

1  
2  
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 REPLY  
MEMORANDUM

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. )

## TABLE OF CONTENTS

<b>INTRODUCTION</b> .....	1
<b>ARGUMENT</b> .....	2
<b>I. THE HISTORICAL EXCEPTIONS DOCTRINE: IF THE SHOE FITS</b> ....	2
<b>II. PLAINTIFFS AND THE COUNTY COMPLETELY MISREAD INTERVENOR-DEFENDANTS’ ARGUMENTS REGARDING THE “GENUINE BIOLOGICAL DIFFERENCES” ANALYSIS UNDER <u>HEWITT</u>.</b> .....	6
<b>III. PLAINTIFFS’ ANALYSIS OF WHETHER MARRIAGE IS ITSELF A PRIVILEGE OR IMMUNITY FAILS TO ENGAGE THE ARGUMENT THAT ALL PREVIOUS ARTICLE I, SECTION 20 CASES HAVE INVOLVED SPECIFIC BENEFITS GRANTED BY THE LAW IN QUESTION.</b> .....	13
<b>IV. BECAUSE MARRIAGE IS NO LONGER ABOUT CONSUMMATION OF THE SEXUAL ACT, PLAINTIFFS SIMPLY CANNOT MAINTAIN THAT MARRIAGE DISCRIMINATES AGAINST THEM ON THE BASIS OF THEIR INDIVIDUAL GENDER OR SEXUAL ORIENTATION.</b> .....	14
<b>CONCLUSION</b> .....	16

## INTRODUCTION

This case ultimately comes down to the following five questions:

1. Should this Court give real weight to the presumption of constitutionality of a statute reflecting the fundamental social family unit as it has been known for thousands of years in the West, and in Oregon since well before statehood?
2. Should this Court pay attention to the statements by the Court of Appeals in Tanner that by its very terms Tanner is not applicable to any question concerning marriage?
3. Does the Historical Exceptions Doctrine—which logically turns to history to understand framer intent concerning certain constitutional texts—apply to a case where we can clearly know framer intent as it pertains to Article 1 section 20?
4. Where a statutory framework recognizing heterosexual marriage is based on “specific biological differences” between men and women--namely their unique ability to procreate and rear children--does that statute satisfy a constitutional standard that only requires a statute to base its distinctions on “specific biological differences”?
5. Should a court honor the proper method for creating constitutional rights—via express amendment by the people—as opposed to creating from whole cloth a new constitutional marriage right from a provision that, by its historic origins, does not recognize such a right, and when neither the people nor their elected representatives have even been asked to weigh in on the question?

DOMC thinks the answer to all the above questions is a simple “yes”; plaintiffs think the answer is “no.”

But these plainly are the questions.

**ARGUMENT**

**I. THE HISTORICAL EXCEPTIONS DOCTRINE: IF THE SHOE FITS . . . .**

In Plaintiffs’ opposition memorandum, they urge this Court to disregard completely a line of cases from the Oregon Supreme Court that is both analytically sound and logically suited to the instant case. Plaintiffs ask this Court to ignore the Historical Exceptions Doctrine, handed down by the Oregon Supreme Court and the Court of Appeals, and reaffirmed consistently over a wide variety of constitutional contexts. *See Intervenor-Defendants’ Memorandum* at 3–12; *Intervenor-Defendants Response* at 4–6 (discussing use of historic exceptions doctrine in various contexts). Significantly, it is a doctrine that gives absolutely no regard to contemporary notions of “forward thinking” *See Plaintiffs’ Opposition Memorandum* at 16. Indeed, by definition, “historic exceptions” will not be affected by the latest trends.

Tellingly, Plaintiffs give no *analytical* reason why this Court should ignore the Historical Exceptions analysis. Plaintiffs only make two basic arguments: one, that it has never yet been applied to Article I, Section 20, and two, that Plaintiffs think the doctrine *should* not be applied to “notions of equality” as they define them.

First, Plaintiffs note the unremarkable fact that the doctrine has never been applied to Article I, Section 20. While that is a true statement as far as it goes, it is also true that no court has ever ruled that Article I, Section 20 is *not* subject to a Historical Exceptions analysis. Moreover, nothing in the Supreme Court’s historical exceptions jurisprudence—which is *not* limited simply to free speech and jury trial cases as Plaintiffs suggest<sup>1</sup>—gives any indication of why the doctrine would not be applicable to Article I, Section 20. The uncomfortable fact for Plaintiffs is that the Oregon appellate courts have

---

<sup>1</sup>The doctrine has been applied repeatedly to Article I, Section 8 in a variety of contexts, has been applied to Article I, Section 11 in the context of criminal jury trials, has been applied to Article I, Section 17 in the context of civil jury trials, and has been at least analyzed in the context of Article I, Section 9 search and seizure law. *See Defendant-Intervenors’ Memorandum* at 3–12; *See also State v. Slowikowski*, 307 Or 19, 27, 761 P 2d 1315 (1988) (use of historic exception doctrine examined in Article I, Section 9 (search and seizure) context, “there is an historical exception for such use of [contraband sniffing] dogs, *i.e.*, such a use would not be a search”).

1 applied the Historical Exceptions Doctrine any time it makes sense to do so under the doctrine's  
2 analytical framework, "however quaint it may seem to us a century and a half later . . . ." State v.  
3 Ciancanelli, 181 Or App 1, 19, 45 P3d 451, (2002) (concluding that the "historical record" established  
4 "beyond peradventure" that the framers would not have understood Article I, Section 8 to prohibit state  
5 regulation of public nudity—"however quaint" that may seem to enlightened moderns). The analytical  
6 framework of the Historical Exceptions Doctrine is simply this: if uncontradicted history—such as  
7 DOMC presented in its summary judgment motion—establishes "beyond peradventure" that the  
8 framers of the Oregon Constitution would not have intended a constitutional provision to contradict an  
9 established legal concept, the constitutional provision *simply does not apply*; it is "historically  
10 excepted" from the constitutional provision at issue. It is significant that Plaintiffs have not even  
11 attempted to challenge the clear historical record showing that the framers' view of marriage was  
12 exclusively and constitutionally between one man and one woman. Indeed, Plaintiffs cannot challenge  
13 that record. It is beyond dispute. So, instead they are left to argue that the doctrine *should* not apply.

14 The only reason Plaintiffs give for why it should not apply is the very odd notion that the  
15 constitutional right of equality is somehow on a different level, more important, given a different priority,  
16 or of a different "nature" than other fundamental constitutional rights. "By its nature, equality is a  
17 concept that must account for the emergence over time, of minorities that are oppressed by the  
18 majority." *Plaintiffs' Opposition Brief* at 16. Indeed, this is a highly curious argument for a group of  
19 civil libertarians to be making—that some constitutional rights are of a higher priority than others; that  
20 notions of equality are somehow more fundamental than notions of freedom of speech and expression;  
21 that the fundamental right to a jury trial when faced with governmental power in the form of a criminal  
22 prosecution is of lesser importance; that the basic right of all free men and women to a trial before a  
23 jury of their peers in a civil case is less important as well; or that any of the other handful of  
24 constitutional rights to which the Oregon appellate courts have applied the historic exceptions analysis  
25 are different in priority or in "nature" than notions of equality.

26 Plaintiffs spend several pages, largely citing Oregon Court of Appeals' Judge Schuman's law

1 review article or his unjoined concurrence in Cox ex rel Cox v. State, for the notion that ideas of  
2 equality change over time. *See* 191 Or App 1, 5, 7, 80 P.3d 514 (2003) (Schuman, J., concurring).  
3 But so, perhaps, do other constitutional rights changes over time, most notably ideas of freedom of  
4 speech. That has never stopped the Oregon Supreme Court from applying the Historical Exceptions  
5 Doctrine to those other—somehow “lesser” in Plaintiffs’ minds—constitutional rights, however quaint  
6 or outdated it seems. Plaintiffs’ notions of “change” cannot and should not stop this Court from  
7 applying the Historical Exceptions Doctrine to Article I, Section 20 in the context of marriage.

8 Plaintiffs’ statement that “with respect to Article I, Section 20 in particular, the text, context,  
9 history, and case law all militate in favor of interpreting the equality mandate—***a mandate that does***  
10 ***not except marriage or any other consideration from its ambit***—to be dynamic, not static,” fails  
11 pathetically to see the point. *See Plaintiffs Opposing Brief* at 17 (emphasis added). Indeed, in ***no***  
12 ***historical exceptions case*** does the constitutional text at issue ***expressly*** except the historic fact or  
13 institution at issue. That is the whole point of the doctrine! Article I, Section 8 does not ***expressly***  
14 except perjury, fraud, or any of the other historic and legal principles that the Courts have deemed to  
15 be outside Article I, Section 8. Article I, Section 11 does not ***expressly*** state that some criminal  
16 proceedings do not trigger the right to jury trial. Article I, Section 17 does not ***expressly*** state that  
17 some civil controversies do not get jury trials. Article I, Section 9 does not ***expressly*** state that some  
18 aggressive searches by law enforcement authorities do not trigger the unreasonable search and seizure  
19 provisions. Likewise, of course nothing in Article I, Section 20 ***expressly*** excludes marriage from its  
20 coverage. But, nonetheless, the Doctrine itself operates to “except” marriage from Article I, Section  
21 20. Plaintiffs’ statement to the contrary is either circular or duplicitous.

22 Apart from that, Plaintiffs do not, can not, and will not admit the obvious implication of their  
23 statement that the equality mandate of Article I, Section 20 is “dynamic, not static.” The obvious  
24 implication is that only the courts and not the political branches of government through statutes, or the  
25 people through constitutional amendments, should decide when a notion of equality has sufficiently  
26 “evolved” to be given constitutional recognition. Once again, Plaintiffs hope this Court will do that

1 which they do not trust the Legislature or the people to be smart enough, wise enough, or fair enough to  
2 do—to engage in a serious constitutional debate about the meaning of equality in the context of  
3 marriage and same-sex couples. Instructively, Plaintiffs point to the “well-documented” fact that the  
4 “the framers of the Oregon Constitution were racist and sexist,” *Plaintiffs Opposing Brief* at 18.

5 There have of course been cases since the framing of the Oregon Constitution recognizing  
6 Article I, Section 20 privileges for racial or gender minorities. This does not alter the historic exceptions  
7 analysis, but indeed strengthens it. For the following statement is beyond dispute: in no case to which  
8 Plaintiffs point did a court decide—without any state or federal constitutional amendment directing or  
9 implying that it do so, and without even any direction from the popular branches of government or the  
10 people—to create from *whole cloth* a new constitutional right against the clear historical intent of the  
11 framers of the very constitutional provision being invoked.

12 All the racial and miscegenation cases Plaintiffs can point to were predicated either under the  
13 Civil War era amendments to the United States Constitution—especially the Equal Protection Clause of  
14 the Fourteenth Amendment—or to subsequent conforming Oregon Constitutional or statutory  
15 provisions. The People passed constitutional amendments: race lost. Concerning gender, both the  
16 Nineteenth Amendment to the US Constitution, as well as conforming amendments to the Oregon  
17 Constitution, as well as a whole host of legislative enactments—all making clear that the people  
18 considered gender to be irrelevant—were at the court’s disposal in the gender discrimination cases.  
19 The same can be said for virtually every other provision of the original Oregon Constitution to which  
20 Plaintiffs would like to analogize: questions of alienage were resolved under federal Fourteenth  
21 Amendment’s naturalization clause; age was addressed through the Fourteenth Amendment, as well as  
22 federal statutory law and conforming Oregon law; handicapped status has been addressed federally and  
23 in Oregon through disabilities acts.

24 The fact, hard as it is for Plaintiffs to admit, is that *they can point to no constitutional*  
25 *amendment, debate, dialogue, ballot measure, legislative enactment, legislative debate, or*  
26 *initiated or referred ballot measure, state or federal, concerning sexual orientation and*

1 *marriage, as support for their request of this Court.* They simply want this Court to create a  
2 same-sex marriage right whole cloth.

3 The Historical Exceptions Doctrine applies analytically, logically, and historically. Because of  
4 that application, Tanner does not apply to the facts of this case. Because of that Doctrine, this Court  
5 can and should rule that the framers of the Oregon Constitution would have intended the traditional  
6 definitions of marriage as between one man and one woman to survive any reading of Article I, Section  
7 20.

8  
9 **II. PLAINTIFFS AND THE COUNTY COMPLETELY MISREAD INTERVENOR-DEFENDANTS’**  
10 **ARGUMENTS REGARDING THE “GENUINE BIOLOGICAL DIFFERENCES” ANALYSIS UNDER**  
11 **HEWITT.**

12 Exacting or strict scrutiny under Oregon’s Article I, Section 20 is *not*—though Plaintiffs clearly  
13 wish it to be—a rule that the “suspect class always wins.” Oregon constitutional law is more refined  
14 than that. *Oregon’s* “strict scrutiny analysis” under Article I, Section 20 asks whether 1) there are  
15 genuine biological differences, and if so, then whether 2) a non-prejudicial reason for the law exists.  
16 That is the sum of the “exacting” or “strict” scrutiny analysis articulated in Hewitt. Hewitt v. SAIF, 294  
17 Or 33, 653 P2d 970 (1982).

18 Plaintiffs’ and Intervenor-Plaintiff’s outright refusal to read the caselaw at any depth other than  
19 their own fuzzy logic has made a muddle of the Article I, Section 20 analysis. DOMC Intervenor-Defendants are  
20 not arguing that laws discriminating against a “suspect class” are reviewed for a “rational basis” under  
21 Article I, Section 20, as Plaintiffs and Intervenor-Plaintiff suggest. Rather, Intervenor-Defendants are  
22 arguing two things:

- 23 1) laws which exclude or impact a suspect class of individuals are reviewed under  
24 Article I, Section 20 *per* Hewitt for “genuine biological differences” between  
25 the favored class and the non-favored class; and
- 26 2) if “genuine biological differences” exist, then the Legislature is given deference  
to craft laws around those differences, so long as the laws are not based merely



1 on prejudicial assumptions about the non-favored class or facially punitive or  
2 biased against the suspect class.

3 *These two steps are the “strict scrutiny analysis” set out in Hewitt.* Hewitt v. SAIF, 294 Or at  
4 46–49. Once the “genuine biological differences” prong is triggered, even in relation to a suspect class,  
5 a law can be justified so long as it is not “legislative shorthand” for purely discriminatory stereotypes.  
6 *See Hewitt*, 294 Or at 47.

7 The case of Tanner v. OHSU, 157 Or App 502, 971 P2d 435 (1998), to the extent it applies  
8 at all never reached the second part of the analysis because, unlike Hewitt, there were no apparent  
9 “genuine biological differences” that would even arguably justify the distribution of benefits to  
10 heterosexual couples but not homosexual couples. The only reason for the difference in benefit  
11 distribution in Tanner was the very thing Plaintiffs are fighting now: *marriage*. Tanner, 157 Or App at  
12 514 (“homosexual couples cannot marry and have no such option”).

13 Even granting that homosexuals are a “suspect class,” *per Tanner*, two of the “genuine  
14 biological differences” between homosexuals and heterosexuals in the family realm are procreation and  
15 child rearing. These are in fact *biological* differences—homosexuals cannot procreate in isolation and  
16 therefore homosexuals cannot raise genetically unified children in the family structure. The Legislature is  
17 entitled to take these differences into account in crafting the marriage statutes. Yes, gays and lesbians  
18 can undergo artificial reproduction and adopt. Yes, they can and do so successfully. This does not  
19 alter the fact that procreation and the rearing of a genetically descended child in fact are truly “genuine  
20 biological differences.” Once these “genuine biological differences” are established, then the Legislature  
21 is given deference to craft laws around these differences, so long as the laws are not facially punitive  
22 against members of the suspect class or based solely on prejudicial (non-biological) assumptions about  
23 the class.

24 Plaintiffs and *amici* offer evidence to argue that gays and lesbians make fine parents, and that  
25 kids do equally well in gay households. Intervenor-Defendants offer evidence to the contrary. This  
26 only shows *why* such matters are not for this Court, but for the Legislature to decide: Legislatures make

1 policy choices into law; courts apply and interpret those choices. Plaintiffs seek nothing less than  
2 judicial usurpation of this basic separation of powers principle.

3 Plaintiffs twist the Hewitt analysis beyond recognition by focusing, not upon the legitimate  
4 biological procreative difference between opposite sex couples and same-sex couples, but instead upon  
5 an irrelevant inquiry as to whether allowing same-sex marriage will somehow disadvantage or  
6 discourage traditional marriage and procreation. *Plaintiffs' Opposition Memorandum to State's*  
7 *Motion* at 5-6. No Oregon Supreme Court decision supports the plaintiffs' strange comparison, which  
8 explains precisely why they have not cited the Court any authority for their analysis. Id.

9 Intervenor-Defendants will now proceed with additional review of the scientific evidence  
10 regarding the genuine biological differences at issue here, but remind the Court that the Court need not  
11 decide "who is right" in these matters, only that a Legislature, motivated by something other than animus  
12 to homosexuals as a class, is entitled to choose to restrict marriage to opposite sex couples out of a  
13 desire to foster families in which a child is raised by her two biological parents.

14 Plaintiffs' arguments deliberately ignore the very obvious biological distinction between opposite  
15 sex and same-sex partners. The former is the procreative relationship and the latter is—in a biological  
16 sense—a sterile, non-procreative relationship. The State of Oregon, as well as the federal government  
17 and all other states in this Nation, have all recognized the patent biological uniqueness of the procreative  
18 man, woman relationship, and have honored and preferred that relationship over all others—as Oregon  
19 courts noted decades ago, to ensure that "the [human] race may be perpetuated in an orderly manner."  
20 Heisler v. Heisler, 152 Or 691, 694, 55 P2d 727 (1936). The fact that some people might bring  
21 children from a prior traditional marriage into a same-sex relationship, or that some same-sex partners  
22 might adopt children or seek artificial reproductive assistance, does absolutely nothing to diminish the  
23 basic biological, procreative distinction between the two relationships. In the words of Hewitt, "the  
24 reason for the classification reflects specific biological differences between" opposite sex and same-sex  
25 couples. Hewitt, 294 Or at 45. The two relationships are very biologically different, one relationship is  
26 procreative, the other is not. At the very least, the Legislature is entitled to recognize this as a policy

1 choice, a policy goal, a general rule.

2 Furthermore, scientific evidence, though scoffed at by Plaintiffs and their retained expert,  
3 illustrate a tangible biological and sociological distinction between child rearing among same-sex and  
4 opposite sex couples. Some same-sex parenting studies have purported to find that children raised by  
5 same-sex couples do as well as other children. However, as *Plaintiffs' own expert has noted*, in  
6 one mostly favorable review of the same-sex parenting research reports, that all of the studies have  
7 uniform defects:

8 there are *no studies of child development based on random, representative samples*  
9 *of such families*. Most studies rely on small-scale, snowball and convenience samples  
10 drawn primarily from personal and community networks or agencies. Most research to  
11 date has been conducted on white lesbian mothers who are comparatively educated,  
12 mature, and reside in relatively progressive urban centers, most often in California or the  
13 Northeastern states.

14 Judith Stacey & Timothy Biblarz, (How) Does the Sexual Orientation of Parents Matter?, 66 American  
15 Soc. Rev. 159, 166 (2001) (emphasis added);<sup>2</sup> see also Robert Lerner & Althea Nagai, No Basis:  
16 What the Studies Don't Tell Us About Same-Sex Parenting 3 (2001) (review of homosexual parenting  
17 studies "found at least one fatal research flaw" in each study, and thus, "no generalizations can reliably  
18 be made based on any of these studies"). *An unbiased Legislature could legitimately ignore such*  
19 *scientifically flawed and largely anecdotal studies*.

20 Significantly, children raised by a single mother, particularly a divorced mother, have poorer  
21 physical health,<sup>3</sup> poorer mental health,<sup>4</sup> a greater likelihood of substance abuse,<sup>5</sup> a higher risk of

---

22 <sup>2</sup> The authors blame these defects on "heterosexism," and do not question the over-all  
23 conclusion that the sexual orientation of a parent is irrelevant. Id. at 167, 179.

24 <sup>3</sup> Ronald Angel & Jacqueline Worobey, Single Motherhood and Children's Health, 29 Journal  
25 of Health and Soc. Behavior 38, 48-49 (1988).

26 <sup>4</sup> Ollie Lundberg, The Impact of Childhood Living Conditions on Illness and Mortality in  
Adulthood, 36 Social Science and Medicine 1047, 1050, Table 3 (1993); Ronald L. Simons, et al.,  
Explaining the Higher Incidence of Adjustment Problems of Children of Divorce, 61 Journal of  
Marriage and the Family 1020, 1028 (1999); Alan Booth & Paul R. Amato, Parental Predivorce  
Relations and Offspring Postdivorce Well-Being, 63 Journal of Marriage and the Family 197, 205

1 suicide,<sup>6</sup> and a higher likelihood of committing a crime that leads to incarceration.<sup>7</sup> This is the group of  
2 children to which the same-sex parenting studies compare children raised in homosexual homes. As  
3 one advocate for homosexual parenting acknowledges, “most of the research compares development  
4 of children with custodial lesbian mothers to that of children with custodial heterosexual mothers.”  
5 Charlotte J. Paterson, Family Relationships of Lesbians and Gay Men, 62 Journal of Marriage and the  
6 Family 1052, 1059 (2000). This is because “it has been widely believed that children living in families  
7 headed by divorced but heterosexual mothers provide the best comparison group.”<sup>8</sup> Since the pro-  
8 same-sex parenting studies find that children raised by homosexuals do as well as, but not significantly  
9 better than, those raised by divorced, heterosexual mothers, the clear weight of the evidence shows that  
10 children raised by same-sex parents do not do as well as children raised by their own mother and father  
11 who are married. *A Legislature motivated only by a desire to advance the optimal environment*  
12 *for child rearing could legitimately choose to limit marriage to opposite sex couples based on*  
13 *these facts.*

14 In reality, the same-sex parenting studies show a significant difference in outcome between  
15

---

16 (2001).

17  
18 <sup>5</sup> Robert L. Flewelling & Karl E. Bauman, Family Structure as a Predictor of Initial Substance  
19 Use and Sexual Intercourse in Early Adolescence, 52 Journal of Marriage and the Family 171, 175 &  
Table 2 (1990).

20 <sup>6</sup> David M. Cutler, Edward L. Glaeser & Karen Norberg, Explaining the Rise in Youth  
21 Suicide, Working Paper 7713 at 32, National Bureau of Economic Research (May 2000) (citing  
impact of divorce).

22 <sup>7</sup> Linda J. Waite & Maggie Gallagher, THE CASE FOR MARRIAGE 134 (2000).

23 <sup>8</sup> As Maggie Gallagher, co-author of THE CASE FOR MARRIAGE, observes: “If the problem  
24 with same-sex couples is not sexual orientation *per se*, but the negative effects of fatherlessness and/or  
25 motherlessness on children’s well-being, it is hard to imagine a scholarly focus better designed to  
26 obscure the evidence.” Maggie Gallagher, Why Supporting Marriage Makes Business Sense 10  
(Corporate Resource Council 2002), available at  
[www.corporateresourcecouncil.org/white\\_papers.html](http://www.corporateresourcecouncil.org/white_papers.html).

1 children raised by heterosexual mothers and those raised by lesbians. *Plaintiffs' own expert*, clearly  
2 a proponent of same-sex parenting, challenged the intellectual honesty of the reports of “no  
3 differences.” Stacey & Biblarz at 178. She observed that “[o]nly a *crude theory* of cultural  
4 indoctrination that posited the absolute impotence of parents might predict such an outcome, and the  
5 remarkable variability of gender configurations documented in the anthropological record *readily*  
6 *undermines such a theory.*” *Id.* at 177 (emphasis added). Instead of “no differences,” as reported  
7 by most studies, some of the studies clearly show a difference when it comes to sexuality. In one of the  
8 studies, “adolescent and young adult girls raised by lesbian mothers appear to have been more sexually  
9 adventurous and less chaste . . . .” *Id.* at 171. This is from the pen of Plaintiffs’ own expert, criticizing  
10 the very studies she cites in her affidavit to this Court. *If Plaintiffs’ own expert finds these studies*  
11 *marred by ideology, an unbiased Legislature could be justified in ignoring them.*

12 The impact on sexuality of children raised by homosexual parents may not be as limited as these  
13 same-sex parenting advocates suggest. Studies of same-sex parenting environments and Plaintiffs’ own  
14 expert also validate a concern held by many who seek to advance the best interests of children:

15 The sexual orientation of parents appears to have a unique (although not large) effect on  
16 children in the politically sensitive domain of sexuality. The evidence, while scanty and  
17 underanalyzed, hints that *parental sexual orientation is positively associated with the*  
*possibility that children will be more likely to attain a similar orientation*—and  
theory and common sense also support such a view.

18 *Id.* at 177-78 (emphasis added).<sup>9</sup> A similar outcome was reported in the Technical Report of the  
19 American Academy of Pediatrics:

20 Compared with young adults who had heterosexual mothers, men and women who had  
21 lesbian mothers were slightly more likely to consider the possibility of having a same-sex  
22 partner, and more of them had been involved in at least a brief relationship with someone  
of the same sex, but in each group similar proportions of adult men and women identified  
themselves as homosexual.

23 Ellen C. Perrin, M.D., and the Committee on Psychosocial Aspects of Child and Family Health,  
24 Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents, 109 Pediatrics 341,

---

25  
26 <sup>9</sup> In Stacey and Biblarz’ view, these differences “cannot be considered deficits from any  
legitimate public policy perspective.” *Id.* at 177.

342 (February 2002).<sup>10</sup> One study reported that “[t]he young adults from lesbian family backgrounds (four of seven sons and ten of fifteen daughters) were significantly more likely to report having considered the possibility of becoming involved in a same-gender sexual relationship, compared with only two of ten sons and one of eight daughters from the heterosexual family control group.” Fiona L. Tasker & Susan Golombok, Adults Raised as Children in Lesbian Families, 65 American J. of Orthopsychiatry 203, 211 (1995). *The Legislature is at least entitled to craft a legislative policy based on such studies. Yet Plaintiffs would have this Court “pick a winner” in this complex sociological discussion.*

Plainly, there are legitimate and significant biological, sociological, and scientifically proven differences between same-sex and opposite sex couples. Plaintiffs seek to simply gloss over these differences and argue that traditional marriage does not encourage procreation *per se*. Plaintiffs’ arguments miss the mark as widely as their legal analysis misses the point of the Oregon strict scrutiny analysis. Marriage in Oregon is based on “genuine biological differences” and is not facially punitive to gays and lesbians, nor is it founded on mere prejudicial assumptions about homosexuals as a class. Therefore marriage, as it has been understood for the last several thousand years, survives even the most strict scrutiny available under Article I, Section 20, and is constitutional.

### **III. PLAINTIFFS’ ANALYSIS OF WHETHER MARRIAGE IS ITSELF A PRIVILEGE OR IMMUNITY FAILS TO ENGAGE THE ARGUMENT THAT ALL PREVIOUS ARTICLE I, SECTION 20 CASES HAVE INVOLVED SPECIFIC BENEFITS GRANTED BY THE LAW IN QUESTION.**

Plaintiffs make much of the fact that marriage is admitted to include the “universal recognition [of a] family unit” and a “commitment of the highest order.” *Plaintiffs’ Response to Intervenor-Defendants’ Summary Judgment Motion* at 3. That is all well and good, but it does nothing to address Intervenor-Defendants’ contention that all previous Article I, Section 20 cases have dealt with tangible rights granted as a result of the specific statute itself. Instead, Plaintiffs focus on hospital

---

<sup>10</sup> Available at [www.aap.org/policy/020008t.html](http://www.aap.org/policy/020008t.html).

1 visitation policies, a “privilege” mentioned nowhere in ORS Chapter 106. “Universal” recognition  
2 cannot be conferred by the closed universe of a statutory procedure. Intervenor-Plaintiff too cites to  
3 “benefits under Oregon law,” ignoring the fact that these benefits are not contained within the  
4 complained-of statute—in fact, Intervenor-Plaintiff cites to six separate statutes—none of them part of  
5 ORS Chapter 106—as examples of privileges that “are” marriage. Doggedly illogical, Plaintiffs  
6 continue to say marriage is a benefit of its own right, but must point elsewhere to prove it.

7 Plainly, marriage is marriage, not intestate succession or spousal support. There is nothing of  
8 substance to rebut in Plaintiffs’ and Intervenor-Plaintiff’s reiteration of extra-statutory rights as being  
9 marriage itself.

10  
11  
12 **IV. BECAUSE MARRIAGE IS NO LONGER ABOUT CONSUMMATION OF THE SEXUAL ACT,**  
13 **PLAINTIFFS SIMPLY CANNOT MAINTAIN THAT MARRIAGE DISCRIMINATES AGAINST THEM**  
**ON THE BASIS OF THEIR INDIVIDUAL GENDER OR SEXUAL ORIENTATION.**

14 Plaintiffs once again fail to grasp the nature of Intervenor-Defendants’ arguments concerning the  
15 so-called discriminatory nature of the marriage statutes. In high irony, Plaintiffs assert that “Intervenor-  
16 Defendants . . . misapprehend a fundamental principle of constitutional law: Constitutional [*sic*] rights  
17 are individual rights not class rights.” *Plaintiffs’ Response to Intervenor-Defendants’ Summary*  
18 *Judgment Motion* at 7. The irony of course is that Plaintiffs adamantly refuse to see that marriage is  
19 not facially discriminatory for precisely this reason. As an *individual*, a gay or lesbian Oregonian *can*  
20 enter into marriage on exactly the same terms as all other Oregonians. That this option is *disagreeable*  
21 to them does not make it facially discriminatory or unconstitutional—the option is open to them. *That*  
22 is why Intervenor-Defendants claim marriage is not within the reach of an absolutist reading of Article I,  
23 Section 20 —because ORS Chapter 106 makes marriage available to all Oregonians on the same  
24 terms.

25 Plaintiffs breezily dismiss this basic logical analysis by stating that it “is entirely beside the point.”  
26 With all due respect to Plaintiffs, it is *not* beside the point on an *individual constitutional* level.

1 Marriage is a “civil contract,” ORS 106.010, and not—in the modern world—a societal sanction of  
2 the sex act. Marriage of course reflects the State concern for the “orderly” regeneration of the species,  
3 Heisler, 152 Or at 694, but as Intervenor-Defendants have amply demonstrated above and in the  
4 previous filings with this Court, procreation is biologically impossible from the sex acts of homosexual  
5 couples.

6 Furthermore, while consummation used to be a requirement for a valid marriage, it no longer is.  
7 Sex does not make a marriage, thus sexual acts are not a *sine qua non* of marriage. This means that  
8 Plaintiffs’ homosexuality is irrelevant to marriage. Many people marry for money, for stability, or for a  
9 myriad of other reasons having little to do with sexuality. Marriage in this sense is not limited to  
10 heterosexual couples, or even sexually active couples. Again, to echo Section III above, Plaintiffs are  
11 not seeing marriage for marriage’s sake—they are seeking public approbation for their sexual  
12 relationships with a member of their own gender.<sup>11</sup> This is not the purpose of marriage and it is not  
13 something they can even necessarily obtain from the “right” to marry their chosen sex partner.

14 All of matters because as Plaintiffs say, “constitutional rights are individual rights.” Plaintiffs here  
15 are not seen to argue that simply “same-sex” marriage is required under Article I, Section 20, but  
16 “homosexual” marriage is required. Plaintiffs hang their Article I, Section 20 hat on their sexual  
17 orientation because plainly no individual is excluded from marriage as a rule due to his or her gender.  
18 Yet, because the sex act is not definitional to modern marriage, there is nothing to preclude two  
19 heterosexual men or two heterosexual women from equally making use of the advantages of marriage if  
20 Plaintiffs succeed in redefining ORS Chapter 106. The underlying logical flaw in Plaintiffs’ entire  
21 argument is therefore that homosexuality cannot be used to justify extension of marriage benefits to  
22 same-sex couples when homosexuality (or any sexuality for that matter) is not a necessary or implicit  
23

---

24  
25 <sup>11</sup> Plaintiffs’ facile deflection of Intervenor-Defendants’ argument into a discussion of  
26 Lawrence is telling. The institution of traditional marriage does not put homosexuals in jail, it does not  
invade their privacy, it does not make them criminals for following their desires. Yet Plaintiffs persist in  
equating a law they can make use of with a law that actively persecuted them.



1 part of these marriages.

2 Stripped to its logical foundation, marriage is not dependent on sexuality, and therefore  
3 sexuality cannot be a justification for extending marriage's reach to same-sex couples. Suspect class is  
4 not triggered by Plaintiffs' claims any more than it would be by two heterosexual men or women who  
5 wanted to take advantage of marriage "benefits" in the same way Plaintiffs do. In sum, because  
6 modern marriage is independent of sexuality, Plaintiffs desire for marriage does not even trigger their  
7 "suspect" classification established by Tanner for the purposes of Article I, Section 20 analysis.<sup>12</sup>

### 8 9 CONCLUSION

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

13 DATED this \_\_\_\_\_ day of April, 2004.

14 O'DONNELL & CLARK, LLP

15  
16 \_\_\_\_\_  
17 Kelly Clark, OSB #83172  
18 Kristian Roggendorf, OSB #01399  
19 Of Attorneys for Intervenor

20 Herbert G Grey, OSB # 81025  
21 4800 SW Griffith Dr #320  
22 Beaverton OR 97005  
23 Of Attorneys for Intervenor

24 Kelly E. Ford, OSB #87223  
25 KELLY E. FORD, P.C.  
26 4800 SW Griffith Dr #320  
Beaverton OR 97005

24 \_\_\_\_\_  
25 <sup>12</sup> Intervenor-Defendants have arguments related to the "county authority issue" that have  
26 bearing on Plaintiffs' and Intervenor-Plaintiff responsive pleadings. In light of this Court's letter of  
April 13, 2004, Intervenor-Defendants will hold these arguments for the time being unless the Court  
requests further briefing.

1 Of Attorneys for Intervenors

2 Kevin Clarkson, Alaska Bar #8511149  
3 BRENA BELL & CLARKSON  
4 310 K Street, Suite 601  
5 Anchorage, AK 99501  
6 Of Attorneys for Intervenors

7 Benjamin W. Bull, Arizona Bar #00940  
8 Jordan Lorence, Minnesota Bar #25210  
9 ALLIANCE DEFENSE FUND  
10 15333 N. Pima Road, Ste 165  
11 Scottsdale, AZ 85260  
12 Of Attorneys for Intervenors

13 Raymond M. Cihak, OSB # 94560  
14 Pamela S. Hediger, OSB #91309  
15 EVASHEVSKI ELLIOTT CIHAK & HEDIGER  
16 745 NW Van Buren St  
17 Corvallis OR 97339  
18 Of Attorneys for Intervenors  
19  
20  
21  
22  
23  
24  
25  
26