union’ statute—might be crafted that could satisfy constitutional requirements.” See State Defendants’ Br. 62–63.

The law to which state defendants refer in their argument was enacted by the Vermont legislature in 2000 in response to a decision by the Vermont Supreme Court. Contrary to state defendants’ suggestion, creating a system for recognizing same-sex unions that is parallel to marriage, yet distinct from it, would not provide full equality for same-sex couples and would not satisfy Oregon constitutional requirements. In particular, the status of marriage itself is a “privilege” under the Oregon constitution, and it must be provided on the same terms and equally to all citizens.

The constitutionality of the Vermont statute has not yet been evaluated by any court. Its enactment was the result of legislative processes and its constitutionality is suspect. In

fact, despite the efforts of the Vermont legislature, couples who enter into civil unions in Vermont do not enjoy the same tangible benefits as married couples. Most obviously, their legal relationships have been ignored by other states and by the federal government. And there is no assurance, either, that private actors will recognize their relationships outside of Vermont.

ARGUMENT

- I. MARRIAGE ITSELF IS A “PRIVILEGE” UNDER ARTICLE I, SECTION 20; IT CONFERS AN INTANGIBLE ADVANTAGE THAT A “CIVIL UNION” OR SIMILAR STATUS CANNOT REPLICATE.

Article I, section 20, of the Oregon Constitution provides 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.” This court discussed the origins, purpose, and development of the clause in *State v. Clark*, 291 Or 231, 630 P2d 810, *cert den* 454 US 1084, 102 S Ct 640, 70 L Ed 2d 619 (1981):

Antedating the Civil War and the equal protection clause of the fourteenth amendment, [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 * * *. 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.

291 Or at 236.

This court has interpreted the term "privilege" broadly to include any "advantage to which [a person] would be entitled, but for a choice made by a government authority." *City of Salem v. Bruner*, 299 Or 262, 268–69, 702 P2d 70 (1985). Amici curiae, along with plaintiffs, state defendants, and intervenor-plaintiff Multnomah County, agree with the trial court that the tangible rights and benefits that flow from the marriage relationship under state law constitute a "privilege"¹ within the meaning of Article I, section 20.² See Plaintiffs' Opening Br. 28–29; State Defendants' Br. 36–37; Multnomah County's Opening Br. 15–16; cf. State Defendants' Br. App-17 (trial court ruling).

The question here is whether a "civil union" statute would violate Article I, section 20, if it provided same-sex couples with these tangible state law benefits while withholding from them the status and title of "married," together with all that word implies. In other words, the question is whether state recognition of a relationship as a marriage is, in and of itself, a "privilege" within the meaning of the state constitution. While this court has not addressed the question, the highest court in Massachusetts has done so, as have the appellate courts in the Canadian provinces of Ontario and British Columbia. Each of those courts concluded that the status of marriage itself was a constitutionally protected benefit,

¹Marriage is an "immunity" for the same reasons that it is a "privilege." For the sake of simplicity, amici curiae will use the word "privilege" in this brief to encompass both privileges and immunities. Cf. *Hammer v. State*, 173 Ind 199, ___, 89 NE 850, 851 (1909) ("'Immunity' and 'privilege' are synonymous terms *:*:*.")

²Intervenor-defendants Defense of Marriage Coalition et al. (DOMC) also do not contest the point, focusing their arguments on the status of marriage itself and not upon its attendant benefits. See DOMC's Opening Br. 47–48.

and that a statute that granted same-sex couples, through a separate institution, the tangible benefits available to married couples, would unconstitutionally deprive same-sex couples of the additional benefit of being married.

The Supreme Judicial Court of Massachusetts has recognized that marriage is "one of our community's most rewarding and cherished institutions," *Goodridge v. Department of Pub. Health*, 440 Mass 309, 313, 798 NE2d 941, 949 (2003), and noted that "[t]angible as well as intangible benefits flow from marriage." *Id.* at 322; 798 NE2d at 955. The court described the intangible benefits of marriage eloquently:

Marriage ~~is~~ bestows enormous private and social advantages on those who choose to marry. 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." *Griswold v. Connecticut*, 381 US 479, 486[, 85 S Ct 1678, 14 L Ed 2d 510] (1965). 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. Therefore, without the right to choose to marry, same-sex couples are not only denied full protection of the laws, but are excluded from the full range of human experience.

Goodridge, 440 Mass at 322, 798 NE2d at 954–55. The same court subsequently held that a proposed "civil union" bill drafted by the Massachusetts legislature in response to *Goodridge* was unconstitutional:

The same defects of rationality evident in the marriage ban considered in *Goodridge* are evident in, if not exaggerated by, [the proposed bill]. . . . Because the proposed law by its express terms forbids same-sex couples entry into civil marriage, it continues to relegate same-sex couples to a

different status. The holding in *Goodridge*, by which we are bound, is that group classifications based on unsupportable distinctions, such as that embodied in the proposed bill, are invalid under the Massachusetts Constitution. The history of our nation has demonstrated that separate is seldom, if ever, equal.

Opinions of the Justices to the Senate, 440 Mass 1201, 1206, 802 NE2d 565, 569 (2004). The court's explanation of its conclusion focused on the importance of the marriage relationship itself:

The bill's absolute prohibition of the use of the word "marriage" by "spouses" who are the same sex is more than semantic. The 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. 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. The bill would have the effect of maintaining and fostering a stigma of exclusion. It would deny to same-sex "spouses" only a status that is specially recognized in society and has significant social and other advantages.

440 Mass at 1207–08, 802 NE2d at 570.

At least two Canadian appellate courts have reached similar conclusions. See *Egale Canada Inc. v. Canada (Attorney General)*, 13 BCLR4th 1, modified 15 BCLR4th 226 (2003); *Halpern v. Toronto (City)*, 65 OR3d 161 (2003). Those courts considered their cases in the shadow of a Canadian federal statute, the Modernization of Benefits and Obligations Act, SC 2000, ch 12, that granted unmarried couples rights and privileges equivalent to those of married couples. To prevail on their claims that the federal statute violated the Canadian Charter of Rights and Freedoms by excluding same-sex couples from marriage, the

petitioners had to convince the courts that the laws treated people differently on the basis of one or more personal characteristics and that this differential treatment

discriminate[d], by *imposing a burden upon or withholding a benefit from* the claimant in a manner which reflect[ed] the stereotypical application of presumed group or personal characteristics, or which otherwise ha[d] the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration.

Halpern, 65 OR3d 161 at ¶ 61 (emphasis added). The Ontario court accepted the petitioners' argument, emphasizing the importance of marriage:

Marriage is, without dispute, one of the most significant forms of personal relationships. For centuries, marriage has been a basic element of social organization in societies around the world. Through the institution of marriage, individuals can publicly express their love and commitment to each other. Through this institution, society publicly recognizes expressions of love and commitment between individuals, granting them respect and legitimacy as a couple. This public recognition and sanction of marital relationships reflect society's approbation of the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships.

Id. at ¶ 5. Further:

Importantly, no one, including the [respondent Attorney General of Canada], is suggesting that procreation and childrearing are the only purposes of marriage, or the only reasons why couples choose to marry. Intimacy, companionship, societal recognition, economic benefits, the blending of two families, to name a few, are other reasons that couples choose to marry. As recognized in [*M. v. H.*, 2 SCR 3, 50 (1999)], same-sex couples are capable of forming "long, lasting, loving and intimate relationships." Denying same-sex couples the right to marry perpetuates the contrary view, namely that same-sex couples are not capable of forming loving and lasting relationships, and thus same-sex relationships are not worthy of the same respect and recognition as opposite-sex relationships.

Halpern, 65 OR3d 161 at ¶ 94.

The court rejected the argument that the Modernization of Benefits and Obligations Act precluded a finding of prohibited discrimination. Besides concluding that the tangible rights of unmarried cohabitants under the Act were not fully equivalent to those provided by marriage, the court said,

[The Charter] guarantees more than equal access to economic benefits. One must also consider whether persons and groups have been excluded from fundamental societal institutions.

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In this case, same-sex couples are excluded from a fundamental society institution—marriage. The societal significance of marriage, and the corresponding benefits that are available only to married persons, cannot be overlooked. Indeed, all parties are in agreement that marriage is an important and fundamental institution in Canadian society. It is for that reason that the claimants wish to have access to the institution. Exclusion perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. In doing so, it offends the dignity of persons in same-sex relationships.

Id. at ¶¶ 106–07; *accord Egale Canada Inc.*, 13 BCLR4th 1 at ¶ 156 (opinion of Prowse, JA).

These intangible benefits of marriage, identified by the Massachusetts high court and by these Canadian courts, are advantages that would be granted to same-sex relationships "but for a choice made by a government authority," and they are "privileges" within the meaning Oregon's Article I, section 20. *See Bruner*, 299 Or at 269.

Many other American courts have recognized the intangible benefits and transcendent importance of marriage. In *Griswold*, the United States Supreme Court described marriage as "a coming together for better or for worse, hopefully enduring, and

intimate to the degree of being sacred." *Griswold*, 381 US at 486. Upholding the right of convicted prisoners to marry in *Turner v. Safley*, 482 US 78, 107 S Ct 2254, 96 L Ed 2d 64 (1987), the Court again recognized that marriage had substantial important dimensions beyond the receipt of government benefits. The Court identified the "expression of emotional support and public commitment" as "an important and significant aspect of the marital relationship." 482 US at 95–96; see also *Anderson v. King County*, 2004 WL 1738447 * 7 (Wa Super 2004).

These things simply cannot be said for "civil union," or any other novel status that might be invented by the legislatures of one or two individual American states in the twenty-first century. No status other than "marriage" conveys to the outside world the full dimension of a couple's relationship. No other status can carry with it the same weighty historical connotation of commitment, through thick and thin, that affects not only the perception of those outside the relationship, but also the experience of the partners within the relationship. No other status provides the same opportunity for the strongest possible public expression of a couple's commitment each to the other and to their family. No other status, by any name, means "family" around the world.

No status other than marriage says to a couple's children: "our family is built on our society's most solemn promise of mutual dedication and self-sacrifice." No other status provides parents, who want to impart to their children a profound respect for the institution of marriage, the same opportunity to be role models. No other status provides a couple

with the opportunity to communicate the same important message about who they are, or about their values and beliefs. No other status satisfies the spiritual needs and beliefs of many couples who wish to enter into a legal marriage, at least in part, as an expression of their spirituality.

No status other than marriage can tie same-sex couples fully into the fabric of our community of families—a community in which images of "married" couples and their families surround us on television, on the radio, and in the movies; in which greeting card shops have entire sections devoted to celebrating "marriages" and their anniversaries; in which people often are identified as "married" or "single," and the length of their marriages often are included as significant facts in their personal and even professional biographies; in which the newspapers universally announce marriages as important items of community news; and in which weddings are an astoundingly common and important celebration both of the marrying couple and of the institution on marriage itself.

Creating a regime that granted tangible benefits to same-sex couples, while denying such couples the right to marry, would exclude a class of people from access to the undeniably significant social content attendant to marriage. That social content includes the ability to make the profound and broadly understood public commitment of marriage, to participate as equals in day-to-day conversation about one's marriage, to convey to the world and to one's children values and beliefs about the importance of marriage, and to participate fully and as equals in a community that recognizes, respects, and, in many cases,

rewards the status of marriage. A “civil union” statute, or any enactment establishing a similar parallel legal system, would place same-sex couples on a dramatically unequal footing relative to their heterosexual counterparts, without any justification for such differential treatment. Article I, section 20, does not allow for such privileges to be granted to any citizen or group of citizens to the exclusion of others.

II. VERMONT'S “CIVIL UNION” LAW WAS THE PRODUCT OF POLITICAL CALCULATIONS AND NOT OF CONSTITUTIONAL ANALYSIS.

In *Baker v. State*, 170 Vt 194, 744 A2d 864 (1999), the Vermont Supreme Court concluded that “none of the interests asserted by the State provide[d] a reasonable and just basis for the continued exclusion of same-sex couples from the benefits incident to a civil marriage license under Vermont law.” 170 Vt at 224, 744 A2d at 886. Accordingly, that court recognized a “constitutional obligation to extend to plaintiffs the common benefit, protection, and security that Vermont law provides opposite-sex married couples.” *Id.*

Having recognized the constitutional offense in Vermont's discriminatory marriage laws, however, the Vermont Supreme Court stopped short of fully remedying the violation by requiring that the plaintiffs be issued marriage licenses. *Id.* at 226, 744 A2d at 887. Instead, the court deferred an actual remedy for an unspecified period of time and offered the Vermont legislature an opportunity to craft a law potentially satisfying the constitutional obligation. *Id.* at 224–25, 744 A2d at 886–87.

The court offered the legislature mixed signals with respect to the essential elements of a constitutional law. On the one hand, the court noted a number of “potentially

constitutional" statutory schemes from other jurisdictions that delivered benefits to same-sex couples through "an alternative legal status to marriage." *Id.* On the other hand, the court declined to endorse any one or all of those "potentially constitutional" schemes, *id.*, and made it very clear that same-sex couples were entitled "to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples." *Id.* The Vermont court deliberately avoided the question of whether a separate status for same-sex couples could actually be equal to marriage, reserving that question for "some future case." *Id.*

Following *Baker*, a committee of the Vermont legislature conducted an intensive study of the issues raised by the decision and opted to draft a bill creating a separate legal status for same-sex couples. The political calculation that underlay that decision was no secret: A majority of the committee members concluded that a bill that provided benefits to same-sex couples, but did not allow same-sex couples to marry, would be more likely to pass the legislature, and less upsetting to the many Vermonters who had expressed opposition to any legal protections for same-sex couples. See, e.g., Jack Hoffman, *Panel Backs Domestic Partnership*, Rutland Daily Herald 1 (Feb 10, 2000). The legislature enacted a "civil union" bill and then-Governor Howard Dean signed it into law on April 26, 2000. Vt Laws 2000, PA 91.³

³The California legislature has enacted a similar law that will take effect on January 1, 2005. See Cal Legis Serv 2003, ch 421. The legislature acknowledged that that new law would not provide equal treatment to same-sex couples, but would "help California move closer to fulfilling the promises of inalienable rights, liberty, and equality contained in the California constitution." *Id.* at § 1(a).

Such political calculations, while common in the legislative context, cannot support a judicial constitutional analysis; courts are bound to recognize and uphold the constitutional rights of all citizens, and cannot diminish or ignore those rights in order to accommodate the perceived comfort or moral views of a vocal minority, or even the majority, within the body politic. *Cf. Lawrence v. Texas*, 539 US 558, 579, 123 S Ct 2472, 156 L Ed 2d 508 (2003) (moral disapproval of lesbian and gay people is not a legitimate state interest); *id.* at 2486 (O'Connor, J., concurring) (identifying the claimed state interest as moral disapproval of lesbian and gay people); *Romer v. Evans*, 517 US 620, 634, 116 S Ct 1620, 134 L Ed 2d 855 (1996) (striking down a law that "raise[d] the inevitable inference that the disadvantage imposed [was] born of animosity toward [lesbian and gay people]"); *Palmore v. Sidoti*, 466 US 429, 433, 104 S Ct 1879, 80 L Ed 2d 421 (1984) ("The constitution cannot control [private] 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."); *Goodridge*, 440 Mass at 312, 798 NE2d at 948 ("Our obligation is to define the liberty of all, not to mandate our own moral code."), quoting *Lawrence*, 539 US at 571; *Goodridge*, 440 Mass at 339, 798 NE2d at 966 ("[I]t is the traditional and settled role of courts to decide constitutional issues.").

Significantly, the Vermont statute has not yet been tested by any court for its constitutionality. Although the statute has been enacted into law, it is by no means clear that it passes constitutional muster.

III. "CIVIL UNIONS" CANNOT IN FACT PROVIDE THE SAME TANGIBLE ADVANTAGES AS MARRIAGE.

The “separate but equal” approach reflected in laws like the Vermont civil union statute is designed for the express purpose of denying same-sex couples access to the legal status of “marriage,” and all of the social significance that that status connotes. The message of exclusion implicit in these laws is constitutionally repugnant. Adding injury to insult, if you will, the civil union alternative also fails to deliver to same-sex couples many of the tangible benefits of marriage that are not conferred directly by the state.

For example, same-sex couples joined in a Vermont civil union face substantially greater obstacles than married couples to recognition of their unions beyond Vermont's borders. Over one thousand significant federal protections, benefits, and obligations are out of reach to couples joined in civil union in Vermont, in large part because they lack the legal status of being “married.” And many private entities rely on and incorporate state definitions of marriage in the benefits and protections they provide, further accentuating the inequalities flowing from the exclusion of same-sex couples from those definitions. Creation of a “civil union” scheme in Oregon would deny same-sex couples—and their children—access to all of these tangible benefits in violation of Article I, section 20.

A. Civil Unions Face Greater Obstacles To Portability.

We live in a mobile society. Families do not necessarily spend their entire lives in the same town, or even the same state. And even while maintaining a constant residence, families and family members frequently travel outside the borders of their own states.

The United States Supreme Court has recognized a fundamental constitutional right to travel from state to state without discrimination. *Saenz v. Roe*, 526 US 489, 119 S Ct 1518, 143 L Ed 2d 689 (1999). As a result, for married couples, moving from state to state has little significant impact on the legal rights of individuals or their families. The laws governing marriage and family formation are, in most cases, similar around the country, and in those cases where state marriage laws vary, deeply-rooted common law principles require that a marriage that is valid where celebrated be respected everywhere. See Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate but (Un)equal*, 25 Vt L Rev 113, 138 (2000) ("The general rule preferring validation of marriages, which exists with an 'overwhelming tendency' in this country, leads courts to find opposite-sex marriages to be valid if there is any reasonable basis for doing so.").

As a consequence, most heterosexual married couples take for granted the continuing validity of their marriage as they travel from state to state, and beyond. As Professor Cox has noted, "It would be absurd to subject any couple to having its 'marriage visa' stamped with 'valid' and 'invalid' as they traveled across the country." Cox, *supra*, 25 Vt L Rev at 138, quoting Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 NYU Rev L & Soc Change 567, 612 (1994–95).

The reliability and certainty of a couple's marital status as that couple travels or migrates from state to state is critical. It can affect a spouse's rights to make medical

decisions, a spouse's right to inherit through the laws of intestacy, a spouse's right to seek legal recourse for wrongful death, and a spouse's right to take time off from work to care for a sick spouse under various state laws. It can affect a couple's ability to secure orderly judicial resolution of financial and other disputes in the event that their relationship ends. And it can ensure the legal recognition of a parent-child relationship when a child conceived through reproductive technologies is not biologically related to both parents.

Had Vermont extended the right of marriage to same-sex couples, some couples nevertheless would have faced obstacles to recognition of their legal status as they traveled beyond Vermont's borders. Many states have enacted laws expressly purporting to deny recognition to legal marriages contracted by same-sex couples in other jurisdictions. Although these laws are unconstitutional for the same reasons that the exclusion of same-sex couples from marriage is unconstitutional, see *Castle v. State*, 2004 WL 1985215 (Vt. Super 2004), their existence may have engendered a sense of insecurity or uncertainty as a same-sex couple, legally married in Vermont, traveled or relocated from state to state.

But the Vermont legislature's decision to create, out of whole cloth, a separate status—a new legal category that has no instantly cognizable meaning under the laws of any other state in this country—elevated the level of uncertainty faced by same-sex couples joined in civil union to a much higher level. Notwithstanding the legislature's attempt to confer the full complement of tangible state law benefits upon couples joined in civil union, by withholding from same-sex couples the legal status of "married," the Vermont legislature

has significantly increased the obstacles such couples face when they cross Vermont's borders. "By creating a separate institution without the historical significance and clearly established rules relating to marriage, the Vermont legislature has made it more difficult for Vermont same-sex couples to know whether they will be abandoning their rights as a couple once they leave the state." Cox, *supra*, 25 Vt L Rev at 143.

A Vermont civil union is a legal novelty in every state except Vermont. The troubling question is this: What is a "civil union" under other states' laws, and what would it mean to recognize one under those laws? "[W]ith the right to marry, same-sex couples would have had hundreds of cases, in which courts recognized marriages from another state, available for use as precedent. While this case law should remain available for use by same-sex couples when arguing that their civil unions are substantially equivalent to marriages, its precedential value is less certain because those cases apply to marriages, not civil unions."

Id. at 140. Further:

If we expected courts to hesitate before recognizing same-sex couples' marriages, we must expect greater hesitancy when they are asked to recognize out-of-state civil unions—a status previously unknown in the law. Judges may decide that Vermont's statutorily created status of "civil union" does not extend beyond the state's border, unlike the clearly portable status of "marriage." This unknown portability of civil unions puts these same-sex couples at great risk: they no longer know whether the law considers them to be single or "married" and whether their status in countless contexts, such as property ownership, intestacy, and responsibility for their partner's debts, changes after they leave Vermont.

Id.

So far, the limited case law involving civil unions outside of Vermont bears out Professor Cox's prediction that couples joined in civil union will face substantial uncertainty outside of Vermont. In several cases, the courts of other states have refused to recognize the existence or validity of a Vermont civil union for the purpose of benefits or protections under the laws of those states, in some cases noting—correctly—that a civil union is not a marriage even under Vermont law. See *Rosengarten v. Downes*, 71 Conn App 372, 802 A2d 170 (Conn App Ct), *appeal dismissed as moot* 261 Conn 936, 806 A2d 1066 (2002) (Connecticut courts lack jurisdiction to dissolve a civil union because doing so, as contrasted with dissolving a marriage, does not fall within any of the statutorily prescribed areas that the court is empowered to decide); *Hall v. Beauchamp*, No. 1D02-807 (Fl Dist Ct App, Oct 10, 2002) (no child visitation allowed while the father had overnight guests to whom he was not married, including his civil union spouse); *Burns v. Burns*, 253 Ga App 600, 560 SE2d 47 (2002) (no child visitation allowed while mother's civil union spouse is in home where the divorce order only allowed child visitation in the presence of adult overnight guests to whom the mother was married or related within the second degree); *R.S. and J.A.*, No. F-185.063, Agreed Final Decree of Divorce (Tex Dist Ct, March 3, 2003), *vacated* (Mar. 28, 2003) (vacating an initial decree dissolving a civil union in light of, among other things, questions concerning the court's jurisdiction to dissolve a civil union).

Such decisions have caused tremendous hardships for families headed by same-sex couples. For example, a non-biological mother who relied on Vermont's civil union law to

protect her parental relationship with her daughter, borne by her civil union spouse and raised by the couple together in Vermont, now finds herself struggling for visitation rights in Virginia, where her now-ex-partner has taken the child. Thus far, the Virginia courts have refused to recognize her parental relationship—derived from the Vermont civil union law—or even to respect the jurisdiction of the Vermont court to which the dissolution action filed by the biological mother initially was directed. S. Mitra Kalita, *Vermont Same-Sex Unions Null in Virginia, Judge Rules*, Washington Post B1 (Aug 25, 2004).

Couples traveling outside of Vermont have run into obstacles outside of the courtroom as well. Vermont resident Laurie Levinger has described a recent trip to the doctor in New Hampshire; the community hospital she visits for her twice-a-year mammogram refused to allow her to list her civil union spouse on the intake form as "next of kin." Levinger refused to give another name. She explained, "Of course, I have other people I could list as next of kin, but it didn't feel right to give someone else's name when I have a legal spouse. Somehow it would've felt like colluding with discrimination, like it was a reasonable request that I not list my spouse." Nancy Remsen, *Civil Unions Come Up Short During Crises*, Burlington Free Press ____ (May 16, 2004); see also Laurie Levinger, *Next of Kin, Out in the Mountains* ____ (Feb 2004).

By increasing the uncertainty faced by same-sex couples relative to their heterosexual counterparts when they leave the state of Vermont, the Vermont legislature has failed to confer on same-sex couples "the same benefits and protections afforded by

Vermont law to married opposite-sex couples." *Baker*, 170 Vt at 224, 744 A2d at 886. For similar reasons, a similar regime, enacted in Oregon, could not satisfy the guarantee of equality for same-sex couples contained in Article I, section 20.

B. Couples Joined In Civil Union Are Severely Disadvantaged With Respect To Federal Benefits.

The federal government, by its own assessment, assigns benefits, protections, and obligations to married couples under 1,138 separate laws. United States General Accounting Office, *Defense of Marriage Act*, GAO-04-353R (Jan 23, 2004), available at <http://www.gao.gov/new.items/d04353r.pdf>; see also United States General Accounting Office, *Defense of Marriage Act*, GAO/OGC-97-16 (Jan 31, 1997), available at <http://www.gao.gov/archive/1997/og97016.pdf> (prior report). As a general rule, the federal government does not regulate marriage, but relies on the states to do so. If a state says that an opposite-sex couple is married, then they are considered married for the purposes of federal law.

Couples joined in civil unions are dramatically disadvantaged relative to married couples with respect to federal statutory protections. For example, Sandy Reeks, a British citizen, and Pam Kinniburgh, an American citizen, were joined in a civil union in Vermont in 2000. The two have been in a committed relationship since the mid-1990s, when Reeks traveled to the United States, first as a tourist, then as a student, and later on a one-year visa extension that allowed her to work. Although the two are joined in civil union, federal immigration law does not recognize their family relationship. As a consequence, Reeks has

had difficulty extending her visa, and the two have moved to Toronto, at least temporarily, leaving behind Kinniburgh's children and grandchildren, their turn-of-the-century farmhouse, one of their jobs, and many of their friends. Anne Wallace Allen, *Law Seen as Unfair for Same-Sex Couples*, Addison Independent 6A (Oct 23, 2003).

Tax season is especially complicated for Vermont same-sex couples joined in civil unions. Vermont state law provides a mechanism for calculating and paying taxes jointly, either as a married or as a civil union couple. Because Vermont's state income tax calculation "piggybacks" on the federal calculation, Vermonters in civil unions must complete two separate federal tax returns: the federal tax returns they file as individuals with the federal government, and hypothetical federal returns, assuming a married filing status, upon which the state tax is calculated. Vermont Department of Taxes, *Questions (Civil Unions)*, available at <http://www.state.vt.us/tax/faq.htm#CIVIL>.

Like many couples joined in civil unions, civil union spouses Liz and Mary Stedman pay an extra \$700 per year in federal taxes because the health insurance coverage extended to Mary by Liz's employer is viewed as income under federal tax law—something that wouldn't happen if they were a heterosexual, married couple. Remsen, *supra*, at 5A.

Holly Puterbaugh and Lois Farnham, who had been together as a couple for twenty-five years in 1997 when they decided to join the *Baker* lawsuit seeking the freedom to marry, cited social security survivor benefits and pension protections as important factors in their decision. Chris Tebbetts, *Courtside Seats: Lois Farnham and Holly Puterbaugh—A Conversation*

With Vermont's Most Famous Plaintiffs, *Out in the Mountains* 14 (Oct 1997). Today, having been joined in a civil union, the fifty-something couple is no more apt to benefit from the protections of the social security laws than they were before filing suit.

To be sure, the so-called "Defense of Marriage Act," 110 Stat 2419 (1996) (DOMA), would pose an obstacle to federal benefits for same-sex couples even if Vermont simply allowed those couples to marry. That constitutionally dubious measure purports to deny federal recognition to marriages validly contracted under state law by same-sex couples. See 1 USC 7. But, by passing a civil union law rather than providing marriage equality, the Vermont legislature created a new legal status that presumably the federal government would not recognize even in DOMA's absence. See *Cox, supra*, 25 Vt L Rev at 145. ("[T]he combination of DOMA and the Vermont legislature's unwillingness to accord marital status to its same-sex couples has made it somewhat more unlikely that those couples will be recognized as married for federal purposes.") By erecting an additional obstacle to the attainment of important federal protections by same-sex couples, the Vermont civil union law falls short of its stated goal and of the constitutional imperative of full equality for same-sex couples, an imperative that is likewise contained in Article I, section 20, of the Oregon constitution.

C. Many Private Parties Attach Their Own Benefits To Marriage As Defined By Statute.

The states and the federal government are not alone in using the legal status of marriage as a gateway to a vast array of protections and benefits. Many private parties do so as well.

Although private parties within Vermont are precluded from treating couples joined in civil union any differently from married couples, Vermont's anti-discrimination laws do not reach beyond Vermont's borders. That means that private parties in other states, such as museums that offer discounted memberships to married couples, or employers that provide paid leave for an employee to care for a spouse, legally may not be bound to treat a couple joined in a civil union as if the couple was married. As a practical matter, if same-sex couples in Vermont were allowed to marry, they automatically would qualify for an array of private benefits conferred by their employers and by public accommodations and other businesses. On the other hand, because the term "civil union" is generally unfamiliar to private actors, and is unlikely to be included in their benefit plans and other policies, civil union status does not open the door routinely to those same entitlements and protections.

Plaintiffs Burke and Doyle provide a concrete example of how private employers use legal marriage as the key to providing certain employee benefits. Before they were married, Burke and Doyle registered their relationship as a domestic partnership in Berkeley, California. Declaration of Kelly Burke 3. Doyle's Oregon employer provided paid health insurance benefits to all members of an employee's family as a benefit of employment. *Id.* at

4. But the employer refused to extend those benefits to Burke because the couple was not legally married. *Id.* After Burke and Doyle married in Multnomah County on March 3, 2004, *Id.* at 2, Doyle's employer provided Burke with health insurance. See Bill Graves, *Gay Marriage Fight Takes Shape*, *Portland Oregonian* ____ (July 31, 2004).

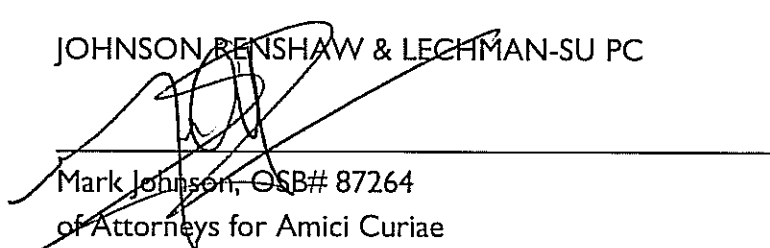
Rather than fostering equality, by denying same-sex couples the status of being "married," a "civil union" scheme in Oregon would increase significantly the likelihood that same-sex couples joined in civil unions, and their families, would continue to be excluded from the private benefits that many organizations confer automatically upon married couples.

CONCLUSION

The arguments for creating a "civil union" or similar scheme are ultimately self-defeating. Either the benefits of civil unions are the same as those of marriage, in which case there is no ready rationale for maintaining two separate systems; or they are not the same, in which case civil unions cannot be a constitutional substitute for full equality in marriage. What is withheld from same-sex couples by labels like "civil union" is the very thing all Americans seek and deserve, namely, equality—the same rules, the same rights, the same responsibilities, and the same respect that is accorded to other couples by law.

DATED this 14 day of OCT, 2004.

JOHNSON, BENSCHAW & LECHMAN-SU PC


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CERTIFICATE OF SERVICE

I hereby certify that I filed the original and 15 copies of the BRIEF OF AMICI CURIAE VERMONT FREEDOM TO MARRY TASK FORCE; VERMONTERS FOR CIVIL UNIONS LEGISLATIVE DEFENSE FUND; PRIDE AT WORK, AFL-CIO; PARENTS, FAMILIES AND FRIENDS OF LESBIANS AND GAYS (PFLAG); NATIONAL GAY AND LESBIAN TASK FORCE; THE NATIONAL LESBIAN AND GAY LAW ASSOCIATION; LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. (LAMBDA LEGAL); NATIONAL BLACK JUSTICE COALITION; HETEROSEXUALS FOR THE RIGHT OF GAYS AND LESBIANS TO MARRY; HUMAN RIGHTS CAMPAIGN; HUMAN RIGHTS CAMPAIGN FOUNDATION; GAY AND LESBIAN ADVOCATES AND DEFENDERS (GLAD); FREEDOM TO MARRY; FAMILY PRIDE COALITION; and ASIAN EQUALITY by regular first class mail on the following: State Court Administrator, Records Section, Supreme Court Building, 1163 State Street, Salem OR 97301.

I further certify that I served 2 copies of the foregoing document(s) upon:

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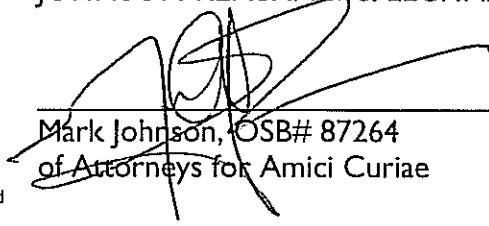
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by mailing in a sealed, first-class postage prepaid envelope, addressed to said persons'

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