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.

SC S51612

Multnomah County
Circuit Court
No.0403-03057

BRIEF OF *AMICI CURIAE* PAULA ABRAMS, GILBERT PAUL CARRASCO, VINCENT CHIAPPETTA, GARRETT EPPS, STEVEN K. GREEN, JAMES HUFFMAN, M. H. "SAM" JACOBSON, STEPHEN KANTER, SUSAN F. MANDIBERG, JAMES M. O'FALLON, MARGARET PARIS, AND DEAN M. RICHARDSON

On certified appeal from the judgment of the Circuit Court of Multnomah County, Honorable Frank L. Bearden, Judge

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Lynn R. Nakamoto, OSB No. 88087
MARKOWITZ, HERBOLD, GLADE & MEHLHAF, P.C.
1211 S.W. Fifth Avenue, Suite 3000
Portland, OR 97204
Telephone: (503) 295-3085

Cooperating Counsel for ACLU Foundation of Oregon, Inc. and Attorneys for Plaintiffs-Respondents, Cross-Appellants Li and Kennedy *et al.*

Kenneth Y. Choe, *Pro Hac Vice*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Lesbian and Gay Rights Project
125 Broad Street
New York, NY 10004
Telephone: (212) 549-2553

Attorneys for Plaintiffs-Respondents, Cross-Appellants Li and Kennedy *et al.*

Hardy Myers, OSB No. 64077
Peter Shepard, OSB No. 80106
Michael C. Livingston, OSB No. 81297
DEPARTMENT OF JUSTICE
1162 Court Street NE
400 Justice Building
Salem, OR 97301-4096
Telephone: (503) 378-4402

Attorneys for Defendants-Appellants, Cross-Respondents State of Oregon *et al.*

Kelly W.G. Clark, OSB No. 83172
Kristian Roggendorf, OSB No. 01399
O'DONNELL & CLARK LLP
1706 N.W. Glisan, #6
Portland, OR 97209
Telephone: (503) 306-0224

Herbert Grey, OSB No. 81025
4800 S.W. Griffith Drive, #320
Beaverton, OR 97005
Telephone: (503) 641-4908

Kelly E. Ford, OSB No. 87223
KELLY E. FORD, P.C.
4800 S.W. Griffith Drive, #320
Beaverton, OR 97005
Telephone: (503) 641-3044

Raymond M. Cihak, OSB No. 94560
Pamela Hediger, OSB No. 91309
EVASHEVSKI ELLIOTT CIHAK & HEDIGER, PC
P.O. Box 781
Corvallis, OR 97339
Telephone: (541) 754-0303

Kevin Clarkson, *Pro Hac Vice*
BRENA BELL & CLARKSON
310 K Street, Suite 601
Anchorage, AK 99501
Telephone: (907) 258-2000

Benjamin W. Bull, *Pro Hac Vice*
Jordan Lorence, *Pro Hac Vice*
ALLIANCE DEFENSE FUND
15333 N. Pima Road, Suite 165
Scottsdale, AZ 85260
Telephone: (480) 444-0020

Attorneys for Intervenors-Defendants-Appellants, Cross-Respondents Defense of Marriage Coalition *et al.*

Agnes Sowle, OSB No. 87348
Jenny M. Morf, OSB No. 98298
OFFICE OF THE MULTNOMAH COUNTY ATTORNEY
501 S.E. Hawthorne Blvd., Suite 500
Portland, OR 97214
Telephone: (503) 988-3138

Attorneys for Intervenor-Plaintiff-Respondent, Cross-Appellant Multnomah County

Vance M. Croney, OSB No. 92045
Benton County Counsel
408 S.W. Monroe, Suite M209
Corvallis, OR 97339
Telephone: (541) 766-6890

Attorneys for Prospective Intervenor-Plaintiff-Respondent, Cross-Appellant Benton County

Barry Adamson, OSB No. 79008
4248 S.W. Galewood
P.O. Box 1172
Lake Oswego, OR 97035
Telephone: (503) 699-9914

Attorney for *Amicus Curiae* Barry Adamson

Chin See Ming, OSB No. 94944
PERKINS COIE LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Telephone: (503) 727-2000

Les Swanson, OSB No. 66121
900 S.W. 83rd Avenue
Portland, OR 97225
Telephone: (503) 725-9705

Attorneys for *Amici Curiae* Paula Abrams *et al.*

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Amici curiae Paula Abrams, Gilbert Paul Carrasco, Vincent Chiappetta, Garrett Epps, Steven K. Green, M. H. "Sam" Jacobson, Stephen Kanter, Susan F. Mandiberg, James M. O'Fallon, and Dean M. Richardson ("*Amici*") are all legal educators from the three accredited law schools in Oregon. More specifically:

- *Amicus* Paula Abrams is a Professor of Law at Lewis & Clark Law School, where she teaches constitutional law, among other subjects
- *Amicus* Gilbert Paul Carrasco is a Professor of Law at Willamette University College of Law, where he teaches constitutional law and civil rights litigation. He is the author of the forthcoming book *Sexuality & Discrimination: A Rights & Liberties Perspective*, which will be published by Carolina Academic Press in 2005
- *Amicus* Vincent Chiappetta is a Professor of Law at the Willamette University College of Law
- *Amicus* Garrett Epps is a Professor of Law at the University of Oregon Law School and author of *To an Unknown God: Religious Freedom on Trial,* a book concerning, *inter alia*, the constitutional history and law of Oregon
- *Amicus* Steven K. Green is an Associate Professor at Willamette University College of Law, where he teaches courses in constitutional law and individual rights. Professor Green also serves as Director of the Willamette Center for Law and Government
- *Amicus* James Huffman is Dean and Professor of Law at Lewis & Clark Law School, where he has taught constitutional law for thirty year
- *Amicus* M. H. "Sam" Jacobson is a Professor of Law at the Willamette University College of Law
- *Amicus* Stephen Kanter is a Professor of Law at Lewis & Clark Law School and was the Dean of that law school between 1986 and 1994

- *Amicus* Susan F. Mandiberg is a Professor of Law at Lewis & Clark Law School
- *Amicus* James M. O'Fallon is Frank Nash Professor of Law at the University of Oregon Law School
- *Amicus* Margaret Paris is an Associate Professor at the University of Oregon Law School
- *Amicus* Dean M. Richardson is a Professor of Law at the Willamette University College of Law[1]

Amici submit this brief in support of the position of Plaintiffs-Respondents and Cross-Appellants Li and Kennedy *et al.*, and to address two discrete issues raised in this litigation. The issues are as follows:

1. Whether Oregon's Equal Privileges and Immunities clause, Or Const, Art I, § 20,[2] should be interpreted to contain a "historical exception," as Intervenor-Defendants-Appellants and Cross-Respondents Defense of Marriage Coalition *et al.* ("DOMC") argue below; and

2. Whether this Court has a duty to devise a remedy for a violation of Article I, section 20, in the first instance, without referring the matter to the legislature[3]

Amici respectfully submit that Article I, section 20, does not and should not contain a "historical exception," and that this Court has an independent duty to craft a remedy for a violation of Article I, section 20, without referring that task to the legislature.

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[1] *Amici* list their affiliated institutions for identification purposes only. *Amici* appear solely in their individual capacities and do not speak for their respective schools.

[2] Article I, section 20, provides:

> No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not be equally belong to all citizens.

[3] This brief does not purport to address all of the issues that are before this Court in this case. Therefore, it does not discuss in detail whether or not there has been a substantive violation of Article I, section 20. Despite this caveat, however, *Amici* do believe that it is a violation of Article I, section 20, to deny same-sex couples the right to marry.

II. SUMMARY OF ARGUMENT

Below, DOMC argued that Oregon's Equal Privileges and Immunities clause, Or Const, Art I, § 20, should be interpreted to contain a "historical exception," similar to that recognized in this Court's Article I, section 8 (free speech), jurisprudence, or that history should be used to define the scope of the guarantee, as this Court did in construing, for example, Article I, sections 10 (right to a remedy), 14 (right to bail), and 27 (right to bear arms).

However, Article I, section 20, does not contain a "historical exception." In no case since 1981, when this Court decided its first case based on its modern day equal privileges and immunities jurisprudence, has the Court ever indicated that such an exception exists.

Under DOMC's naïve, determinative, view of history, a "historical exception" would require Oregon to reverse its present-day position on race and sex discrimination, because race and sex discrimination were written into the State Constitution when it was adopted in 1857. For example, under *former* Article I, section 35, free "negroes and mulattoes" were prohibited from residing in the state, and under *former* Article II, section 2, only white males were allowed to vote. The "exception," as proposed by DOMC, would apparently codify these otherwise discarded historical majoritarian norms and elevate them to the level of current-day constitutional dictates.

DOMC argues that as norms change over time, constitutional dictates too may change, thus attempting to explain why racial and gender minorities, as well as others, are today protected by Article I, section 20, when they were not at the time of the framing of the Oregon Constitution. In other words, as DOMC would have it, a citizen or class of citizens is protected so long as their interests do not disturb the weightier normative interests of a current majority. This, however, is precisely the type of impermissible balancing test that this Court firmly rejected in *State v. Kennedy*, 295 Or 260, 267, 666 P2d 1316 (1980) and *Hewitt v. SAIF*, 294 Or 33, 35, 653 P2d 970 (1982).

Contrary to DOMC's argument, this Court did indeed consider history when it decided Oregon's modern-day equal privileges and immunities jurisprudence, in *State v.*

Clark, 291 Or 231, 630 P2d 810, *cert denied*, 454 US 1084, 102 S Ct 640, 70 L Ed 2d 619 (1981), and its progeny. A review of *Clark* and its progeny shows that the Court studied the history of the clause, as well as the language of the clause itself and the historical cases interpreting the clause. A review of *Clark* and its progeny also unequivocally demonstrates that sensitivity to history does not automatically demand a "historical exception."

Second, although the trial court ruled in favor of Plaintiffs-Respondents and Cross-Appellants Li and Kennedy *et al.*, it nonetheless declined to order a remedy. Instead, the trial court enjoined defendant Multnomah County from issuing marriage licenses to same-sex couples, and gave the legislature ninety days after the commencement of the next regular or special session to produce remedial legislation. *Amici* submit that the trial court erred by placing the responsibility for crafting a remedy on the legislature, and that this Court has a duty to order a remedy in the first instance, without abdicating that task to the legislature. Based on this Court's holding in *Hewitt*, where a statute is defective because it is underinclusive, as is the case here, the Court's duty is to remedy the defect by extending the privilege to the excluded class, as this would best maintain the objective of the marriage statute. *Amici* are unaware of any precedent that supports a referral to the legislature of this Court's duty to provide a remedy. Indeed, to do so would most likely violate Oregon's remedy guarantee, Or Const, Art I, § 10.[4]

III. DISCUSSION

A. Article I, Section 20, of the Oregon Constitution Does Not Contain a "Historical Exception" Test

DOMC argues that Article I, section 20, should be interpreted to contain a "historical exception." However, this Court's framework for analyzing Article I, section 20, which is now nearly 25 years old, does not contain such an exception. Moreover, the adoption of such

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[4] Article I, section 10, of the Oregon Constitution pertinently provides:

> [E]veryman shall have remedy by due course of law for injury done to his person, property, or reputation.

an exception would import mid-nineteenth century historical majoritarian norms into the meaning of the clause, and apparently necessitate the reversal of this Court's present-day position on race and sex discrimination. To the extent the scope of the clause changes over time as majoritarian norms change, as DOMC urges, the clause would necessarily incorporate a long-disfavored balancing test that pits the interests of a citizen or class of citizens against the normative interests of the majority.

1. The Source of the "Historical Exception" Test

The source of the "historical exception" test lies in this Court's framework for analyzing Article I, section 8, Oregon's free speech guarantee.[5] That framework, which was first announced in *Robertson*, recognizes three categories of laws, each of which is tested in a separate prong of analysis.

As described in *City of Eugene v. Miller*, 318 Or 480, 488, 871 P2d 454 (1994), "The first *Robertson* category consists of laws that 'focus on the *content* of speech or writing' or are 'written in terms directed to the substance of any opinion or any subject of communication.'" (internal quotation marks omitted). It is this first category of law that must be tested against a "historical exception":

> Laws within that category violate Article I, section 8, "unless the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach." *State v. Robertson, supra*, 293 Or at 412, 649 P2d 569.

City of Eugene, 318 Or at 488. The burden of meeting this test rests on the "party opposing the claim of constitutional privilege," that is, the government. *State v. Henry*, 302 Or 510, 521, 732 P2d 9 (1987).

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[5] Article I, section 8, of the Oregon Constitution provides:

> No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.

The other two prongs of the *Robertson* framework do not contain a "historical exception":

> The second *Robertson* category consists of laws that "focus[] on forbidden effects but expressly prohibit expression used to achieve those effects." *State v. Plowman, supra,* 314 Or at 164, 838 P2d 558. Laws in that category "are analyzed for overbreadth." *Ibid.* Finally, the third *Robertson* category consists of laws that "focus[] on forbidden effects, but without referring to expression at all." *Ibid.* Laws within the third category are analyzed to determine whether they violate Article I, section 8, as applied. *State v. Robertson, supra,* 293 Or at 412, 649 P2d 569.

City of Eugene, 318 Or at 488. This Court's examination of history in *Robertson,* combined with its decision to apply a "historical exception" to only one of these categories of speech, illustrates the principles, first, that sensitivity to history does not automatically mean that a "historical exception" is required, and second, that such an exception must be supported, not only by the history of the clause, but also by its language and case law, as well as logic.

2. There is No "Historical Exception" Test for Article I, Section 20

The fact of the matter is that this Court's modern framework for analyzing cases under Article I, section 20, does not include a "historical exception" test. An examination of those cases, which follows below, demonstrates that simple fact.

a. This Court's Modern Article I, Section 20, Jurisprudence Does Not Contain a "Historical Exception" Test

The germ of this Court's modern Article I, section 20, jurisprudence is contained in *State v. Clark,* decided in 1981. The *Clark* court observed that while, historically, the original concern of Article I, section 20, was with "special privileges or 'monopolies,'" its protection "was soon held to extend to rights against adverse discrimination as well as against favoritism." 291 Or at 236-37. Based on its language, the clause protects both individual citizens and classes of citizens:

> The clause forbids inequality of privileges or immunities not available "upon the same terms," first, to any citizen, and second, to any class of citizens. In other words, it may be invoked by an individual who demands equality of treatment with other individuals as well as by one who demands equal privileges or immunities for a class to which he or she belongs.

Id. at 237. There are two kinds of classes. First, a class may be created by the challenged law itself:

> every law itself can be said to "classify" what it covers from what it excludes. For instance, the rule of this court that limits the time for filing a petition for review (Rule 10.05) "classifies" persons by offering the "privilege" of review to those who file within 30 days and denying it to those who file later. Similarly, a law that licenses opticians and optometrists to perform different functions, *see Williamson v. Lee Optical*, 348 US 483, 75 S Ct 461, 99 L Ed 2d 563 (1955), does not grant or deny privileges to classes of persons whose characteristics are those of "opticians" and "optometrists"; rather, the law creates those classes by the licensing scheme itself.

Id. at 240. Second, a class may exist by virtue of characteristics that are apart from the law in question:

> Familiar examples of the latter kind of "class" are personal characteristics such as sex, ethnic background, legitimacy, past or present residency, or military service.

Id. For purposes of Article I, section 20, different analyses apply to discrimination against, as described above, (1) individuals, (2) classes created by the challenged law itself, and (3) classes that exist independent of the challenged law.

With respect to discrimination against individuals, the question is "whether the government has made or applied a law so as to grant or deny privileges or immunities to an individual person without legitimate reasons related to that person's individual status." *Id.* at 239. Thus, a prosecutor may not choose to charge an individual by information in circuit court after a showing of probable cause in a preliminary hearing, instead of by grand jury indictment, when the choice was by "'haphazard' or standardless administration, in which the procedure is chosen *ad hoc* without striving for consistency among similar cases[.]" *State v. Freeland*, 295 Or 367, 374, 667 P2d 509 (1983).

With respect to discrimination against a class created by the challenged law itself, such discrimination is permissible under Article I, section 20, "if the law leaves it open to anyone to bring himself or herself within the favored class on equal terms." *Clark*, 291 Or at 240-41. Accordingly, a law that licenses opticians and optometrists to perform different

functions is permissible, even if one profession's function is deemed more favorable than the other's, because the law does not prevent an optometrist from becoming an optician, or *vice versa*. *Id.*

Finally, with respect to discrimination against a class that exists by virtue of characteristics that are apart from the law in question, such discrimination is impermissible under Article I, section 20, either when it lacks a rational basis where the classification is not "suspect," *In re Marriage of Crocker*, 332 Or 42, 55, 22 P3d 759 (2001), or when it does not have an actual, factual, basis where the classification is "suspect," *Hewitt*, 294 Or at 45. A classification is "suspect" when it "focuses on 'immutable' personal characteristics." *Id.* Such a classification "can be suspected of reflecting 'invidious' social or political premises, that is to say, prejudiced or stereotyped prejudgments." *Id.* at 45. Thus, classifications "made on the basis of gender," or "racial, alienage, and nationality classifications," are "inherently suspect." *Id.* at 46 (footnotes omitted). They bear "no relation to ability to contribute to or participate in society" but rather, are "based on unexamined societal stereotypes and prejudices" and reflect "purposeful, historical, legal, economic and political unequal treatment." *Id.*

In the case of gender classifications, "The suspicion may be overcome if the reason for the classification reflects specific biological differences between men and women." *Id.* It is not overcome:

> when other personal characteristics or social roles are assigned to men or women because of their gender and for no other reason. That is exactly the kind of stereotyping which renders the classification suspect in the first place.

Id. Thus, in *Hewitt,* this Court held that *former* ORS 656.226 was unconstitutional because it provided workers' compensation to a woman and her children for an injury to a male worker with whom she had cohabited, but not married, without providing for similar compensation to a man and his children when his female worker partner is injured.[6] *Id.* at 50. As the Court

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[6] *Former* ORS 656.226 specifically provided:

reasoned, the gender classification at issue there was "not based on intrinsic differences between the sexes," but "[r]ather reflects assumptions about the relative social roles and the probable dependency of men and women." *Id.* at 49-50.

If, however, a classification is based on "personal characteristics that are not immutable," then the classification is not "suspect" and need only have a "rational basis." *In re Marriage of Crocker*, 332 Or at 55. Thus, for example, this Court has held that, under Article I, section 20, a court may properly require a divorced parent to pay support for his or her child's education, even if the court may not impose the same requirements on married parents who live together. *Id.* The Court reasoned that a legislator "rationally could believe that households in which the parents do not live together might need judicial assistance in making educational decisions, because the absence of cohabitation itself likely reflects a lack of harmony and consensus in parental decision-making." *Id.*

A review of this Court's cases, therefore, reveals that the analytical framework for Article I, section 20, does not contain a "historical exception." The Court did not recognize such an exception when it first announced that framework in 1981 in *Clark*, even though *Clark* is contemporaneous with *Robertson*, the source of that exception. It also did not recognize such an exception in any of its cases in the nearly 25 years since *Clark*, where it developed and applied that framework to classifications involving, among other things:

- gender, *Hewitt*
- children with injured parents, *Norwest v. Presbyterian Intercommunity Hosp.*, 293 Or 543, 652 P2d 318 (1982)
- persons appealing tax assessments, *Cole v. Oregon*, 294 Or 188, 655 P2d 171 (1982)

> In case an unmarried man and an unmarried woman have cohabited in this state as a husband and wife for over one year prior to the date of an accidental injury received by such man, and children are living as a result of that relation, the woman and the children are entitled to compensation under ORS 656.001 to 656.794 the same as if the man and woman had been legally married.

- legitimacy, *State ex rel. Adult & Family Servs. Div. v. Bradley*, 295 Or 216, 666 P2d 249 (1983)
- criminal charging procedures, *Freeland*
- tort damage limitations, *Hale v. Port of Portland,*, 308 Or 508, 783 P2d 506 (1989)
- product liability statutes of repose, *Sealy v. Hicks*, 309 Or 387, 788 P2d 435 (1990)
- parenthood, *Zockert v. Fanning*, 310 Or 514, 800 P2d 773 (1990)
- geographical location, *Seto v. Tri-County Metro. Transp. Dist.*, 311 Or 456, 814 P2d 1060 (1991)
- marital status, *Crocker*

Nothing in any of these cases even remotely suggests that Article I, section 20, contains a historical exception.

And, contrary to DOMC's and *amicus curiae* Mr. Barry Adamson's arguments, this Court did indeed consider the history of the clause when it announced that framework. *See State ex rel. Juvenile Dep't v. Reynolds*, 317 Or 560, 565, 857 P2d 842 (1993) (referring to *Clark* as an example of this Court's approach to constitutional questions by examining the historical context of the clause). This Court has acknowledged that, historically, "The original target of the constitutional provision was the abuse of governmental authority to provide special privileges or immunities *for* favored individuals or classes, not discrimination *against* disfavored ones." *Hale*, 308 Or at 524-25 (emphasis in original); *see also Clark*, 291 Or at 236-37 (same); *Hewitt*, 294 Or at 42 (same). However, this Court has also recognized that the clause had been applied by historic case law to protect "against adverse discrimination as well as against favoritism." *Clark*, 291 Or at 237. Certainly, the language of the clause supports both sets of protections, if they are indeed different.

b. The Use of History as an Interpretative Tool is Different from a "Historical Exception" Test and Does Not Always Lead to Such a Test

In addition to its recognition that state constitutional clauses are not always identical to their federal counterparts, as well as its systematic avoidance of balancing tests, sensitivity

to history has been a hallmark of this Court's modern constitutional interpretative method. As noted above, *Clark* itself is an example of a case where this Court took history into consideration when interpreting a constitutional clause. Indeed, under *Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992), history is one of three factors that the Court considers in interpreting a constitutional provision: "There are three levels on which [a] constitutional provision must be addressed: Its specific wording, the case law surrounding it, and the historical circumstances of its creation." *See also Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 55, 11 P3d 228 (2000) (recognizing that this Court "long had followed" an approach similar to *Priest's* when interpreting the Oregon Constitution). However, sensitivity to history does not automatically mean that a "historical exception" test is required.

As discussed in section III.A.1 above, the "historical exception" test is in fact an *element* within an analytical framework for determining free speech issues under the Oregon Constitution. In order to defend a restriction on speech that is directed to the substance of any opinion or any subject of communication, the government must show, first, that the restraint was historically "well established when the first American guarantees of freedom of expression were adopted" and, second, that those "guarantees were not intended to replace the earlier restrictions." *Henry,* 302 Or at 521. It would seem axiomatic that before the Court adopts such an element and imposes such a burden, the element and burden must be supported by a logical framework that is sustained not just by the historical context of the constitutional clause at issue, but also by the words of the clause, as well the case law that surrounds it. *See Priest*, 314 Or at 415-16.

The Court has not adopted a "historical exception" in every case in which it has interpreted constitutional provisions, even when it has relied heavily on history as an interpretive tool. In *State v. Kessler*, 289 Or 359, 372, 614 P2d 94 (1980), the Court used history to interpret "arms," within the meaning of Oregon's right to bear arms, Or Const, Art I, § 27,[7] to include "hand-carried weapons commonly used by individuals for personal

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[7] Article I, section 27, of the Oregon Constitution provides:

defense." The Court did not adopt a "historical exception" test in that case. Similarly, in *Priest*, this Court examined history to help conclude that the right to bail, under Article I, section 14, of the Oregon Constitution,[8] "applies only to those accused (but not yet convicted) of offenses," and not those who have been convicted, during the pendency of an appeal. 314 Or at 419. Again, the Court did not adopt a "historical exception" test in that case.

Similarly, in *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 23 P3d 333 (2001), although this Court considered the history of the right to remedy clause of the Oregon Constitution, Art I, § 10, at length, the Court adopted a specific framework for interpreting and applying the clause to the issue there without including a "historical exception." *See* 332 Or at 135 (stating framework)

And, of course, as discussed, Article I, section 20, the equal privileges and immunities clause of the Oregon Constitution, does not contain one at all.

In *State ex rel. Dwyer v. Dwyer*, 299 Or 108, 698 P2d 957 (1985), this Court *did* recognize a "historical exception" as part of its framework for analyzing Oregon's jury trial guarantee for criminal cases, under Article I, section 11.[9] There, this Court held that a contempt proceeding held without the benefit of a jury, under ORS 33.100, was:

> wholly confined within an historical exception that was well established when the Oregon constitutional guarantee of a jury trial in

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> The people shall have the right to bear arms for the defence [*sic*] of themselves, and the State, but the Military shall be kept in strict subordination to the civil power.

[8] Article I, section 14, of the Oregon Constitution provides:

> Offences [*sic*], except murder and treason, shall be bailable by sufficient sureties. Murder or treason, shall not be bailable, when the proof is evident, or the presumption strong.

[9] Article I, section 11, of the Oregon Constitution pertinently provides:

> In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury[.]

> all criminal prosecutions was adopted, and the jury trial guarantee in Article I, section 11, demonstrably was not intended to reach punishment for indirect criminal contempt for violation of court orders to pay child support.

299 Or at 114-15. The Court cited *Robertson* as authority for the exception. *Id.* at 15. However, this Court has not consistently considered or applied the exception in subsequent cases involving Article I, section 11. *Compare State ex rel. Juvenile Dep't* (mentions but does not apply the exception) *with Delgado v. Souders*, 334 Or 122, 46 P3d 729 (2002) (applies the exception).

This Court, of course, did adopt the exception in Oregon free speech analysis, but as already discussed, not all prongs of that analysis contains such a test. Moreover, *Amici* respectfully submit that the "historical exception" test there is confined by the examples that this Court listed as satisfying the exception: "[P]erjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud and their contemporary variants." *Robertson,* 293 Or at 412. These exceptions fall into two distinct categories: (1) proscriptions that preserve the very possibility of meaningful speech by identifying and enforcing a few, traditional, central cases where intentional or reckless falsehoods that cause substantial harm to others are criminalized, and (2) regulations of speech that is used to commit a conventional crime that is otherwise constitutionally enforceable.

The first category of exceptions consists of legal proscriptions that criminalize injurious falsehoods, in order to preserve the ideal of truth or truthfulness that makes meaningful speech possible. This category includes deceptive speech such as "perjury, * * * some forms of theft, forgery, and fraud." *Robertson*, 293 Or at 412. These historically recognized central cases of deception that cause substantial harm are not protected by Article I, section 8, because such speech, if tolerated, breaks down distinctions between truth and falsity, which speech and expression require for their informative, communicative and expressive power and content. Thus, "perjury, * * * some forms of theft, forgery and fraud" have been traditionally proscribed because deceptive speech that causes substantial harm to others, if left unchecked, would undermine the very ideals promoted by a guarantee of free

expression: the free, open, and unfettered expression and exchange of meaningful ideas and values. If intentional falsehoods have no bounds, then the very foundation of meaningful speech is threatened. Accordingly, the exception of such speech from the free speech guarantee is entirely consistent with the guarantee itself.

The second category of historical exceptions is the regulation of expression that is used to commit a conventional crime that is otherwise constitutionally enforceable. This category includes "solicitation or verbal assistance in crime." *Robertson*, 293 Or at 412. Soliciting another to pull the trigger of a gun, directing an accomplice by cellular telephone to attack the victim, or triggering a speech-activated bomb are examples in this second category of speech that are not protected by Article I, section 8. Here the speech may logically be excepted from the free speech guarantee because its very utterance is an otherwise constitutionally enforceable crime. In short, the "historical exceptions" to the free speech guarantee, as exemplified in the *Robertson* Court's list of such exceptions, comport in a logical manner with the language of the clause, the surrounding case law, and its history as well.

The same cannot be said with regard to Article I, section 20, the equal privileges and immunities clause of the Oregon Constitution, should the Court choose to adopt a "historical exception" at this late date. As will be further elaborated below, such an exception would indeed conflict with the language of the clause, the surrounding case law, and its history.

3. The Naïve Application of a "Historical Exception" is Inconsistent with the Recognized Purpose of Article I, Section 20, and Would Render It into a Nullity

As discussed above, this Court has long recognized that, historically, the original concern of Article I, section 20, was with "special privileges or 'monopolies.'" *Clark*, 291 Or at 236-37, and that "[t]he original target of the constitutional provision was the abuse of governmental authority to provide special privileges or immunities *for* favored individuals or classes, not discrimination *against* disfavored ones." *Hale*, 308 Or at 524-25 (emphasis in original); *see Hewitt*, 294 Or at 42 (same). However, this Court has also recognized that the

clause has also been applied in historic case law to protect "against adverse discrimination as well as against favoritism." *Clark*, 291 Or at 237.

It is undeniable that Article I, section 20, generally prohibits classifications based on race and sex:

> [N]o one doubts that it would violate article I, section 20, to grant or deny a preliminary hearing because an accused is of Oriental or Native American descent, or an immigrant, or of a particular religious denomination, or of one or the other gender." *See State v. Clark, supra,* 291 Or at 240, 242, 630 P.2d 810, *Hewitt v. SAIF, supra.*

Freeland, 295 at 375-76. Yet, if history is deemed determinative, as DOMC would have it, either by way of a naïve application of a "historical exception" test or otherwise, it would seem inevitable that racial and sexual classifications would be permissible under Article I, section 20.

Article I of the Oregon Constitution, when originally adopted in 1857,[10] contained the following explicit provision excluding "negroes" and "mulattoes" from the State:

> No free negro, or mulatto, not residing in this State at the time of the adoption of this Constitution, shall come, reside or be within this State, or hold any real estate, or make any contracts, or maintain any suit therein; and the Legislative Assembly shall provide by penal laws, for the removal, by public officers, of all such negroes and mulattoes, and for their effectual exclusion from the State, and for the punishment of persons who shall bring them into the state, or employ, or harbor them.

Former Or Const, Art I, § 35; *see The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857,* at 404 & 430 (Charles Henry Carey ed., Western Imprints 1984) [hereinafter *The Oregon Constitution*] (providing text of *former* Or Const, Art I, § 35, and explaining the numbering of the text within Article I). Also, as originally adopted in 1857, *former* Article I, section 31, provided that only "[w]hite foreigners" who

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[10] The Convention that framed the Oregon Constitution met in August and September 1857. *The Oregon Constitution* 57. The Constitution was then submitted and approved by the people of the Oregon Territory on November 9, 1857. *Id.* at 401. It became effective on February 14, 1859, upon Oregon's entry into the Union. *Roberts v. Myers*, 260 Or 228, 234, 489 P2d 1148 (1971).

are, or may become residents in the State, "shall enjoy the same rights in respect to the possession, enjoyment, and descent of property as native born citizens."

Under Article II, as originally adopted in 1857, only white males were allowed to vote:

> In all elections, not otherwise provided for, by this Constitution, every white male citizen of the United States, of the age of 21 years, and upwards, and who shall have resided in the State during the six months immediately preceding such election; and every while male of foreign birth of the age of 21 years, and upwards, and who shall have resided in the United States one year, and shall have resided in the State during the six months immediately preceding such election, and shall have declared his intention to become a citizen of the United States one year preceding such election, conformably to the laws of the United States on the subject of naturalization, shall be entitled to vote in all elections authorized by law.

Former Or Const, Art II, § 2. In addition, *former* Article II, section 6, as originally adopted in 1857, affirmatively provided that "No Negro, Chinaman, or Mulatto shall have the right of suffrage." *Former* Article XV, section 8, further prohibited "Chinamen" from holding any real estate or mining claim:

> No Chinaman, not a resident of the State at the adoption of this constitution, shall ever hold any real estate, or mining claim, or work any mining claim therein. The Legislative Assembly shall provide by law in the most effectual manner for carrying out the above provisions.[11]

In short, the Oregon Constitution itself, as originally adopted, mandated discrimination against women and non-white races. It would thus appear that blind

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[11] *Former* Article XV, section 8, was not repealed until 1946. *See Oregon Blue Book* 304 (2003-04). *Former* Article II, section 2, was amended in 1914 to allow for women's suffrage. *See, e.g., The Oregon Constitution* 434 (stating history of the amendment). *Former* Article I, section 35, excluding "negroes" and "mulattoes" from the State, was repealed in 1926, nearly 70 years after the clause was originally adopted by the people, and *former* Article II, section 6, affirmatively denying the right to vote to "Negroes," "Chinamen," and "Mulattoes," was repealed in 1927, exactly 70 years after the clause was originally adopted by the people. *See Oregon Blue Book* 301 (2003-04). *Former* Article I, section 31, providing certain rights to "white foreigners," was not formally repealed until 1970. *Id.* at 307.

obeisance to historical majoritarian norms of the mid-nineteenth century would eviscerate the protections that are currently afforded by the Equal Privileges and Immunities clause of Article I, section 20.

DOMC argued below, however, that as majoritarian norms change over time, the scope of Article I, section 20, too, might properly change:

> The People passed constitutional amendments: race lost. Concerning gender, both the Nineteenth Amendment to the US Constitution, as well as conforming amendments to the Oregon Constitution, as well as a whole host of legislative enactments—all making clear that the people considered gender to be irrelevant—were at the court's disposal in the gender discrimination cases. The same can be said for virtually every other provision of the original Oregon Constitution to which Plaintiffs would like to analogize: questions of alienage were resolved under [the] federal [Constitution's] Fourteenth Amendment's naturalization clause; age was addressed through the Fourteenth Amendment, as well as federal statutory law and conforming Oregon law; handicapped status has been addressed federally and in Oregon through disabilities acts.

Intervenors-Defendants Defense of Marriage Coalition's [Trial Court] Reply Memorandum 5. There are at least two serious problems with DOMC's position. First, at its worst, DOMC's position nullifies Article I, section 20. That provision would have no independent authority of its own. Instead, it would merely mirror what the majority has already decided and enacted into law, and *only* what the majority has already decided and enacted into law. This simply turns our Constitution—a superseding organic law—on its head. This Court should reject DOMC's position and keep the Constitution upright.

Second, at best, DOMC's position subordinates the interests of all those who seek the protection of Article I, section 20, to the normative interests of the current majority, requiring this State's courts to examine and weigh those interests against each other. This is precisely the sort of "contemporary 'balance' of pragmatic considerations about which reasonable people may differ over time" that this Court disfavors. *Kennedy,* 295 Or at 267. It is also one that this Court rejected when it crafted and applied the analytical framework for Article I, section 20, in *Hewitt.* As discussed in section III.A.2.a above, *Hewitt* dealt with gender discrimination. In the course of that opinion, the Court discussed an early gender

discrimination case under Article I, section 20, *State v. Baker*, 50 Or 381, 92 P 1076 (1907). *Baker* held that a law allowing males over the age of 18 to enter and remain in a saloon, but not women between the ages of 18 to 21, was constitutional. The *Baker* Court first reasoned that, "The act in question is * * * for the purpose of promoting good morals and sound policy." 50 Or at 384. Its "object," the Court stated, "is to suppress the evils incident to the frequenting of saloons by women. The vicious tendency of the mingling of men and women in saloons, or places where intoxicating liquors are sold, is regarded as harmful to good morals[.]" *Id.* The Court then held, "By nature citizens are divided into the two great classes of men and women, and the recognition of this classification by laws having as their object the promoting of the general welfare and good morals does not constitute an unjust discrimination." *Id.* at 384-85 (*quoted in Hewitt*, 294 Or. at 37). The *Baker* Court also held, as observed in *Hewitt,* that, "The liberties or rights of every citizen are subject to such limitations in their enjoyment as will prevent them from being dangerous or harmful to the body politic[.]" *Id.* at 385 (*quoted in Hewitt*, 294 Or. at 37). *Baker,* the *Hewitt* Court recognized, "is an early example of a 'balancing' test approach to 'class legislation.'" 294 Or at 37. It should go without saying that by developing and applying the Article I, section 20, framework as discussed in section III.A.2.a above, the *Hewitt* Court emphatically rejected *Baker* and its "balancing test."[12]

To be sure, there are circumstances under which it is appropriate for this Court to reexamine its precedents. However, those circumstances do not exist here. This court may "reconsider a previous ruling under the Oregon Constitution whenever a party presents to [it]

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[12] The *Hewitt* Court stated:

> This court has not considered the validity of a gender-specific statute challenged under article I, section 20 of our own constitution in twenty-six years. As a result we are not hampered by recent holdings attempting to whittle away at stereotyped and outmoded notions of "proper" roles for men and women. We are free in Oregon to begin our analysis of gender based laws on a clean slate.

294 at 41-42.

a principled argument suggesting that, in an earlier decision, this court wrongly considered or wrongly decided the issue in question." *Stranahan*, 331 Or at 54. The party seeking to overturn the precedent must raise arguments "that either present new information as to the meaning of the constitutional provision at issue or that demonstrate some failure on the part of this court at the time of the earlier decision to follow its usual paradigm for considering and construing the meaning of the provision in question." *Id.* Thus far in this litigation, however, DOMC and those parties aligned with it have failed to demonstrate that there is any "new information" available to this Court that was not already considered by this Court in *Clark* and its progeny, or that this Court failed to follow its "usual paradigm" for analyzing Article I, section 20. Indeed, in order to adopt DOMC's arguments, this Court would in fact have to *ignore* its now settled paradigm for resolving cases under Article I, section 20.

Moreover, Article I, section 20 is not as crabbed as DOMC would have it. For despite their prejudices, the framers of Oregon's Constitution were also progressives. They recognized that, even in their time, there were "a great many things which people held entirely republican and right, which subsequent experience and the progress of the age taught us are blots upon our national escutcheon." *The Oregon Constitution* 102. They used Indiana's then recent Bill of Rights as a model because it "recognizes" and "embodies" that progress. *Id.* They did not write their prejudices into Article I, section 20, for there is nothing in the language of that clause about "negroes," mulattos," "chinamen," women, and certainly nothing about gays and lesbians, let alone same-sex marriage. Instead, the framers stated Article I, section 20, in broad, exhortative, terms that do not contain any limitations on the sort of "citizens" entitled to its protection. Indeed, the framers well recognized that the Bill of Rights serves to protect individuals and minorities from majoritarian tyranny:

> 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 the individual citizen. Then, if the individual citizen is to be protected in this point in which he is endangered, there must be restrictions put upon this constitution. The people must say we will limit ourselves in certain principles of A. B., or this body of citizens.

Id. Seen in *this* historical light, it would be antithetical to the framers' intent to read their marjoritarian stereotypes and prejudices, whatever they may be, into Article I, section 20. The Court should reject any attempt by any party to so read Article I, section 20, through the guise of a "historical exception" or any other device.

B. Under *Hewitt* and the Remedy Guarantee of the Oregon Constitution, the Court Must Provide a Remedy by Extending the Privilege of Marriage to Same-Sex Couples, Without Deferring the Matter to the Legislature

The trial court below concluded that it is a violation of Article I, section 20, to deny same-sex couples the benefits of marriage. However, the trial court declined to remedy the violation. Instead, it enjoined defendant Multnomah County from issuing marriage licenses to same-sex couples, and gave the legislature ninety days after the commencement of the next regular or special session, whichever comes first, to produce remedial legislation.[13] Opinion and Order 16. *Amici* respectfully submit that the trial court erred in not ordering a remedy after it had decided that the Constitution had been violated. It is now incumbent upon this Court to remedy that violation by extending the privilege of marriage to same-sex couples, without referring that task to the legislature.

In addressing a violation of the Equal Privileges and Immunities clause because a particular law is underinclusive, the Court is faced with the "issue whether to strike down the special privilege or to extend it beyond the favored class." *Hale*, 308 Or at 525. The Court "must examine legislative history to assess how best to maintain the objective sought to be achieved by the statute." *Hewitt*, 294 Or at 53. At the very least, the marriage statute here serves as a gatekeeper to the numerous legal rights, responsibilities and obligations attendant to that institution, for instance: the privilege protecting marital communications, ORS 40.255(2); the right of a surviving spouse to bring tort claims for injuries to the decedent, ORS 30.020; a surviving spouse's rights to intestate succession, ORS 112.025; ORS 112.035,

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[13] The next regular session of the legislature is not due to begin until Monday, January 10, 2005. *See* ORS 171.010 (setting forth schedule for regular sessions). No special sessions have thus far been announced.

ORS 114.105; and the right to spousal and child support when a marriage is dissolved, ORS 107.105. Given that marriage is ubiquitous, it is difficult to imagine that the best way to maintain the objectives of the marriage statute is to invalidate it, and to thereby deny its privilege to all.

Indeed, when confronted with the issue of the proper remedy in *Hewitt*, this Court stated its reluctance to "adopt a policy of *per se* invalidation of statutes containing discriminatory classifications." 294 Or at 53. This Court observed that "[s]uch a policy provides a disincentive for litigants to challenge objectionable statutes." *Id.* This Court also wrote,

> More importantly, we are not convinced that denial of benefits to all adequately and fairly resolves the problem of discriminatory laws. We see no reason why in this case, for example, 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.; *see also Zockert*, 310 Or at 524 ("Where an impermissible classification is utilized by the legislature, we have decided in favor of equalizing privileges."). The same can be said here: there is no reason why the entitlements of opposite-sex couples should be eliminated, so that the rights of same-sex couples may be vindicated. The Court should, therefore, remedy the violation of Article I, section 20, here by extending the right to marry to same-sex couples.

Unlike the trial court, this Court should *not* refer to the legislature the task of providing a remedy. *Amici* are unaware of any case where this Court has determined that a constitutional violation has occurred and then declined to order a remedy, in deference to the legislative process. Indeed, *Amici* respectfully submit that the remedy guarantee of Article I, section 10, of the Oregon Constitution requires this Court to provide a remedy in the first instance, not the legislature. That guarantee "mandate[s] the availability of a remedy by due course of law for injury to absolute rights respecting persons, property, and reputation." *Smothers*, 332 Or at 114. Remedy guarantee clauses are ultimately derived from the *Magna Carta*, as well as from various learned commentaries on that text. *Id.* at 94-100. They became "more common after 1780, as constitution writers realized that unrestrained state

legislative power was as much a threat to the security of individual right as unrestrained parliamentary and royal power had been." *Id.* at 105. In other words, these clauses reflect a "mistrust of legislative power" and are a check on that power. *Id.* at 115. With respect to Oregon's remedy guarantee, this Court has held that "the drafters of Article I, section 10, sought to give constitutional protection to absolute rights respecting persons, property, and reputation as those rights were understood in 1857, and that the means for doing so was to mandate the availability of remedy by due course of law in the event of an injury to those rights." *Id.* at 115. More important, in the context of this case, the guarantee "is a directive to courts, as guardians of constitutional rights, to determine the constitutionality of legislatively created remedies respecting such [absolute] rights." *Id.* at 155.

"Absolute rights" are more specifically those rights that "in 1857, the common law regarded as 'absolute,' that is derived from nature or reason rather than solely from membership in civil society." *Id.* at 123. This Court has relatedly observed that "Declarations or bills of rights in state constitutions reflected the broad deep foundations of English rights as those rights were understood at the time, but drafters restated their common law rights as natural rights." *Id.* at 103. In short, it may be surmised that the rights contained in Oregon's Bill of Rights, including the right to equal privileges and immunities, fall within the "absolute" rights to which the remedy guarantee applies.

Here, this Court is not confronted with the constitutionality of an existing legislative remedy. There is no such remedy because what is at issue is in fact a legislative violation of Plaintiffs-Respondents and Cross-Appellants Li and Kennedy *et al.'s* rights under Article I, section 20. The mandate of the remedy guarantee—to provide "remedy by due course of law in the event of an injury to [absolute] rights," *Smothers,* 332 Or at 115—requires that a remedy be provided to Plaintiffs-Respondents and Cross-Appellants. And given that the remedy guarantee is a check on the power of the legislature, it is up to this Court to supply that remedy in the first instance, not the legislature. Once the judicial branch has fulfilled its duty to fashion the most appropriate remedy, the legislative branch retains its power to

modify that remedy—as long as any such legislative modification complies with Article I, section 20, and other provisions of the Constitution.

IV. CONCLUSION

For the reasons discussed above, this court should hold that: (1) Oregon's Equal Privileges and Immunities clause, Or Const, Art I, § 20, does not contain a "historical exception," and (2) that this Court has a duty here to devise a remedy for the violation of Article I, section 20, without referring that task to the legislature.

DATED: October 14, 2004.

Respectfully submitted,

PERKINS COIE LLP

By _____
Chin See Ming, OSB No. 94494

Les Swanson, OSB No. 66121
900 S.W. 83rd Avenue
Portland, OR 97225

Attorneys for *Amici Curiae* Paula Abrams *et al.*

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I caused to be filed the foregoing BRIEF OF *AMICI CURIAE* PAULA ABRAMS, GILBERT PAUL CARRASCO, VINCENT CHIAPPETTA, GARRETT EPPS, STEVEN K. GREEN, JAMES HUFFMAN, M. H. "SAM" JACOBSON, STEPHEN KANTER, SUSAN F. MANDIBERG, JAMES M. O'FALLON, MARGARET PARIS, AND DEAN M. RICHARDSON on October 14, 2004, by mailing the original and 12 copies thereof by United States Postal Service first-class mail to:

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1163 State Street
Salem, OR 97301-2563

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Hardy Myers, OSB No. 64077
Peter Shepard, OSB No. 80106
Michael C. Livingston, OSB No. 81297
DEPARTMENT OF JUSTICE
1162 Court Street NE
400 Justice Building
Salem, OR 97301-4096
Telephone: (503) 378-4402

Attorneys for Defendants-Appellants, Cross-Respondents State of Oregon *et al.*

Barry Adamson, OSB No. 79008
4248 SW Galewood
PO Box 1172
Lake Oswego, OR 97035
Telephone: (503) 699-9914

Attorney for *Amicus Curiae* Barry Adamson

Lynn R. Nakamoto, OSB No. 88087
MARKOWITZ, HERBOLD, GLADE & MEHLHAF, P.C.
1211 S.W. Fifth Avenue, Suite 3000
Portland, OR 97204
Telephone: (503) 295-3085

Cooperating Counsel for ACLU Foundation of Oregon, Inc. and Attorneys for Plaintiffs-Respondents, Cross-Appellants Li and Kennedy *et al.*

Kenneth Y. Choe, *Pro Hac Vice*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Lesbian and Gay Rights Project
125 Broad Street
New York, NY 10004
Telephone: (212) 549-2553

Attorneys for Plaintiffs-Respondents, Cross-Appellants Li and Kennedy *et al.*

Agnes Sowle, OSB No. 87348
Jenny M. Morf, OSB No. 98298
OFFICE OF THE MULTNOMAH COUNTY ATTORNEY
501 S.E. Hawthorne Blvd., Suite 500
Portland, OR 97214
Telephone: (503) 988-3138

Attorneys for Intervenor-Plaintiff-Respondent, Cross-Appellant Multnomah County

Kelly W.G. Clark, OSB No. 83172
Kristian Roggendorf, OSB No. 01399
O'DONNELL & CLARK LLP
1706 N.W. Glisan, #6
Portland, OR 97209
Telephone: (503) 306-0224

Herbert Grey, OSB No. 81025
4800 S.W. Griffith Drive, #320
Beaverton, OR 97005
Telephone: (503) 641-4908

Kelly E. Ford, OSB No. 87223
KELLY E. FORD, P.C.
4800 S.W. Griffith Drive, #320
Beaverton, OR 97005
Telephone: (503) 641-3044

Raymond M. Cihak, OSB No. 94560
Pamela Hediger, OSB No. 91309
EVASHEVSKI ELLIOTT CIHAK & HEDIGER, PC
P.O. Box 781
Corvallis, OR 97339
Telephone: (541) 754-0303

Kevin Clarkson, *Pro Hac Vice*
BRENA BELL & CLARKSON
310 K Street, Suite 601
Anchorage, AK 99501
Telephone: (907) 258-2000

Benjamin W. Bull, *Pro Hac Vice*
Jordan Lorence, *Pro Hac Vice*
ALLIANCE DEFENSE FUND
15333 N. Pima Road, Suite 165
Scottsdale, AZ 85260
Telephone: (480) 444-0020

Attorneys for Intervenors-Defendants-Appellants, Cross-Respondents Defense of Marriage Coalition *et al.*

Vance M. Croney, OSB No. 92045
Benton County Counsel
408 S.W. Monroe, Suite M209
Corvallis, OR 97339
Telephone: (541) 766-6890

Attorneys for Prospective Intervenor-Plaintiff-Respondent, Cross-Appellant Benton County

PERKINS COIE LLP

By _____
Chin See Ming, OSB No. 94494

Attorneys for *Amici Curiae* Paula Abrams *et al.*