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3
4 IN THE CIRCUIT COURT OF THE STATE OF OREGON
5 FOR THE COUNTY OF MULTNOMAH

6 MARY LI and REBECCA KENNEDY;
STEPHEN KNOX, M.D., and ERIC
7 WARSHAW, M.D.; KELLY BURKE and
DOLORES DOYLE; DONNA POTTER and
8 PAMELA MOEN; DOMINICK VETRI and
DOUGLAS DEWITT; SALLY SHEKLOW
9 and ENID LEFTON; IRENE FARRERA and
NINA KORICAN; WALTER FRANKEL
10 and CURTIS KIEFER; JULIE WILLIAMS
and COLEEN BELISLE; BASIC RIGHTS
11 OREGON, an Oregon not-for-profit
corporation; and AMERICAN CIVIL
12 LIBERTIES UNION OF OREGON, an
Oregon not-for-profit corporation,
13

Plaintiffs,

14 MULTNOMAH COUNTY, a political
15 subdivision of the state of Oregon,

16 Intervenor-Plaintiffs,

17 v.

18 STATE OF OREGON; THEODORE
KULONGOSKI, in his official capacity as
19 Governor of the State of Oregon, HARDY
MYERS, in his official capacity as Attorney
20 General of the State of Oregon; GARY
WEEKS, in his official capacity as Director of
21 the Department of Human Services of the State
of Oregon; and JENNIFER WOODWARD, in
22 her official capacity as State Registrar of the
State of Oregon,
23

Defendants,

24 - and -
25

26 DEFENSE OF MARRIAGE COALITION,

Case No. 0403-03057

INTERVENOR-DEFENDANT DEFENSE
OF MARRIAGE COALITION'S
MEMORANDUM IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY
JUDGMENT

an assumed business name of OREGON)
 FAMILY COUNCIL, an Oregon not-for-)
 profit corporation; CECIL MICHAEL)
 THOMAS; NANCY JO THOMAS; DAN)
 MATES; and DICK JORDAN OSBORNE,)
 Intervenor-Defendants.)

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INTRODUCTION

Marriage is not unconstitutional. Plaintiffs in this case, through incomplete legal analysis and appeals to emotion argue that traditional marriage,¹ as understood throughout Western history and specifically by the framers of Oregon's Constitution, is an unconstitutional grant of privileges and immunities that violates Article I, Section 20. But traditional marriage— marriage between one man and one woman—would clearly be a historical exception to any reading of Article I, Section 20 that would invalidate the marriage statutes, then or now. This conclusion is dispositive, even apart from the obvious problems of reading Article I, Section 20 as Plaintiffs do—with blinders as to the proper legal guidelines and the legitimate social and policy choices made by the Legislature in enacting ORS Chapter 106.

Intervenor-Defendants have two primary arguments:

1. First, traditional marriage represents a well-recognized historical exception to any overly broad or hyper-technical reading of Article I, Section 20 that would suggest that the marriage statutes, in continuous existence since before the framing, represent an unequal privilege or immunity.

This analysis states:

- a. Statutes in place under territorial or common law at the time of the framing of the Oregon Constitution, even if they could be said arguably to contradict an absolutist reading of a constitutional provision, are not unconstitutional if they were obviously intended to be excepted from, and to survive the adoption of, the constitutional provision; and
- b. Marriage laws at the time of the framing of the Oregon Constitution implicitly or explicitly excluded multiple-person marriages and marriage between close kin— as well

¹ Intervenor-Defendants of course note that the “traditional” definitions of marriage have changed since the time of the framing of the Oregon Constitution to exclude limitations on the basis of race. However, these changes have occurred as a result of constitutional amendments, both federal and state. No such constitutional amendment has occurred regarding sexual orientation.

1 as same-sex marriage—and there has never been a subsequent federal or state
2 constitutional amendment (as there has been for race) overriding these traditional
3 historical exceptions.

4 2. Second, even if the “historic exception” doctrine somehow does not apply, marriage is fully
5 constitutional under Article I, Section 20 for at least five reasons:

- 6 a. Marriage reflects legitimate distinctions rationally chosen by the Legislature for
7 legitimate, non-discriminatory, and compelling governmental reasons; and when it
8 comes to such choices, the courts are to give great deference to the Legislature. The
9 court is not to ask whether it agrees with the policy choice in the first instance, but only
10 whether a reasonable, unbiased Legislature could have made such a policy choice. The
11 marriage statutes reflect a legitimate legislative policy preference for traditional marriage
12 and its potential for procreation and childbearing as the most ideal vehicle for strong
13 families and children.
- 14 b. Marriage is open to all citizens and allows full participation of both genders. Neither
15 “groups” nor “couples” have rights; only individuals have rights. And only laws that
16 either facially discriminate against members of a suspect class (or a true class without
17 rational basis), or were enacted with the specific intent of harming a true class run afoul
18 of Article I, Section 20.
- 19 c. Marriage *itself* is neither a privilege nor immunity. The benefits, responsibilities and
20 detriments that flow from marriage—such as Plaintiffs say they seek—are not contained
21 in ORS Chapter 106, and therefore Chapter 106 does not represent an unconstitutional
22 grant of privileges and immunities to any individual or class. Plaintiffs are simply using
23 “marriage” as a shorthand term for “state-recognized partner benefits” that lie outside
24 the challenged statute.
- 25 d. A marriage contract does not even consider sexual orientation in allowing the
26 participation of individuals—neither romantic love nor sexual relations are a requirement

1 to enter into a statutory marriage contract. Homosexuals are allowed to enter into a
2 marriage contract “on the same terms” as heterosexuals. Reading the marriage statutes
3 to require same-sex marriages is no different from demanding that underage or close-
4 kin couples, or even already married persons be allowed to enter into marriage
5 contracts. The Legislature has reasons for all of these legitimate distinctions. Plaintiffs
6 are asking for treatment not “upon the same terms,” but on unique terms redefined only
7 for their particular group.

8 e. Gays and lesbians, while perhaps a true class, are not a “suspect class” for purposes of
9 Article I, Section 20 analysis.

10 Furthermore, Intervenor-Defendants have moved for summary judgment on the proper
11 statutory construction of ORS Chapter 106, that marriage is only between one man and one woman.
12 (Plaintiffs concede the statute’s meaning in their complaint, and this motion should be granted.)

13 For all of these reasons, Plaintiffs’ claims should fail, and Intervenor-Defendants are entitled as
14 a matter of law to summary judgment against Plaintiffs and Intervenor-Plaintiff on their claims.
15 Intervenor-Defendants are furthermore entitled as a matter of law to partial summary judgment in favor
16 of Intervenor-Defendants’ First and Fourth Affirmative Defenses and Counterclaims.

17
18 **I. MARRIAGE CONSTITUTES AN HISTORICAL EXCEPTION TO ANY ABSOLUTIST OR HYPER-**
19 **TECHNICAL READING OF ARTICLE I, SECTION 20 THAT WOULD SUGGEST MARRIAGE MUST**
ENCOMPASS SAME-SEX UNIONS.

20 **A. INTRODUCTION: THE FOREST & THE TREES.**

21 In setting forth their Privileges and Immunities argument, the Plaintiffs must struggle mightily with
22 the meaning of Article I, Section 20 of the Oregon Constitution, and its caselaw, to try to make their
23 case. However, the Plaintiffs, as well as prior Multnomah County legal opinions, and those of
24 Legislative Counsel and the Attorney General—all written by rightly respected lawyers—nonetheless
25 fail to see the constitutional forest for the trees. Plaintiffs totally ignore some very basic concepts in
26 Oregon constitutional jurisprudence, concepts articulated repeatedly over the last twenty years by the

Supreme Court in its “Historical Exceptions Doctrine.”

B. FRAMER INTENT IN OREGON CONSTITUTIONAL LAW: STILL THE GOAL.

The Supreme Court has recently restated that, when it comes to understanding key provisions of the Constitution, its job is to understand the intent of the framers. “As a preliminary matter, we note that, when construing provisions of the Oregon Constitution, it has long been the practice of this Court to ascertain and give effect the intent of the framers . . . and of the people who adopted it.” Stranahan v. Fred Meyer, 331 Or 38, 54-55, 11 P3d 228 (2000) (internal quotation marks omitted), *citing* Priest v. Pierce, 314 Or 411, 415-16, 842 P2d 65 (1992).

The Supreme Court has also repeatedly noted that, even when constitutional phrases appear to be plain and uncompromising, there may be “clear historical exceptions” to those ringing words. In the case of free speech, for example, the Court in State v. Robertson, 293 Or 402, 649 P2d 569 (1982), first noted that such speech as perjury, fraud, verbal theft and solicitation were obviously never intended to be included in the protections of Article I, Section 8; they are “clear historical exceptions”:

This [constitutional provision] forecloses the enactment of any law written in terms directed to the substance of any ‘opinion’ or any ‘subject’ of communication, ***unless the scope of the restraint is wholly confined within some historic 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. Examples are perjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud and their contemporary variants.***

293 Or at 412 (Emphasis added).

To take another example from early in the Court’s historical exceptions doctrine, in Dwyer v Dwyer, 299 Or 108, 698 P2d 957 (1985), the Supreme Court held that the husband in a divorce case was not entitled to a jury trial in a criminal contempt proceeding arising out of his failure to pay child support. Despite that Article I, Section 11, by its terms appears to be absolute—“in all criminal prosecutions the accused shall have the right to a public trial by an impartial jury.”—the Court held no jury trial was required. How can this be? The Supreme Court held that “clear historical exceptions” existing at the time of the framing demonstrated that, despite the apparently absolute constitutional

1 language, “the jury trial guarantee in Article I, Section 11 demonstrably was not intended to reach
2 punishment for indirect criminal contempt.” 299 Or 114–15.

3 In Robertson itself, the Supreme Court in 1982 found that then ORS 163.275 (making it a
4 crime to compel or induce another person to engage in conduct from which he has a legal right to
5 abstain) was a clear historical exception to Article I, Section 8: “The historic exception is found in the
6 long established laws against blackmail and other forms of extortion. On historic grounds alone, we
7 have no doubt that these or their contemporary equivalents survived Article I, Section 8...” 293 Or at
8 421-22. That the Court struck the statute down for vagueness did not alter its historical analysis.

9 Likewise, in State v. Henry, 302 Or 510, 732 P2d 9 (1987), the Court decided that the
10 obscenity statutes did **not** fall with any historical exception to Article I, Section 8, concluding
11 (somewhat dubiously as a matter of history) that “restrictions on sexually explicit or obscene
12 expressions were not well-established at the time the early freedoms of expression were adopted
13 The pejorative label of ‘obscenity’ has not described any single type of impropriety through the years.”
14 302 Or at 520.

15 Another early historical exceptions case was State ex rel Hathaway v. Hart, 300 Or 231, 708
16 P2d 1137 (1985), in which the Court found , as in Dwyer, that, despite the broad language of Article I,
17 Section 11's guarantees of a jury trial, the defendant in a criminal proceeding for violating a restraining
18 order was not entitled to a jury trial. Significantly, the Court was not slowed down by the fact that the
19 framers “could not have known about” modern day restraining orders: “We may use the historical
20 record for analogies to restraining orders . . .” [finding the Act was] “analogous to traditional injunctions
21 prohibiting spouses from harassing each other during a pending divorce suit...” 300 Or at 240-241.
22 The Court concluded in short order that “it was firmly established in England and in the United States
23 that contempts of Court were disposed of without jury trials,” id at 241, and that “the framers of the
24 state constitution would have understood proceedings such as the one at issue here as an exception to
25 the coverage of Article I, Section 11. Therefore, defendant was not and is not entitled to a jury trial.”
26 Id at 241-242.

1 In Molodyh v. Truck Insurance Exchange, 304 Or 290, 744 P2d 992 (1987), the Court found
2 that an insured in an action on a fire insurance policy was entitled to a jury trial (unless the plaintiff had
3 voluntarily waived it through an arbitration clause). Nonetheless, the Court noted numerous examples
4 where, despite the plain reading of Article I, Section 17's guarantee of a jury trial in civil cases—"in all
5 civil cases the right of trial by jury shall remain inviolate"—a jury trial was *not* guaranteed, again
6 because of the Historic Exceptions doctrine. Molodyh, 304 Or 295–96. For example, in civil cases
7 under certain dollar limits no jury trial attaches: "this Court also has stated that a jury trial is guaranteed
8 only in those classes of cases *in which the right was customary at the time the constitution was*
9 *adopted* or in cases of like nature." Id. at 295 (emphasis added).

10 Another jury trial question of more recent vintage was Delgado v. Souders, 334 Or 122, 46
11 P3d 729 (2002), in which the Court held that a defendant in an action under the anti-stalking statute did
12 not have a constitutional right to trial by a jury despite Article I, Section 11. In reviewing the relevant
13 history, the Court analogized the stalking statutes to those existing at the time of the framing, including
14 the 1855 statutes providing for proceedings to prevent the commission of crimes. 334 Or at 140-141.
15 The Court concluded that "in light of the foregoing, we conclude that the procedure set out in ORS
16 30.866 for obtaining an SPO fall within a historical exception to Article I, Section 11. . . accordingly,
17 the defendant was not entitled to the constitutional safeguard set out in that provision, such as the right
18 to a jury trial." Id. at 141.

19 Finally, in another recent case, this one from the Court of Appeals, it was held that a criminal
20 defendant could be prosecuted for promoting unlawful public sex and prostitution under ORS 167.062,
21 since statutes governing such offenses are wholly contained within historical exceptions to Article I,
22 Section 8. *See State v. Ciancanelli*, 181 Or App 1, 9–16, 45 P3d 451 (2002) (discussing the history of
23 governmental regulation of public nudity and public displays of sexual conduct and concluding that):
24 "we. . . do not hesitate to conclude that the framers in mid-nineteenth century Oregon understood that
25 the state had the authority to regulate public sexual conduct. . . ." Id. at 15. Significantly, the Court was
26 not troubled by the fact that it had "failed to report any statutes that directly parrot the language of ORS

1 167.062. . . .,” since:

2 “we do not read Robertson to require such a historical ‘smoking gun.’ To the contrary, the
3 Oregon Supreme Court emphasized that a historical exception does not consist of a
4 particular statutory prototype, but instead of a well established principle of law *evidenced*
5 *by*, among other things, statutes and caselaw from the relevant time.”

6 Id. at 15-16, *citing* Robertson, 293 Or at 434. Ciancanelli further noted that, in Robertson the
7 Supreme Court canvassed a wide array of historical sources; in Henry, the Court did the same. The
8 Court “followed the same analytical approach, examining English and American precedents from the
9 17th to the 19th centuries to determine what the framers most likely intended. . . .” 181 Or App at 15-
10 16.

11 In short, the Historical Exceptions Doctrine recognizes that when history makes clear that a
12 constitutional phrase, no matter how bold or ringing in its assertion, could not have been intended by the
13 framers to replace some legal, social or historic fact, then history wins out over the pure language of the
14 Constitution. Significantly, neither the Plaintiffs in their pleadings, nor the opinions upon which
15 Multnomah County has relied, nor the Attorney General’s opinion, have even touched upon this central
16 doctrine. To that extent, all the opinions missed the forest for the trees.

17 ////

18 ////

19 **C. MARRIAGE, AS RECOGNIZED CONTINUOUSLY IN STATUTES AND COMMON LAW SINCE
20 BEFORE STATEHOOD, IS A HISTORIC EXCEPTION TO ARTICLE I, SECTION 20.**

21 If anything is a “clear historical exception” to a constitutional text, traditional notions that
22 marriage was between one man and one woman—enlisted in the common law for hundreds of years
23 and in the Oregon territorial statutes since well before and at—is a clear historical exception to Article
24 I, Section 20. It simply cannot be argued that the framers ever would have thought that limiting
25 marriage to one man and one woman—any more than limiting marriage to those who are not of close
26 blood kin, or to those who are at least of the age of consent, or to those not already married—could
have possibly contradicted the lofty words of Article I, Section 20. In other words, the framers would

1 never have intended for traditional marriage to be unconstitutional under Article I, Section 20.

2 Prior to the adoption of the Oregon Constitution, during, and afterwards, marriage was
3 understood to be defined, or restricted, by these requirements: one man and one woman, at least of the
4 age of consent, outside of certain degrees of kinship, and unmarried. Statutes pertaining to marriage
5 predated the actual adoption of the Oregon Constitution. In fact, as the Attorney General points out in
6 his March 12, 2004, Opinion, “Section 6 of an Act Relating to Marriage and Divorce, enacted by the
7 Territorial Assembly on January 17, 1854, is the direct precursor to ORS 106.150.” *Opinion Letter*
8 *of Hardy Myers to the Honorable Ted Kulongoski* at 3, note 2. Like the current statute, Section 6 of
9 the Territorial Statute refers to “husband” and “wife.” Likewise, the 1863 Act, which replaced the
10 Territorial Statute, referred to “husband and wife”. *Id.* Section 13 of the 1863 Act, according to the
11 Attorney General, “reinforces that the parties to an 1863 marriage could not have been two persons of
12 the same sex, as it required parental consent for a license if the *female* was under the age of 18 or the
13 *male* was younger than 21.” *Id.* The Attorney General’s footnote on history concludes that “successor
14 statutory provisions, also containing express recognition that the marital relationship is one of ‘husband
15 and wife,’ had been carried forward without interruption right up until the present versions of ORS
16 106.150, 106.041, and 106.020. *See* 1921 Oregon Laws, Section 9720-9724; 1940 Oregon
17 Compiled Laws Annotated, Section 63-101 through 63-105.” *Id.* It is simply beyond question that
18 the Oregon marriage statutes do now and have always contemplated that marriage was between one
19 man and one woman.²

20 Not only the Oregon Territorial Statutes, but the Constitution itself assumes that marriage is
21 between a man and a woman. *See* Article XV, Section 5 “the property and pecuniary rights of every

22
23 ² Another significant historical milestone was the 1878 federal polygamy case, *Reynolds v.*
24 *United States*, 98 US 145 (1878), in which the US Supreme Court rejected the claim of a Latter Day
25 Saints defendant for a religious freedom right to polygamy, noting that the common law had always
26 outlawed it. *Id.* at 165. “Marriage, while from its very nature a sacred obligation, is nevertheless, in
most civilized actions, a contract, and usually regulated by law. Upon it society may be said to be built,
and out of its fruits spring social relations and social obligations and duties, with which government is
necessarily required to deal.” *Id.*

1 married woman, at the time of marriage or afterwards, acquired by gift, devise, or inheritance shall not
2 be subject to the debts, or contracts of the **husband**; and laws shall be passed providing for the
3 registration of the **wife's** separate property” (emphasis added).

4 The debate surrounding the adoption of this provision reveals not only that marriage was only to
5 be between one man and one woman, but that the framers assumed that the public purpose of marriage
6 had to do with protecting and preserving the family unit. The debates of September 22, 1857, are the
7 best example. The discussion on whether to strike or pass Article XV, Section 5 is attached in full as
8 Appendix 1 to this brief, but particularly relevant portions are as follows:

9 “Mr. Deady was in favor of striking out [the provision]. He would not make
10 two persons of the husband of wife—it only tended to family alienation and jars.

11 “Mr. Williams supported the motion to strike out. In this age of woman’s rights
12 and insane theories, our legislation should be of such to unite the family circle, and make
13 husband and wife what they should be—bone of one bone, and flesh of one flesh. . . .
14 Mr. Logan opposed striking out. . . if [the husband] was prudent and thrifty [the wife]
15 would give him control of her property. And if he was not, it was better that she should
16 have the power to preserve her property to support herself and educate her children.
17 He had never heard of any divorces growing out of any conflicting interests in land
18 claims. Mr. Kelsay had heard of such divorces and had known them too, he was for
19 striking out. The wife was amply provided for without this. This would make the
20 husband simply a boarder at his wife’s establishment.”

21 Cary, THE OREGON CONSTITUTION AND PROCEEDING AND IN DEBATES OF THE CONSTITUTIONAL
22 CONVENTION OF 1857 (Salem, Oregon: State Printing Department, 1926) at 368–369.

23 This constitutional debate shows several things relevant to the current case. First, the framers
24 understood and assumed that marriage was between one unmarried man and one unmarried woman.
25 Second, they assumed that their legislation “should be such as to . . . make husband and wife what they
26 should be—bone of one bone and flesh of one flesh.” Moreover, their concern for the effect of the
27 amendment was whether it would “unite the family circle,” or whether it would encourage marital
28 tension and divorce. These latter two concerns are particularly important to understand the public
29 purpose of marriage as including a concern for the traditional family unit and procreation and nurture of
30 children, as set forth more particularly in Section II below.

31 Of course, not just American, but English legal precedent and commentary well established that

1 marriage has always been considered between one man and one woman. *See* William Blackstone, 4
2 COMMENTARIES ON THE LAWS OF ENGLAND, 163 (describing polygamy as a felonious offense: “for
3 polygamy can never been endured under any rational civil establishment, whatever the specious reasons
4 may be urged for it by the Eastern nations. . . .”). In Book 1, Chapter 15, Blackstone refers to
5 marriage as “the reciprocal duties of husband and wife,” continuing that “in general, all persons are able
6 to contract themselves in marriage, unless they labor under some particular disabilities and incapacities.
7 . . . these disabilities are of two sorts . . . first, such as are canonical . . . of this nature are pre-contract,
8 consanguinity, or relation by blood; and affinity, relation by marriage, and some particular corporal
9 infirmities. In these canonical disabilities are either grounded upon the express words of the divine law,
10 or are consequences plainly deducible from thence.” As the Supreme Court has explained,
11 *Blackstone’s Commentaries* “became one of the principle means of the colonists’ information about
12 the state of English law in general.” Smothers v. Gresham Transfer, Inc., 332 Or 83, 98, 23 P3d 333
13 (2001). *See also*, State v. Ciancanelli, 181 Or App at 9–10 n7: “the *Commentaries* were not merely
14 an approach to the study of law; for most lawyers they constituted all there was of the law In view
15 of the scarcity of law books during the earliest years of the Republic and the limitations of life on the
16 frontier, it is not surprising that Blackstone’s convenient work became the bible of American lawyers.”

17 Thus Blackstone makes clear several principles of marriage: first, though the general rule is that
18 all persons are able to marry, there are a number of exceptions, and they are unambiguous. Marriage is
19 limited to a man and a woman; marriage is limited to those who are not already married; marriage is
20 limited by degrees of consanguinity or relation by blood; it is limited to those who can consent. In
21 short, marriage is legitimately defined by the state, and some distinctions are inherent and necessary for
22 its public purpose.

23 From these historical sources it must be concluded that the marriage statutes in Oregon law
24 were, and are, historical exceptions to any provision in the constitution which would tend to call them
25 into question, including Article I, Section 20. The territorial statutes, Blackstone, the Constitution itself
26 and the constitutional debates all make clear that marriage has always been defined as it currently is in

1 ORS Chapter 106, and that the framers would have intended it to survive the enactment of Article I,
2 Section 20, or any contrary reading of that provision.

3
4 **D. WHY SEXUAL ORIENTATION IS DIFFERENT THAN RACE.**

5 “Well,” the Plaintiffs and Multnomah County will undoubtedly say, “if you want to talk about
6 history, let us be fair: the framers never would have thought that the racist sentiments ensconced in the
7 Oregon territorial statutes were unconstitutional either; but that does not mean that those ideas are
8 constitutionally acceptable.” But the constitutional and historical difference between the two scenarios
9 is palpable. We fought the bloodiest war in this country’s history, and enacted three major federal
10 constitutional amendments and several revisionary state constitutional amendments, to address
11 questions of race. We had a constitutional dialogue in this country on race, and we have decided that
12 our constitutions are color-blind. That it took 100 years and dozens of court decisions to enforce this
13 constitutional mandate does not change the historical analysis. As a nation and as a state, we had the
14 constitutional debate: race no longer matters. Both the state and federal constitutions reflect that. We
15 have never had such constitutional dialogue on questions relating to sexual orientation. That is the
16 difference.

17
18 **E. CONSTITUTIONAL CHANGE: TWO METHODS, ONLY ONE OF WHICH IS VALID.**

19 In summarizing the discussion then, and bringing it to a fine point, we are at a crossroad. By
20 any intellectually honest reckoning and by understanding the Historic Exceptions Doctrine repeatedly
21 affirmed by the Supreme Court, as Oregon law now stands, the situation is clear. The marriage statutes
22 do not allow same-sex marriage and the Constitution does not require it. That leaves the question: if
23 advocates for same-sex marriage such as Plaintiffs want to change that fact, as they clearly do, then
24 how should that properly be done? How do we create new constitutional rights? The designers of our
25 constitutional republic, and our state drew up a simple plan: if the citizens want to amend the
26 Constitution, there is a defined way to do so. Initially, it was from the Legislature (which was required

1 to consider the question in two separate sessions) to the people. *See* former Or Const Art XVII, § 1
2 (1901 and earlier). Since the early Twentieth Century, the process has been through a constitutional
3 revision or convention, or through a ballot measure initiated or referred by the Legislature, directly to
4 the voters. Or Const Art IV, § 2. This is the only method allowed by the Constitution for amending it
5 to add new rights.

6 This method is arduous and difficult, and takes time to build a civic consensus. No doubt the
7 framers intended it that way. It requires advocates of a constitutional change to convince a majority of
8 their fellow citizens that our common life would be well-served by the change.

9 But then, of course, there is another way to “amend” our constitutions, federal or state. For at
10 least thirty years, and perhaps longer, political activists have turned to the courts to get what they could
11 never get at the ballot box: new constitutional rights nowhere mentioned or even contemplated by the
12 Constitution. Surely it is this idea on which the Plaintiffs and Multnomah County staked their carefully
13 planned surprise reversal of longstanding practice. They are banking on the Oregon courts to create, or
14 recognize, a constitutional right under Article I, Section 20, for same-sex couples to marry. One cannot
15 help but wonder why: perhaps the Plaintiffs and Multnomah County have no confidence that the
16 Oregon electorate will agree to amend the Constitution. Perhaps they think the people not fair enough,
17 or wise enough. But this subtly elitist view that the people are not fair enough, or wise enough to decide
18 paramount questions such as the meaning of marriage is not the view that shaped our constitutional
19 democracy. Witness how hard at the national level the early constitutionalists worked to convince the
20 people of the wisdom and security of the new federal constitution. The *Federalist Papers*, that great
21 treatise on the American Constitution, is evidence of that political and intellectual struggle. The framers
22 of the federal constitution, their intellectual ancestors, and the framers of the Oregon Constitution, knew
23 something that the Plaintiffs and Multnomah County have forgotten, or never believed. They knew
24 what Jefferson knew, what Lincoln knew. “I know of no safer repository of political power but in the
25 people,” Jefferson said. “And if we think the people not enlightened enough to hold it, the remedy is
26 not to take it from them, but to educate them.” Letter from Thomas Jefferson to William Charles Jarris

1 (Sept. 28, 1820), in *The Writings of Thomas Jefferson* 177 (H.A. Washington ed., 1854).

2 But Plaintiffs and Multnomah County have chosen to circumvent the process of public debate,
3 deliberation and vote. They ask this Court to “declare it to be so” when what they need to do is explain
4 to the voters “why it *should* be so.” Plaintiffs would have this Court ignore the profound wisdom of the
5 framers. They would use this Court to create a constitutional right that should properly be created only
6 at the ballot box. They would ask this Court to ignore the entire “Historical Exceptions” jurisprudence
7 of the Oregon Supreme Court and the plain historical logic set forth in those doctrines. Plaintiffs and
8 Multnomah County would have this Court find against historical fact that the framers of the Oregon
9 Constitution intended for Article I, Section 20 to supplant traditional notions of marriage with the
10 radically redefined notion that marriage is open to all persons without regard to distinction of any kind.
11 In short, Plaintiffs ask this Court to say that the framers would have intended to throw out the most
12 fundamental societal family unit at the time they wrote the Equal Privileges and Immunities Clause. Such
13 a conclusion defies history, defies common sense, defies logic, and defies the constitutional framework
14 for amending our charter document. It should be rejected.

15
16 **II. OREGON’S HISTORICAL STATUTORY DEFINITION OF MARRIAGE, AS CONSTITUTING ONLY**
17 **THE UNION OF ONE MAN AND ONE WOMAN, DOES NOT VIOLATE ARTICLE I, SECTION 20**
OF THE OREGON CONSTITUTION.

18 When examined under logic and Oregon appellate court precedent, ORS Chapter 106 is
19 constitutional under Article I, Section 20 for at least five reasons.

20 First, assuming for the sake of argument that “homosexuals”³ are a “suspect class” for purposes
21 of Article I, Section 20 inquiry, *see Tanner v. OHSU*, 157 Or App 502, 524, 971 P2d 435 (1998),
22 the marriage statute evinces a rational legislative decision “based on intrinsic differences between the
23 sexes.” *See Hewitt v. SAIF*, 294 Or 33, 49, 653 P2d 970 (1982). Thus ORS Chapter 106 is

24
25 ³ Intervenor-Defendants use the term “homosexual” advisedly, recognizing that it may be
26 construed by some as pejorative. This is not the intent of Intervenor-Defendants; rather as seen in
Tanner, it is the term that even the courts use.

1 constitutional as written.

2 Second, for a law to violate Article I, Section 20 it must discriminate against a suspect class by
3 its plain terms—it must exclude a class on its face, not at one level removed—or it must be enacted
4 with the specific intent of harming a true class. *See, e.g., In re Marriage of Crocker*, 332 Or 42, 22
5 P3d 759 (2001) (law violated Article I, Section 20 by excluding class on the face of the law). ORS
6 Chapter 106 does not exclude gays and lesbians specifically on its face because they as individuals can
7 marry, and there is no evidence that the drafters of ORS Chapter 106 intentionally discriminated against
8 homosexuals. Therefore Article I, Section 20 does not apply to a law such as ORS Chapter 106 that
9 does not exclude the members of a class, but only has a disparate impact on a class as a whole.

10 Third, marriage is not itself a privilege or immunity—it is “a civil contract.” ORS 106.010.
11 From that civil contract, the Legislature has ascribed numerous benefits that are dependent upon it. But
12 marriage itself—the core, basic act of marriage —is not a privilege or immunity subject to Article I,
13 Section 20; Plaintiffs are simply arguing about marriage as a shortcut for arguing for the actual privileges
14 and immunities that flow from that status under Oregon law.

15 Fourth, Plaintiffs are not seeking treatment “upon the same terms” by seeking to have marriage
16 redefined to include same-sex pairs. Assuming that homosexuals are members of a suspect class,
17 nothing differentiates this class from one based on age (another recognized suspect class), kinship, or
18 any of the other limits placed on marriage in ORS Chapter 106. Plaintiffs are not attempting to
19 invalidate marriage because it is not available “upon the same terms” to *all*, but because it is not
20 available to be *redefined by them*..

21 Fifth, with all due respect to the Court of Appeals, the precedent set by Tanner v. OHSU, 157
22 Or App 502, defining “homosexuality” as a suspect class based on immutable characteristics, is flawed.
23 Homosexuality is not a “suspect class,” and laws which impact gays and lesbians require only a rational
24 basis to be sustained. The Legislature’s choice of the procreative family unit as the best environment
25 for the raising of children is a sufficient rational basis to justify the limitation of ORS Chapter 106 to one
26 man and one woman. Even if homosexuality is a suspect class, these are overriding or compelling

1 reasons for preferring heterosexual marriage.

2 ////

3 ////

4 **A. INTRODUCTION**

5 ***I. MARRIAGE IS TO BE PRESUMED CONSTITUTIONAL.***

6 Marriage is civil in nature, and it is a secular relationship that has always been subject to
7 regulation by the civil state. *See Maynard v. Hill*, 125 US 190, 1 L Ed 654, 8 S Ct 723 (1888).⁴
8 Oregon’s legislatively enacted laws define, and they have always defined, marriage as being only the
9 union of one unmarried man and one unmarried woman of a certain age and outside of certain kinship.
10 Furthermore, because marriage is codified in statute, it enjoys a heavy presumption of constitutionality.
11 *State v. Harmon*, 225 Or 571, 577, 358 P2d 1048, 1051 (1961) (“the judiciary is not entitled to adopt
12 [an unconstitutional construction of a statute] if another construction is reasonable which will uphold the
13 constitutionality of the statute.”). The presumption of constitutionality is a fundamental principle of all
14 statutory construction because it is, at root, a separation of powers question. *See Matter of*
15 *Constitutional Test of House Bill 3017, Oregon Laws, 1977*, 281 Or 293, 300, 574 P2d 1103, 1106

17 ⁴ No provision of the Oregon Constitution defines marriage. Article IV, Section 1 vests “[t]he
18 legislative power of the state, except for the initiative and referendum powers reserved to the people,”
19 in the people’s elected “Legislative Assembly.” Fortifying the Legislative Assembly’s “legislative” role
20 and power, Article II, Section 1 makes plain that the powers of government in Oregon are divided into
21 Legislative, Executive and Judicial departments and that no department “shall exercise any of the
22 functions of another, except as in this Constitution expressly provided.” Nothing in Article VII (Original
23 or Amended) even hints that the Judiciary is given power or responsibility to define or regulate marriage
24 independent of its interpretation and enforcement of legislative enactments. The Legislature has
25 undertaken its responsibility and has exercised its constitutionally vested power to define and regulate
26 marriage. Oregon’s marriage statutes are codified in ORS chapter 106. ORS 106.150 defines
marriage and prescribes the legal method for forming a marriage. ORS 106.41(1) delineates the
requirements for obtaining a marriage license. Historically, defining and regulating marriage in Oregon
has always been a legislative function. Legislatively enacted statutes regulating marriage have been in
effect in Oregon since it was a territory. Section 6 of “An Act Relating to Marriage And Divorce,” was
enacted by the Territorial Assembly on January 17, 1854. The 1854 Act is the direct precursor to
ORS 106.150.

(1978) (“The court’s first obligation when a constitutional attack on a law is at all plausible is to determine whether the law may reasonably be given a valid interpretation, because it is assumed that the legislature means to act within constitutional bounds.”) *citing* State v. Harmon, 225 Or 571, 577, 358 P2d 1048 (1961); Wright v. Blue Mountain Hosp. Dist., 214 Or 141, 144, 328 P2d 314 (1958); Peninsula Drainage Dist. No. 2 v. City of Portland, 212 Or 398, 418, 320 P2d 277 (1958); Federal Cartridge Corp. v. Helstrom, 202 Or 557, 565, 276 P2d 720 (1954). *See also* State v. Smyth, 286 Or 293, 296, 593 P2d 1166 (1979) (“Courts do not readily ascribe to legislators an intention to deprive persons of a right that the constitution guarantees.”); Molodyh v. Truck Ins. Exchange, 304 Or 290, 299, 744 P2d 992, 998 (1987) (“we act with the presumption that the legislature did not intend to violate the constitution.”); Application of Roberts, 290 Or 441, 447, 622 P2d 1094, 1097 (1981) (“statutes are to be construed so as to satisfy the constitution unless no other construction is possible”).

2. A BRIEF REVIEW OF THE NATURE AND HISTORY OF ARTICLE I, SECTION 20

Article I, Section 20 of the Oregon Constitution prohibits the passage of any law “granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.” Or Const Art. I, § 20.⁵ As the Oregon Supreme Court has repeatedly explained, “[t]he original target of this constitutional prohibition was abuse of governmental authority to provide special privileges or immunities *for* favored individuals or classes, not discrimination *against* disfavored ones.” Hale v. Port of Portland, 308 Or 508, 524-25, 783 P2d 506, 515-16 (1989) (emphasis in original) *citing* State v. Savage, 96 Or 53, 59, 184 P 567 (1920). *Accord* Crocker v. Crocker, 332 Or 42, 54, 22 P3d 759, 765-66 (2001) (“The equal privileges and immunities clause

⁵ Early Oregon Supreme Court decisions interpreted Art. I, Sec. 20 as virtually identical to the protections which are provided by the Equal Protection Clause of the Fourteenth Amendment. *See, e.g., School Dist. No. 12 v. Wasco County*, 270 Or 622, 627-28, 529 P2d 386 (1974); State v. Cory, 204 Or 235, 238-39, 282 P2d 1054 (1955). However, in State v. Clark, the Court embarked upon a different path regarding its interpretation and application of the Oregon privileges and immunities clause. State v. Clark, 291 Or 231, 235-241, 630 P2d 810 (1981).

1 scrutinizes benefits in the form of privileges and immunities given to a particular class, rather than
2 discrimination against a particular class”) *citing and quoting* Hale, 308 Or 508, 524-25, 783 P2d
3 506, 515-16 (1989); Clark, 291 Or at 236–37 *citing* City of Klamath Falls v. Winters, 289 Or 757,
4 619 P2d 217 (1980) (“its language reflects early egalitarian objections to favoritism and special
5 privileges for a few rather than the concern of the Reconstruction Congress about discrimination against
6 disfavored individuals or groups”).⁶

7 However, “[b]ecause the clause would ordinarily be invoked by persons who wanted a
8 privilege or immunity for themselves rather than to withdraw it from others, its protective effect was
9 soon held to extend to rights against adverse discrimination as well as against favoritism . . . Clark, 291
10 Or at 237. In this respect, the provision guards against the discriminatory granting of privileges or
11 immunities to or against both “individual citizens” and “classes of citizens.” Id. at 239, 240-41.
12 Because Plaintiffs do not allege that they were individually singled out and denied a right to marry, but
13 instead challenge ORS 106.150’s definition of marriage, which denies the status of marriage to any and
14 all pairs of individuals of the same sex,⁷ this action involves alleged “class” discrimination. *See, e.g., id.*
15 at 238-240.

16 In evaluating whether a class exists under Art. I, Sec. 20, the Court must first determine
17 whether the class “is created by the challenged law itself” or exists “by virtue of characteristics . . . apart
18 from the law in question.” Greist v. Phillips, 322 Or 281, 292, 906 P2d 789, 795 (1995) *quoting*
19 Sealey v. Hicks, 309 Or 387, 397, 788 P2d 435, 440 (1990), *quoting* Clark, 291 Or at 240. Classes
20 which are created by the law in question “are entitled to no special protection and, in fact, are not even
21 considered to be classes for the purposes of Article I, section 20.” State ex. rel. Huddleston v.
22 Sawyer, 324 Or 597, 610, 932 P2d 1145, 1153 (1997). *See* State v. Tucker, 315 Or 321, 337-38,
23 845 P2d 904, 914-15 (1993) (not a class if “the law leaves it open to anyone to bring himself or

24
25 ⁶ Art. I, Sec. 20 is in this sense the converse of the Fourteenth Amendment’s Equal Protection
26 Clause. Crocker, 332 Or at 54, 22 P3d at 766 *citing* Savage, 96 Or at 59, 184 P. 567.

⁷ *See* Complaint ¶¶ 111, 113, 118, 120, 127, 135.

1 herself within the favored class on equal terms”).

2 Constitutional scrutiny is triggered only when a law discriminates based upon class
3 characteristics that exist apart from the law in question. Such classes are referred to as a “true class”
4 within Art. I, Sec. 20 jurisprudence. Hale, 308 Or at 526, 783 P2d at 516; *accord Clark*, 291 Or at
5 240-41, 630 P2d at 816-17. As Justice Linde explained for the Court in Clark:

6 The terms “class” and “classification” are invoked sometimes to mean whatever distinction
7 is created by the challenged law itself and sometimes to refer to a law’s disparate treatment
8 of persons or groups by virtue of characteristics which they have apart from the law in
9 question. Familiar examples of the latter kind of “class” are personal characteristics such
10 as sex, ethnic background, legitimacy, past or present residency or military service. On
11 the other hand, every law itself can be said to “classify” what it covers from what it
excludes. . . . [T]he law creates these classes by the licensing scheme itself. *Attacks on
such laws as “class legislation” therefore tend to be circular and, as the above
quotations from early decisions show, have generally been rejected whenever the
law leaves it open to anyone to bring himself or herself within the favored class
on equal terms.*

12 291 Or at 240-41, 630 P2d at 816 (emphasis added) *citing Williamson v. Lee Optical*, 348 US 483,
13 75 S Ct 461, 99 L Ed 563 1955); Jarvill v. City of Eugene, 289 Or 157, 184-85, 613 P2d 1 (1980).

14 In analyzing whether a “true class” exists or not, in addition to asking whether the classification is
15 created by the law itself, later Oregon Supreme Court decisions have asked whether “every person had
16 the opportunity to remain in the allegedly favored class by obeying the law,” or whether the
17 classification is “based on factors beyond the . . . [person’s] control.” Huddleston, 324 Or at 610-11,
18 932 P2d at 1153; *accord Crocker*, 332 Or at 55 (true class is based upon “personal or social
19 characteristics”); Van Wormer v. City of Salem, 309 Or 404, 408, 788 P2d 443 (1990); Sealey, 309
20 Or at 397; Hale, 308 Or at 525 (true class is based upon “antecedent personal or social characteristics
21 or societal status”).⁸

22 Where a law discriminates against a “true class,” a rational basis is all that is required to uphold

23
24 ⁸ Wilson v. Dept. of Rev., 302 Or 128, 131-32, 727 P2d 614, 616-17 (1986) (“this court
25 will not invalidate a law on the simple grounds that the law classifies individuals or groups of individuals.
26 . . . Article I, section 20, prohibits those schemes that classify ‘persons or groups by virtue of
characteristics which they have apart from the law in question.’ . . . Laws which are left open for
individuals voluntarily to bring themselves within a favored class do not violate Article I, section 20”).

1 the discrimination. See Jensen v. Whitlow, 334 Or 412, 423, 51 P3d 599 (2002) (law distinguishing
2 on basis of public employment only require rational basis to sustain); Crocker, 332 Or at 55 (“When
3 distinctions are based on personal characteristics that are not immutable, this court reviews the
4 classification for whether the legislature had a rational basis for making the distinction”); Hewitt, 294 Or
5 at 45.

6 A suspect class is a specific type of true class that “is defined in terms of ‘immutable’
7 characteristics and ‘can be suspected of reflecting invidious social or political premises, that is to say
8 prejudice or stereotyped prejudgments.’” Tanner, 157 Or App at 522, quoting Hewitt v. SAIF, 294
9 Or 33. When the law disfavors a suspect class, it is subject to more exacting or “strict” scrutiny. See
10 Hewitt, 294 Or at 43 (“We do not have any difficulty following that part of the analysis which asks
11 whether the classification is made on the basis of a suspect class such as race or sex and, if so, holding
12 that such a classification is subject to a strict scrutiny.”), quoting Olsen v. State ex rel. Johnson, 276 Or
13 9, 19, 554 P2d 139 (1976). Laws that exclude a suspect class may be justified by actual differences in
14 the classes distinguished, so long as those differences are not exclusively “legislative shorthand” for
15 discriminatory stereotypes. See Hewitt, 294 Or at 47. Oregon’s marriage statutes meet this standard,
16 as explained in the following section.

17
18 **B. ORS CHAPTER 106 REFLECTS RATIONAL AND COMPELLING LEGISLATIVE CHOICES—THE**
19 **TRADITIONAL FAMILY IS THE BEST VEHICLE FOR SOCIAL STABILITY AND NURTURING OF**
20 **CHILDREN— THAT LEGITIMATELY ARE BASED UPON INTRINSIC BIOLOGICAL DIFFERENCES**
21 **BETWEEN MEN AND WOMEN, AND BETWEEN HETEROSEXUAL COUPLES AND HOMOSEXUAL**
22 **COUPLES.**

23 The Legislative Assembly of Oregon has decided, within its power under Article IV, Section
24 1,⁹ that marriage is a civil contract between one man and one woman as husband and wife.¹⁰ Plaintiffs
25 allege that as members of the suspect class of homosexuals, this legislative limitation of marriage to
26

⁹ Article IV, Section 1 vests “[t]he legislative power of the state, except for the initiative and
referendum powers reserved to the people,” in the people’s elected “Legislative Assembly.”

¹⁰ See Section III, *infra* at 34, and Note 4 [*first note @ II.A.1*], *supra*.

1 opposite sex couples is an unconstitutional grant of privileges and immunities to heterosexuals.
2 However, although plaintiffs couch their claims in terms of equal privileges and immunities and
3 “fundamental rights” to “privacy and autonomy,”¹¹ the true target of their challenge “is not the unequal
4 treatment of individuals or whether individual rights have been impermissibly burdened, but the power
5 of the Legislature to effectuate social change[.]” Goodridge v. Department of Health, 798 NE2d 941,
6 974 (Mass. 2003) (Spina, J. dissenting). Because opposite sex marriage reflects reasonable legislative
7 choices based on biological differences between the classes distinguished, Plaintiffs have no
8 constitutional grounds on which to attack marriage.

9 As noted directly above in Section II.A.2, not all legislation that discriminates against a suspect
10 class is impermissible under Article I, Section 20. Hewitt noted that laws based on gender must be
11 “based on intrinsic differences between the sexes.” 294 Or at 49. Simply put, the Legislature cannot
12 pass a law that excludes a certain group from some privilege or immunity by simply *extrapolating*
13 *laws from prejudices*. The grant of spousal benefits to widows but not to widowers was ruled
14 unconstitutional in Hewitt because the statute assumed “women . . . to be dependent on men more often
15 than the reverse . . . [and] [t]he assumption of female dependency is an archaic and overbroad
16 generalization.” Hewitt, 294 Or at 46–47 (citation and internal quotation marks omitted).

17 In this case, for Plaintiffs to prevail, they would need to prove that statutory marriage represents
18 the codification of a specific prejudice against homosexual unions, and that this specific prejudice *in*
19 *particular* motivated the passage of the statute. In Hewitt, there was no reason other than a woman’s
20 supposed dependency to limit survivor benefits to widows. Therefore, because of the presumption of
21 constitutionality of statutes, not only do Plaintiffs need to show that marriage codified a specific
22 prejudice against gays and lesbians, but they also need to show that *no other reason could exist* for
23 the exclusion of same sex pairs from marriage. See State ex rel. Juvenile Dept. of Multnomah County
24 v. Orozco, 129 Or App 148, 150, 878 P2d 432, 434 (1994) (“Statutes are accorded a presumption
25

26 ¹¹ Complaint ¶¶ 113-15, 120-22, 127-29, 135-37.

1 of constitutionality *unless no constitutional construction is possible.*”), citing State v. Smyth, 286
2 Or at 296. Ultimately, in determining whether ORS Chapter 106 makes legitimate exclusions, the
3 question is *whether a rational Legislature could decide that marriage should be exclusively*
4 *between opposite sex pairs based on genuine physical distinctions and on an interest in the*
5 *procreation and nurturing of children, apart from prejudice against gays and lesbians.*

6 Indeed, there are numerous sociological justifications for a rational Legislature to limit marriage
7 to only opposite sex couples. Indeed, “[b]y nature citizens are divided into the two great classes of
8 men and women, and the recognition of this classification by laws having for their object the promoting
9 of the general welfare and good morals does not constitute an unjust discrimination.” State v. Hunter,
10 208 Or 282, 300 P2d 455 (1956), quoting State v. Baker, 50 Or 381, 385, 92 P. 1076 (1907). In
11 the case of gender, an unbiased Legislature could reasonably see that females should marry males, *not*
12 because of gender stereotypes (“a woman needs a man” or vice-versa), but rather because of the
13 procreative and stabilizing function of marriage. In the case of heterosexual versus homosexual couples,
14 an unbiased Legislature could reasonably conclude that child rearing occurs best in opposite-sex
15 households, not due to any bias against same-sex couples, but based on developmental studies of
16 children, concluding that children develop best in a household with a father and a mother.¹² This court
17 need not agree with that choice as a matter of policy. Yet, due to the presumption of constitutionality,
18 *any* rational, non-prejudicial reason for distinguishing between homosexuals and heterosexuals in
19 marriage will constitutionally suffice.

20 The following subsections reference two expert affidavits of Dr. E. Walter Throckmorton and
21

22 ¹² For instance, this principle was the driving force behind the ruling that the laws forbidding
23 interracial marriage were unconstitutional. See Loving v. Virginia, 388 U.S. 1 (1967). Anti-
24 miscegenation laws “arose as an incident to slavery and [were] common . . . since the colonial period.”
25 Id. at 6. The Supreme Court ruled that “[t]here is patently *no legitimate overriding purpose*
26 *independent of invidious discrimination* which justifies this classification.” Id. at 10-12. Because
no “fundamental biological differences” (to borrow Hewitt’s phraseology) exist among the races of
humanity, no reason other than prejudice (termed “White Supremacy” in Loving) could justify anti-
miscegenation laws.

1 Dr. Jeffrey B. Satinover. These affidavits and the studies they cite as authority amply demonstrate a
2 number of unbiased reasons why a Legislature could rationally choose to define marriage as between
3 one man and one woman, at least 17 years of age, and not closer in kinship than first cousins. None of
4 these reasons have anything to do with prejudice against gays.

5
6 ***I. PROCREATION.***

7 A rational Legislature could find—without resorting to anti-gay bias—that limiting marriage to
8 two people of the opposite sex is the optimal system to encourage procreation and the continuation of
9 stable society. One hundred percent of same-sex couples are infertile ***as an isolated couple***. In
10 either case, if a partner in a same-sex relationship produces a child, it is not genetic procreation ***by the***
11 ***two partners***. Natural procreation is the natural result of heterosexual marriage. The fact that some
12 married couples cannot or choose not to reproduce is an exception, not the general rule.

13 Several courts and judges have recognized this indisputable difference between same-sex and
14 opposite-sex couples. In Singer, 522 P2d at 1195, the court specifically pointed to reproductive
15 capacity as a reason for the institution of marriage: “marriage exists as a protected legal institution
16 primarily because of societal values associated with the propagation of the human race. Further, it is
17 apparent that no same-sex couple offers the possibility of the birth of children by their union.” *See also*
18 Adams v. Howerton, 486 F Supp 1119, 1124 (C.D. Ca. 1980) *aff’d*, 673 F2d 1036 (9th Cir.), *cert.*
19 *denied*, 458 U.S. 1111 (1982); Goodridge, 798 NE2d at 1001-02 (Cordy, J., dissenting joined by
20 Spina and Sosman, JJ.); Standhardt, 77 P3d at 458 (recognizing the fundamental right of procreation
21 unique to opposite sex marriage); Baehr v. Lewin, 852 P2d 44, 55-56 (Hawaii 1993) (same).

22 That many heterosexual couples do not bear children or that homosexual couples adopt or
23 otherwise care for children, ***is beside the point***. Policymakers often create statutes in light of the
24 optimal goal—the rule they want to recognize—not the exception to that rule. So, for example, it
25 would be appropriate for a rational policymaker to decide that, as a rule, police assigned to street
26 patrol duties should be persons with sight or below a certain age. Even though a blind person or a

1 physically fit 70-year-old might make a good street cop in certain cases, this does not mean that the
2 policymaker has unconstitutionally discriminated against the blind or the aged. The validity of the
3 distinctions depends, as Hewitt recognizes, upon the policymakers' goals.

4 A rational, unbiased Legislature could—without relying on prejudicial stereotypes— legitimately
5 limit marriage to opposite-sex couples based on the compelling need for society to perpetuate itself
6 through procreation, and the natural biological differences between men and women. Even if one
7 assumes that homosexuals are a protected class, or that marriage is a privilege or immunity that
8 excludes them, procreation is a rational and compelling legislative reason to distinguish them, based on
9 fundamental biological differences, and therefore satisfies Hewitt's "specific biological differences" test.
10 See Hewitt, 294 Or at 46.

11 12 2. CHILD REARING.

13 A reasonable Legislature, without resorting to prejudicial stereotypes, could find that the rearing
14 of children is a compelling need of the state, and that the optimal environment for raising
15 children—again recognizing that the optimal result is not always attained— is in a home comprised of
16 the child's married biological mother and father. Such a Legislature does not need to resort to
17 prejudices against homosexual couples to do so.

18 Under every standard—educational achievement, drug use, criminal activity, physical and
19 emotional health, social adjustment and adult earnings—children of intact marriages have
20 fewer problems than children of broken families. . . . Not only do children need two
21 parents; *it also seems that ideally a child should have both a mother and a father.*

22 George W. Dent, Jr., The Defense of Traditional Marriage, 15 Journal of Law & Politics 581, 594–95
23 (1999) (emphasis added). See Satinover Aff. ¶¶ 4–23; Throckmorton Aff. ¶¶ 8–18. . Clinical studies
24 observe that the triad of mother-father-child is necessary and desirable for the growth of a healthy child.
25 “‘Early triangulation’ serves especially to consolidate both the self-representation and the parental
26 representation.” Richard N. Atkins, *Discovering Daddy: The Mother's Role*, in FATHER AND CHILD
139, 144 (Stanley H. Cath, et al., eds., 1982). The forward to FATHER AND CHILD notes the increased

1 awareness of the importance of the role of both mothers and fathers in child rearing:

2 Our sensitivities and instruments have become honed, attuned to the role a man comes to
3 play during the early years in modulating the intensity of the mother-child tie, inviting that
4 child to become a separate individual in an ever-widening world. . . . Researchers have
5 become more aware of the subtle exchanges of identity taking place and of the mother's
6 and father's part in facilitating development. . . .

7 John Munder Ross, *Preface* xvii-xviii FATHER AND CHILD. Dr. Alfred A. Messer, a psychiatrist at
8 Northside Hospital in Atlanta, Georgia, also notes the importance of both mothers and fathers as
9 follows: "Children recognize the difference between maleness and femaleness as early as 14 months of
10 age." Alfred A. Messer, Boys' Father Hunger: The Missing Father Syndrome, 23 Medical Aspects of
11 Human Sexuality 44, 44 (January 1989). Boys establish their physical and gender role identity between
12 the ages of 18 to 36 months. "If the young boy is deprived of his father's presence, the result can be
13 deeply traumatic" *Id.* at 45.

14 The fact that some single parents, blended families, and same-sex couples raise healthy children
15 does not negate the fact that children have the best chances of developing fully in a home where both
16 their mother and father are present. *See generally*, Lynn O. Wardle, Multiply and Replenish:
17 Considering Same-Sex Marriage in Light of State Interests in Marital Procreation, 24 Harv. J.L. &
18 Pub. Pol'y 771, 804 (2001). *See also* Throckmorton Aff. ¶¶ 8–17. Same sex couples who adopt
19 children or have them through artificial means intentionally deprive the children of the opportunity to be
20 raised by opposite sex parents. "Even with natural reproduction, death, divorce or abandonment may
21 deprive a child of one or both parents. But unlike natural reproduction, . . . same-sex marriage
22 guarantee[s] that a child will **not** have both a mother and a father." Dent, 15 Journal of Law & Politics
23 at 634-35 (emphasis added).

24 Plaintiffs will no doubt dispute these studies and affidavits. This dispute is irrelevant. ***This***
25 ***Court does not need to decide who is right, only whether a rational Legislature could choose***
26 ***traditional marriage for these or similar reasons.*** The courts' job is ***not*** as policy maker for the
State. Thus, a reasonable Legislature—without resorting to prejudice or stereotypes—could
legitimately conclude that there is a compelling interest in defining marriage as between opposite sex

couples, because those couples are the best way to raise children.

C. ARTICLE I, SECTION 20 ONLY APPLIES TO LAWS WHICH DISCRIMINATE AGAINST CLASSES ON THE FACE OF THE STATUTE OR THAT WERE PASSED DELIBERATELY TO DISCRIMINATE AGAINST A PARTICULAR CLASS.

Article I, Section 20 cannot apply to ORS Chapter 106, because ORS Chapter 106 does not *on its face* exclude any individual from participating in the statutory scheme. The public purpose for regulating marriage is not about love or even sex. Marriage is open to all individuals of age in the State. The Oregon Supreme Court has *never* held that *disparate impact* on a true class from a facially neutral law is sufficient to trigger Article I, Section 20. In other words, the challenged law must on its face create *disparate treatment* adverse to the identified “true class.” Unintended, non-purposeful *disparate impact*, as claimed by these plaintiffs is insufficient to trigger Article I, Section 20. Indeed, Plaintiffs claim is most akin to arch-orthodox Mormons or fundamentalist Muslims objecting to ORS Chapter 106 because it discriminates against them on the “immutable” classification of religion. Simply because there is a particularly significant impact on these groups from the law is no reason to conclude that the law targets them or specifically excludes them.

The prohibition of Article I, Section 20 is not triggered in the case of Oregon’s marriage laws because the marriage laws do not facially discriminate against any “true class.” The marriage laws do not discriminate based upon class characteristics that exist apart from the law in question. Instead, the marriage laws simply define marriage as a unique civil contract which may be created between one man and one woman. The marriage laws give every unmarried person of age the opportunity to bring themselves within the favored class (*i.e.*, married), by simply marrying someone of the opposite sex. The institution of marriage as defined by ORS 106.150, is available to every man and woman in Oregon. Parties to a marriage could theoretically be either homosexuals or heterosexuals.¹³ Any man

¹³ “Similarly, the marriage statutes do not discriminate on the basis of sexual orientation. As the court correctly recognizes, constitutional protections are extended to individuals, not couples. . . . The marriage statutes do not disqualify individuals on the basis of sexual orientation from entering into

1 or woman who is of age may participate in marriage as it is statutorily defined “on equal terms,” by
2 marrying a person of the opposite sex, who is also of age, and who is of an appropriate degree of
3 consanguinity. *See Clark*, 291 Or at 240-41 (benefits must be made available on equal terms).

4 Although gender and homosexuality are “personal or social characteristics apart from the law in
5 question” and, at least in the case of gender, have been found by the Oregon Supreme Court to
6 constitute a “suspect class,” *see Hewitt*, 294 Or at 36-37, the marriage laws do not forbid people to
7 enter the institution of marriage ***based upon*** either gender or sexual preference. In other words, the
8 marriage laws do not facially “disparately treat” any true class. The Oregon Supreme Court’s decisions
9 finding the existence of true classes under Article I, Section 20, reflect that there must be a direct nexus
10 between the discrimination that is alleged to exist within the framework of the challenged law and the
11 identified “true class.” Succinctly, for a statute to violate Article I, Section 20, it must show disparate
12 treatment of members of a true or suspect class, not simply a disparate impact on the class members.

13 In re Marriage of Crocker, 332 Or 42, 22 P3d 759 (2001) is a good example of the above
14 principle. In Crocker the father’s allegation was that ORS 107.108(1) violated Article I, Section 20
15 because it permitted a child support obligation to be imposed upon unmarried, divorced or separated
16 parents while no provision existed permitting such an obligation to be imposed in like circumstances
17 upon married parents. 332 Or at 46, 22 P3d at 761. In that case, there was a ***direct nexus*** between
18 the marital status discrimination that was present on the face of the statute and the “true class” of
19 “divorced” parents, of which the father was a member. Or, in other words, the statute on its face
20 ***disparately treated*** married and divorced parents with respect to child support obligations.

21 Likewise, in Hewitt, because ORS 656.226 provided a worker’s compensation benefit for the
22 unmarried female cohabiting partner (and the out-of-wedlock children) of an injured man, while at the

23 _____
24 marriage. All individuals, with certain exceptions not relevant here, are free to marry. Whether an
25 individual chooses not to marry because of sexual orientation or any other reason should be of no
26 concern to the court.” Goodridge, 798 NE2d at 975 (Spina, J., dissenting joined by Cordy and
Sosman, JJ.). As the Plaintiffs repeatedly argue, men and women sometimes marry for economic or
other reasons which have nothing to do with affection or procreation.

1 same time giving no comparable benefit to the unmarried male partner (or children) of an injured
2 woman. 294 Or at 35, 653 P2d at 971. In that case, there was a direct nexus between the gender
3 discrimination that was present on the face of the statute, and the true class of “men,” of which the
4 plaintiff was a member. Or, in other words, the statute on its face *disparately treated* men and
5 women with respect to worker’s compensation benefits.

6 Finally, in Sealey the plaintiff’s allegation was that ORS 30.905 violated Article I, Section 20
7 because it created a statute of repose for tort claimants injured by a product, while no such statute of
8 repose existed for tort claimants injured in other ways. 309 Or at 396-97, 788 P2d at 440. In Sealey,
9 there was a direct nexus between the “cause of injury” discrimination that was present on the face of the
10 statutory scheme, and the “true class” of “people injured by products,” of which the plaintiff was a
11 member. Or, in other words, the statute on its face *disparately treated* people injured by products
12 and people injured in other ways.

13 The Oregon Supreme Court’s distinction between disparate impact and disparate treatment is
14 not unique. Under the Fourteenth Amendment and the Constitutions of other states, absent intentional
15 discrimination, it is insufficient for a plaintiff to claim an equal protection violation by simply pointing to a
16 *disparate impact* experienced from a facially neutral law. *See, e.g., Personnel Admin’r of Mass. v.*
17 *Feeney*, 442 US 256, 273, 99 S Ct 2282, 2293, 60 L Ed 2d 870 (1999) (14th Amendment);
18 *Greenberg v. Kimmelman*, 494 A2d 294, 308 (N.J. 1985) (N.J. Const.); *Golab v. City of New*
19 *Britain*, 529 A2d 1297, 1301 (Conn. 1987) (Conn. Const.); *Abbeville Cty. Sch. Dist. v. State*, 515
20 SE2d 535, 538 (S.C. 1999) (S. Car. Const.).

21 Here, the marriage laws do not on their face *disparately treat* anyone. In fact, the only
22 *individuals* disparately treated by the marriage laws are children under the age of 17, because they
23 are the only people simply excluded from marriage completely on the face of the statute.¹⁴ The
24

25 ¹⁴ Of course, age is also a recognized suspect classification under current precedent. *See*
26 *Moccio v. Department of Human Resources, Adult and Family Services Div.*, 103 Or App 207, 214,
796 P2d 1233 (1990) (a “suspect class [is] one characterized by *age*, gender, color, creed, ethnic

1 marriage laws are gender neutral and they do not discriminate on their face against either men or
2 women. Any unmarried man or woman in Oregon who is at least 17 years of age and not close kin to
3 the other party may marry. ORS 106.150. Furthermore, the marriage statutes do not facially
4 discriminate against gays and lesbians—they are not excluded simply by virtue of their homosexuality.
5 Gays and lesbians are free to marry a person of the opposite sex. The marriage statutes represent only
6 a civil contractual arrangement, not a codification of love, fidelity, or sexual intercourse.

7 Plaintiffs’ potential reliance upon Loving, 388 US 1, and the anti-miscegenation analogy, in their
8 attempt to claim that the marriage laws discriminate against gender or homosexuality is misplaced. In
9 Loving, the United States Supreme Court specifically found that the Virginia anti-miscegenation law,
10 although purporting to equally treat whites and nonwhites, was purposefully intended and structured so
11 as to favor one race (white) and disfavor all others (nonwhites). Id. at 11. The Virginia statute’s
12 legislative history demonstrated that its purpose was not merely to punish interracial marriage, but to do
13 so *for the sole benefit of the white race*. As the Supreme Court readily concluded, the Virginia law
14 was born of, and was designed to perpetuate, invidious historical prejudice and “to maintain White
15 Supremacy.” Id. Consequently, there was a fit, a nexus, between the class that the law was intended
16 to discriminate against (nonwhite races) and the classification enjoying heightened protection (race). By
17 contrast to Loving, here there is no historical evidence that limiting marriage to opposite-sex couples
18 was motivated by a desire to disadvantage men or women—or even homosexuals—in particular. Any
19 reliance on Loving by the Plaintiffs is misplaced and even offensive to the memory of those who
20 suffered from the deep, abiding, comprehensive, and institutionalized oppression suffered by racial
21 minorities in this country.

22
23 **D. MARRIAGE IS NOT *ITSELF* A PRIVILEGE OR IMMUNITY.**

24 Plaintiffs do not want marriage, they want the benefits, privileges and immunities tied to the
25
26 _____
background or national origin”) (emphasis added).

1 status of marriage by Oregon law. Plaintiffs write “Indeed, the exclusion of lesbian and gay couples
2 from marriage necessarily excludes them from over 500 rights, responsibilities, benefits, and obligations
3 that are predicated on marriage under the laws of Oregon.” Plaintiffs’ First Amended Complaint at 4.
4 This is what Plaintiffs must complain of at the constitutional level. However, these complaints do not
5 make the institution of marriage itself a privilege or immunity under Oregon Law. Instead of arguing for
6 equal “rights, responsibilities, benefits, and obligations” under the laws outside of ORS Chapter 106,
7 Plaintiffs are using ORS Chapter 106 as simply legal shorthand for those benefits.

8 Article I, Section 20 protects tangible benefits—privileges or immunities—of the State. The
9 caselaw surrounding Article I, Section 20 reflects that only tangible rights fall within the purview of
10 Article I, Section 20 protections. *See, e.g., Jensen v. Whitlow*, 334 Or 412 (immunity from suit in
11 tort); *Hewitt*, 294 Or 33 (survivorship benefits); *Huckaba v. Johnson*, 281 Or 23, 573 P2d 305 (1978)
12 (tax benefit); *Anderson v. Gladden*, 234 Or 614, 383 P2d 986 (1963) (right to jury of one’s own
13 race); *Mendiola v. Graham*, 139 Or 592, 10 P2d 911 (1932) (grazing rights); *In re Oregon Tunnel*
14 *Dist. No. 1*, 120 Or 594, 253 P. 1 (1927) (right to vote); *Tanner*, 157 Or App 502 (health benefits);
15 *Northwest Advancement, Inc. v. State, Bureau of Labor, Wage and Hour Div.*, 96 Or App 133, 772
16 P2d 934 (1989) (exemption from government regulation); *Hoffman v. Highway Division of Dept. of*
17 *Transp.*, 23 Or App 497, 543 P2d 50 (1975) (compensation for removal of signs). As is seen from
18 just this small sample of Article I, Section 20 cases, a “privilege or immunity” must be something more
19 than simply a “status” on which actual, tangible benefits rest.

20 Plaintiffs can point to no cases in the Article I, Section 20 context in which mere social status or
21 recognition was deemed sufficient to trigger Article I, Section 20’s protections. If Plaintiffs seek the
22 benefits granted to married couples under specific Oregon Revised Statutes, they should be attacking
23 those benefit-granting statutes in particular, not ORS Chapter 106.

24
25 **E. PLAINTIFFS ARE NOT ASKING FOR MARRIAGE “ON THE SAME TERMS” AS ALL OTHERS, BUT**
26 **FOR A SPECIAL STATUTORY EXEMPTION APPLICABLE ONLY TO THEIR PERCEIVED CLASS.**

1 Plaintiffs do not ask for marriage “upon the same terms” as every other Oregonian. Instead,
2 they demand the right to redefine marriage so that they may marry someone of the same sex.
3 Oregonians do not have the unfettered privilege of marrying *any other person* of their choosing. A
4 person’s choice of a spouse is limited by degrees of consanguinity (laws prohibiting incest), by age
5 (laws defining the maturity/capacity to consent to marriage), by number of spouses (laws against
6 polygamy), and just like plaintiffs, to a spouse of the opposite sex. Plaintiffs are demanding the privilege
7 of marriage upon terms which are wholly different from the terms which are imposed upon other
8 citizens.

9 Article I, Sec. 20 does not give the plaintiffs the right to make this demand. “The right to marry
10 has always been understood in law and tradition to apply only to couples of different genders. A
11 change in that basic understanding would not lift a restriction on the right, but would work a
12 fundamental transformation of marriage into an arrangement that could never have been within the intent
13 of the Framers. . . .” Lewis v. Harris, 2003 WL 23191114 at *13, Slip Op., Case No.
14 MER-L-15-03. (N.J. Super. L. Nov. 5, 2003).

15 Indeed, ORS Chapter 106 does not take sexual preference into account. Just like persons of
16 any other sexual preference, no heterosexual persons of the same sex are allowed to marry, regardless
17 of what purposes of economic advantage they might wish to pursue through matrimony. So too,
18 cousins and more closely related kin, those who would like to marry more than one person, and
19 individuals under age 17 are excluded from marriage as couples.¹⁵ Plaintiffs are being less than
20 intellectually honest by limiting their challenge against ORS Chapter 106. There is simply no logical
21 distinction that can be drawn between one statutory limitation on marriage and the next. If the marriage
22 statutes are in fact unconstitutional, then they are unconstitutional for more reasons and to more classes
23 of plaintiffs than their supposed exclusion of gays and lesbians.

25 ¹⁵ Intervenor-Defendants do not intend this to be a parade of horrors, a *reductio ad*
26 *absurdum* argument, or a slippery slope argument. Instead, what Intervenor-Defendants seek to
illustrate is the illogic of the Plaintiffs’ arguments in this case.

1 **F. HOMOSEXUALS ARE NOT A SUSPECT CLASS UNDER ARTICLE I, SECTION 20 ANALYSIS.**

2 Oregon Supreme Court opinions have repeatedly indicated that “suspect” classifications are
3 based upon “immutable” characteristics. Jensen, 334 Or at 423-24, 51 P3d at 604-05 (“the
4 classification . . . does not violate Article I, section 20, because it is not based on race, gender or other
5 immutable personal characteristics”); Crocker, 332 Or at 55, 22 P3d at 766 (“When distinctions are
6 based on personal characteristics that are not immutable . . . classifications based on immutable
7 characteristics are suspect Marital status is not immutable”).¹⁶ In plain English something is
8 “immutable” when it is unalterable, changeless or invariable in form, quality, or degree. *See* THE
9 RANDOM HOUSE COLLEGE DICTIONARY 665 (Random House, Inc. 1975 rev. ed.). Given this plain
10 meaning of the word, it is inexplicable why the Oregon appellate courts have occasionally in *dicta* listed
11 such alterable things as “religion” and “alienage” as being immutable. *See Jensen*, 334 Or at 423-24, 51
12 P3d at 605. The Court has very clearly ruled that other alterable characteristics such as “marital status”
13 or “geographic location” are not “suspect.” *See Crocker*, 332 Or at 55, 22 P3d at 766; Seto v. Tri-
14 County Met. Trans. Dist. of Oregon, 311 Or 456, 466-67, 814 P2d 1060, 1066 (1991).

15 Tanner’s validity is highly questionable because (a) the Oregon Supreme Court has never
16 recognized homosexuality as a “true class” in any context; (b) the Court of Appeals did not find that the
17 OHSU health benefits policy *facially* classified on the basis of sexual preference (just like Ms. Tanner,
18 no unmarried *heterosexual* man or woman received OHSU health benefits for their *opposite sex*
19 boyfriend or girlfriend); and c) the Oregon Supreme Court has never proceeded to apply Article I,
20 Section 20 analysis to a situation in which there was not a direct nexus between the discrimination
21 alleged to exist within the challenged statutory scheme and the “true class” of which the plaintiff is a
22 member (in other words, where there was not facially disparate treatment).

23 _____
24 ¹⁶ There is a significant dispute whether homosexuality is biologically determined or genetically
25 based. *See Thockmorton Aff.*, ¶¶19–33. Indeed, this dispute is one of the great points of disagreement
26 in modern society. *See id.* Furthermore it is at least an open question whether gays and lesbians have
 been subject to the same level of historic, systematic, and ubiquitous oppression to which the
 recognized suspect classes of race, sex, and alienage have been subjected.

1 **III. ORS CHAPTER 106 IS PROPERLY READ TO ALLOW ONLY THE MARRIAGE OF ONE MAN**
2 **AND ONE WOMAN; HOMOSEXUAL MARRIAGES ARE NOT PERMISSIBLE UNDER OREGON’S**
3 **CURRENT MARRIAGE LAW.**

4 ORS Chapter 106 makes clear that under the laws of the State of Oregon, marriage is a union,
5 a civil contract, between one man and one woman. Using the tenets of statutory construction, set out in
6 PGE v. Bureau of Labor and Industries (PGE v. BOLI), 317 Or 606, 859 P2d 1143 (1993), the
7 marriage statute is unequivocal that marriage in Oregon consists only of the union of one man and one
8 woman. Under PGE v. BOLI, a court in interpreting a statute looks first to the text and context of the
9 statute to determine the legislature’s intent. 317 Or at 610–11. Only if an examination of the text and
10 context is unclear does the court look to legislative history, and then if that is unclear, general maxims of
11 statutory construction. 317 Or 611–12. *But see* ORS 174.020(1)(b) (allowing party to introduce
12 legislative history in the first instance).

13 “In the state of Oregon, ‘marriage’ is a civil contract entered into with the consent of the state,
14 ***between a man and woman***, competent to so contract, in the presence of two witnesses, solemnized
15 by some one authorized by statute for that purpose.” Heisler v. Heisler, 152 Or 691, 693, 55 P2d 727
16 (1936) (emphasis added) (citation omitted). “Marriage is a civil contract entered into in person by
17 males at least 17 years of age and females at least 17 years of age, who are otherwise capable, and
18 solemnized in accordance with ORS 106.150.” ORS 106.010. The solemnization required in ORS
19 106.010 specifically demands that “the parties thereto shall assent or declare in the presence of the
20 clergyperson, county clerk or judicial officer solemnizing the marriage and in the presence of at least
21 two witnesses, that they ***take each other to be husband and wife***.” ORS 106.150(1) (emphasis
22 added). Marriage licenses are contemplated in the statute to be issued to only heterosexual couples.
23 ORS 106.041(1) (“All persons wishing to enter into a marriage contract shall obtain a license . . .
24 directed to any person or religious organization . . . to join together as ***husband and wife*** the persons
25 named in the license.”) (emphasis added).

26 Plaintiffs in their complaint have conceded that marriage under ORS Chapter 106 is limited to
one man and one woman. *See* Plaintiffs’ First Amended Complaint at ¶¶ 4, 91, 111, 117, 124, 132.

1 Therefore, Intervenor-Defendants are entitled to summary judgment as a matter of law on their Fourth
2 Affirmative Defense and Counterclaim requesting a declaration that ORS Chapter 106 limits marriage
3 to the union of one man and one woman.

4 ////

5 ////

6 **CONCLUSION**

7 For the foregoing reasons, Plaintiffs' motions for partial summary judgment on their first
8 and second claims for relief should be denied and Intervenor-Defendants' motions for partial summary
9 judgment on their first and fourth affirmative defenses and counterclaims.

10 DATED this _____ day of April, 2004.

11 O'DONNELL & CLARK, LLP

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13 _____
14 Kelly Clark, OSB #83172
15 Kristian Roggendorf, OSB #01399
16 Of Attorneys for Intervenor

17 Herbert G Grey, OSB # 81025
18 4800 SW Griffith Dr #320
19 Beaverton OR 97005
20 Of Attorneys for Intervenor

21 Kelly E. Ford, OSB #87223
22 KELLY E. FORD, P.C.
23 4800 SW Griffith Dr #320
24 Beaverton OR 97005
25 Of Attorneys for Intervenor

26 Kevin Clarkson, Alaska Bar #8511149
BRENA BELL & CLARKSON
310 K Street, Suite 601
Anchorage, AK 99501
Of Attorneys for Intervenor

Benjamin W. Bull, Arizona Bar #00940
Jordan Lorence, Minnesota Bar #25210
ALLIANCE DEFENSE FUND
15333 N. Pima Road, Ste 165
Scottsdale, AZ 85260

1 Of Attorneys for Intervenors

2 Raymond M. Cihak, OSB # 94560

3 Pamela S. Hediger, OSB #91309

4 EVASHEVSKI ELLIOTT CIHAK & HEDIGER

5 745 NW Van Buren St

6 Corvallis OR 97339

7 Of Attorneys for Intervenors