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I. INTRODUCTION: THE ONLY JUSTIFICATION FOR STATE REGULATION OF INTIMATE RELATIONSHIPS

The only historic or continuing justification for government to intrude upon, regulate, and license private intimate relationships lies in that relationship's potential for bringing forth children. There simply is no other explanation for this staggering state intrusion into private lives. That there may be other, ancillary social benefits from government regulation of marriage—stability, orderly acquisition or division of property, or others—is not reason enough, and is not the historic reason for government to license marriage. It is because of the state's undeniable interest in the procreation and rearing of children. From this premise, marriage cannot be said to involve unconstitutional treatment toward relationships that are, by definition, biologically incapable of procreation. In this way, government regulates—licenses—those relationships that produce offspring in the legislatively-determined optimal environment, while leaving unregulated sexual relationships that either do not naturally produce children (same sex unions), or produce children in ways detrimental to their development (close kin relationships, polyamory, underage relationships). Given that the state's concern in regulating private sexual conduct is limited to biologically procreative pairings, it does not offend principles of equal privileges to limit state regulation of the intimate relationship to those couples that at least, in theory, can naturally reproduce.

In their respective opening briefs, BRO Plaintiffs and Multnomah County assign error to the trial court's ruling that marriage itself is not a "privilege or immunity" within the meaning of Article I, Section 20. In assigning error, those parties do not even attempt to carry the Article I, Section 20 analysis beyond this rudimentary starting point before proceeding to address the remedy for an unstated Article I, Section 20 violation. By simply stating that "marriage is a privilege or

immunity”—without completing the Article I, Section 20 analysis that would explain what the “privilege or immunity” of marriage is, much less why this privilege or immunity must therefore be extended to either same sex couples or homosexuals¹—BRO Plaintiffs and Multnomah County ignore significant legal issues implicit in the trial court’s ruling, and therefore fail to assign error properly.

Even apart from this flaw, BRO Plaintiffs’ and Multnomah County’s assignments of error are surprisingly limited in scope. Although consisting of six stated assignments of error, the BRO Plaintiffs’ brief really complain about only two issues: 1) the trial court’s granting them relief of only the benefits, and not the institution, of marriage; and 2) the trial court’s deference to the legislative role in crafting a remedy for any perceived inequality.

In addition to the incomplete assignment of error on the first issue—whether marriage is a privilege or immunity—the proposed rule of law from the Plaintiff parties, by their own words, would use simple “desires”, not definable biological or social criteria, to make constitutional distinctions. Such a rule of law is unsustainable.

Then, on the issue of remedy, neither Plaintiffs nor the County address the proper role legislative history played in guiding this Court’s remedy in *Hewitt v. SAIF*, 294 Or 33, 653 P2d 970 (1982), and their proposed remedy runs counter to government’s only historically recognized or continuing justification for invading the sanctity or intimacy of wholly private affairs—procreation of children.

¹ The precise parameters of the class by whom these rights are purportedly deserved is an important practical distinction that cannot be overlooked by this Court. If “homosexuals” are the class at issue, there is a different analysis—and different logical problems—that must be addressed than if the class is that of “same sex couples.”

Finally, the State of Oregon's brief assigned error to the issuing of mandamus relief, but failed to touch on all applicable legal reasons for doing so. In this Response, DOMC Intervenor supplement and bolster the State's assignment of error.

OVERVIEW OF THIS BRIEF:

For simplicity's sake, DOMC Intervenor will combine the responsive arguments regarding BRO Plaintiffs' First, Second, and Third Cross-Assignments of Error with Multnomah County's First Cross-Assignment of Error into the "Answer to First General Cross-Assignment of Error, in which Plaintiffs argue that Marriage Itself is a Privilege or Immunity." DOMC Intervenor combine the responsive arguments regarding BRO Plaintiffs' Fourth, Fifth, and Sixth Cross-Assignments of Error with Multnomah County's Second Cross-Assignment of Error into the "Answer to Second General Cross-Assignment of Error, in which Plaintiffs argue that Marriage Must Be Extended to BRO Plaintiffs."

This brief also responds to Multnomah County's hapless attempt to frame a Fourteenth Amendment issue in the face of binding precedent to the contrary.

Several of the *amici* briefs contain arguments that merit attention. DOMC Intervenor will address some of the *amici* arguments in a section following the responses to the assignments of error denoted "Response to *Amici* Arguments."²

Finally, the State's First Assignment of Error failed to address important aspects of the

² Most of the amicus briefs were received within a week of this brief's due date. More thoughtful and complete responses to some of the *amici* will be forthcoming in DOMC's reply brief.

status of the marriage licenses issued by Multnomah County to same sex couples.³ DOMC

Intervenors will discuss aspects of the State’s First Assignment of Error overlooked in the State’s opening brief in the “Answer to the State’s Assignment of Error.”

II. RESPONSES TO ASSIGNMENTS OF ERROR

A. ANSWER TO FIRST GENERAL CROSS-ASSIGNMENT OF ERROR, IN WHICH PLAINTIFFS ARGUE THAT MARRIAGE ITSELF IS A PRIVILEGE OR IMMUNITY.

I. *CONCISE ANSWER TO FIRST GENERAL CROSS-ASSIGNMENT OF ERROR.*⁴

For three reasons, BRO Plaintiffs and Multnomah County (collectively “BRO Plaintiffs” or “Plaintiff Parties” unless noted) have not shown marriage in and of itself—apart from the privileges and obligations of marriage which are created outside of Chapter 106 and are not challenged in this litigation—to be a privilege or immunity for Article I, Section 20 purposes.

First, the only privilege or immunity intrinsic in marriage even alleged is the “expression of public commitment” cited by the County from *Turner v. Safley*, 482 U.S. 78 (1987), and alluded to by BRO Plaintiffs as an “expression of commitment.” *Multnomah County Opening Brief* at 13–14; *BRO Opening Brief* at 31. All other privileges or immunities cited by BRO Plaintiffs arise

³ This Court aligned DOMC Intervenors with the State over DOMC Intervenors’ objection. One significant reason for DOMC Intervenors’ reluctance to align with the State was the State’s consistent refusal to raise several obvious arguments in the course of defending ORS Chapter 106 at summary judgment below. Because the interests of DOMC Intervenors and the State do in fact diverge in this manner, DOMC Intervenors, with respect, take opportunity in this brief to comment on the State’s assignments of error.

⁴ Standard of Review: DOMC Intervenors accept the standard of review set out in Multnomah County’s opening brief as a *de novo* standard under *Oregon State Police Officers’ Ass’n v. State*, 323 Or 356, 361, 918 P2d 765 (1996).

and exist *outside* of the marriage contract and *outside* the marriage statutes challenged in this case. This intangible “expressive aspect” of marriage falls amazingly short of the kind of concrete benefits that have, up to now, been necessary to constitute a privilege or immunity for purposes of Article I, Section 20.

Next, even assuming that this officially sanctioned “expression of commitment” is its own privilege or immunity, BRO Plaintiffs improperly assume that the trial court’s ruling on the benefits of marriage must extend to the very institution itself. Not so. Even though the trial court ruled that benefits of marriage must be extended to same sex or homosexual couples under Article I, Section 20, it does not logically follow that the institution of marriage itself must also be extended to Plaintiffs, even if they can show that marriage itself is a privilege or immunity.⁵ In this way, BRO Plaintiffs fail to demonstrate how they as a class are being unconstitutionally deprived of access to the particular privilege or immunity of marriage; instead, they implicitly rely on the trial court’s ruling on *benefits* to somehow make that connection for them. But it simply does not do so.

2. ***ARGUMENT: WHY MARRIAGE CANNOT BE REDEFINED SO EASILY.***

a. Marriage Itself Is Not a Privilege or Immunity Under Article I, Section 20.

BRO Plaintiffs assign error and focus much of their analysis on the trial court’s conclusion that marriage itself is not a privilege or immunity within the meaning of Article I, Section 20.

⁵ The trial court avoided DOMC Intervenors’ historic exceptions argument precisely on this basis. *Opinion and Order* at ER 437 (limiting the judgment explicitly to benefits, and thus distinguishing the historic exceptions doctrine). Significantly, in their opening briefs BRO Plaintiffs collectively have completely ignored the legal barriers to extending marriage itself to same sex couples—barriers such as the historic exception doctrine, significant biological differences, and the lack of precedent for a disparate impact analysis in Article I, Section 20 cases, all issues that were raised and argued below.

DOMC Intervenor in the opening brief wrote that the question of the intangible status or benefit of marriage itself “need not detain the court,” *so long as* “BRO Plaintiffs . . . adequately express what it is, intrinsic to the statutory scheme of marriage, that is itself a privilege or immunity[.]” *DOMC Intervenor Opening Brief* at 46. BRO Plaintiffs have manifestly not shown an independent privilege or immunity within the four corners of ORS Chapter 106.

- i. *Analytically, Benefits Outside of the Statutory Scheme or Contract of Marriage Cannot Be Challenged as If They Were Marriage Itself. The Consequence Is Not the Cause.*

The benefits statutorily related to marriage are not themselves marriage. The government benefits which so occupy BRO Plaintiffs’ interest in this case are not analytically any part of marriage, but rather part of the statutory accretions placed on the institution over time. Significantly, they have not been challenged in this litigation. Any one, several, or all of the legislative consequences of being married—the “benefits”—could be amended or even repealed without affecting a couple’s status as “married.” The consequences are not the cause.⁶ Also, the positive

⁶ BRO Plaintiffs’ novel notion that a more constitutionally recognizable “advantage” will flow from marriage in the future, as same sex marriage is accepted by other states and the federal government, is not borne out by current trends. Federal law still expressly excludes same sex spouses from federal benefits. 1 U.S.C. § 7. Only one state supreme court, that of Massachusetts, has said that same sex marriage is required by that state’s constitution. Moreover, six states have already passed amendments to their constitutions defining marriage as being only the union of one man and one woman (Alaska, Hawaii, Louisiana, Missouri, Nebraska and Nevada). Eleven more states have similar marriage amendments on their ballots this November (Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah). Even in Massachusetts, where the Court ruled same sex marriage is constitutionally required, the State Legislature has taken a substantial step toward amending the state’s constitution to preclude same sex marriage. The Massachusetts Legislature passed a marriage amendment in 2003 which must receive a similar passage in the next legislative session and then be ratified by the people. *See Journal of the Senate in Joint Session, Monday, March 29, 2004 located at <http://www.mass.gov/legis/journal/jsj032904.htm>* (attached as DER-Resp-1). Yet even if the legal tide was turning in favor of same sex marriage, federal

consequences for married people in daily private life are not intrinsic in marriage, and no ruling of any court could require the extension of private benefits or societal approval to married homosexual couples.⁷

ii. *A License to Make a Public “Expression of Commitment” Is Not Sufficient to Confer Article I, Section 20 Protections.*

As detailed in DOMC Intervenor’s Opening Brief and above, the legal status of marriage itself is not coequal with the tangible rights BRO Plaintiffs seek—the kinds of privileges and immunities that have historically been a prerequisite to Article I, Section 20 protections. *See DOMC Intervenor’s Opening Brief* at 48 (and cases cited therein). Rather, the best argument that BRO Plaintiffs can make is that marriage itself is a form of expression, almost a type of speech.

The right to engage in expressive activity is of course well-protected in Oregon. *See, e.g., League of Oregon Cities v. State*, 334 Or 645, 670, 671 n22, 56 P3d 892 (2002) (expressive activity protected from unequal treatment under the law). However, it is primarily Article I, Section 8, not Article I, Section 20, that provides protection for expressive activity. *Id.* Of course, where expressive activity is involved, the appropriateness of DOMC Intervenor’s “historic exceptions” argument carries strong precedential force; and so if marriage is a kind of speech, it is even more obviously historically excepted from challenge. *See State v. Robertson*, 293 Or 402, 412, 649

benefits and other states’ benefits are plainly outside the compass of Oregon’s marriage statutes at issue in this appeal.

⁷ BRO Plaintiffs worry that their children will face harassment because they have unmarried same sex parents. *BRO Plaintiffs’ Opening Brief* at 18. But granting the status of marriage on a same sex relationship will not necessarily or even probably change the opinion of people who do not accept same sex relationships as legitimate. Public opinion remains beyond any court’s ability to direct.

P2d 569 (1982) (currently illegal expressive activities, that were likewise illegal in 1859, are “historic exceptions” to the free speech protections of Article I, Section 8 and may be regulated). Yet the basic thrust of DOMC Intervenor’s argument remains: simply “expressing commitment,” in and of itself, falls far short of being a tangible privilege or immunity for purposes of Article I, Section 20—in contrast to the specific benefits involved in the overwhelming body of Article I, Section 20 caselaw. *See DOMC Intervenor’s Opening Brief* at 48 (and cases cited therein).

b. The BRO Plaintiffs’ Proposed Definition of Marriage Is Unworkable and Provides No Objective Criteria For Its Alleged Class.

Even more important than the question of whether marriage is a privilege or immunity is the question of whether the marriage statutes can be said to violate Article I, Section 20 *even assuming* that marriage is a privilege or immunity. BRO Plaintiffs have simply not closed the logical loop in the Article I, Section 20 analysis. Furthermore, in attempting to argue that marriage is gender-biased, Plaintiff-parties’ redefinition of marriage proposes “desires”—their word—as the defining characteristic of the class they seek to protect. Such definition is unworkable, limitless and beyond the concept of immutability.

i. BRO Plaintiffs Did Not Actually Assign Error to That Portion of the Trial Court’s Ruling That Says Marriage Need Not Be Extended to Them.

Between finding that a privilege or immunity exists and granting a remedy, a court must be shown how Plaintiffs as a class are being unconstitutionally deprived of access to the particular privilege or immunity. It is not enough merely to show that a) a “privilege” exists and b) Plaintiffs do not have it. They must also show that, under the Court’s precedents, the denial is irrational, unfair,

and unconstitutional. *They have not done so, and have not even made relevant arguments.*

Because BRO Plaintiffs and the County each failed specifically to assign error to anything outside the status of marriage and the remedy, they have failed to raise a specific question of law on which this Court can rule. The failure to assign error may well be fatal to BRO Plaintiffs' and the County's claims, because BRO Plaintiffs' exclusion from marriage is the underlying claim in the case. *Compare Karson v. Oregon Liquor Control Com'n*, 189 Or App 223, 227, 74 P3d 1163 (2003) (failure to assign error to denial of damages not fatal where appellant assigned error to underlying claim) *with State ex rel. Brammer v. City of Stayton*, 162 Or App 409, 413, 986 P2d 1188 (1999) (no appellate relief on attorney fees may be considered where failure to assign error to award).

ii. *The Very Basis of BRO Plaintiffs's Proposed Redefinition of Marriage Is Hopelessly Vague and Unworkable.*

Significantly, BRO Plaintiffs **admit** that they have access to marriage as individuals,⁸ but argue that their sexual orientation as a practical matter prevents them from taking advantage of the marriage laws. Thus Plaintiffs bring their claims as **couples**. *See* case caption. But if couples have constitutional rights, this same argument would apply with equal force to all other groups currently excluded from traditional marriage. *See discussion at DOMC Intervenors' Opening Brief* at 60–62. BRO Plaintiffs do not come close to articulating any workable distinction, or logical

⁸ *See BRO Plaintiffs' Opening Brief* at 17 (“[A]ll of the individual plaintiffs qualify to marry in that they do not have another living wife or husband, are not first cousins or nearer of kin, and have the legal age and capacity needed to enter into a marriage.”); *Multnomah County's Opening Brief* at 5 (admitting that the BRO Plaintiffs individually “qualify to marry in that they do not have another living wife or husband . . . and have legal age and capacity to enter a marriage.”).

stopping point, to their arguments. Indeed, there is none. *See discussion at DOMC Intervenors' Opening Brief* at 60–62.

The County for Plaintiff parties proposes to redefine marriage as “men and women . . . who have entered into” (1) enduring; (2) stable; (3) relationships; (4) creating family units. *County's Opening Brief* at 11. Interestingly enough, the County's new definition of marriage is based not upon sexual orientation, but in fact, general *desires*. *See id.* (“ORS Chapter 106 is a law . . . that works to create a favored class of citizens. The law limits marriage to individuals who desire to marry individuals of the opposite gender.”). How can it be that “desires” form the basis for a workable or justifiable class under Article I, Section 20, and how can one set of desires ever be constitutionally preferred to another? Desires alone cannot define a constitutionally protected class, certainly not in the marriage context, certainly not in the contest of Article I, Section 20. *See DOMC Intervenors' Opening Brief* at 60–62. Indeed, it is far from proven on the record below that sexual orientation is the only factor that would motivate someone to desire to wed another of their own sex. One can easily envision simple economic advantage sufficient to spark the “desire” for same sex marriage, in either heterosexual or homosexual persons. Does this create a “family unit” or merely an economic convenience? The County cannot say. Every marriage restriction on the books would fall if “desires” alone—untethered from the legislatively determined goals of marriage—form the basis for defining classes that must be treated alike under Article I, Section 20. Indeed, how could the government ever determine whether two persons who seek to be married are in a “relationship” creating a “family unit,” much less an “enduring” or “stable” one.

Justice Marshall in *Goodridge* admitted honestly that by its decision, a majority of the Massachusetts Court was *re-defining* marriage. The Massachusetts Court stated plainly “we are

mindful that our decision marks a change in the history of our marriage law.” *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 948 (Mass. 2003). The *Goodridge* court then stated that “We have recognized the long-standing statutory understanding, derived from the common law, that ‘marriage’ means the lawful union of a woman and a man. But that history cannot and does not foreclose the constitutional question.” *Id.* at 953.

Unlike this Court’s precedent and practice, the Massachusetts Court unabashedly ignored history. It then set out to re-define marriage as involving “a person who enters into an intimate, exclusive union with another[.]” *Id.* at 949. Later, the Massachusetts Court noted that “the right to marry means little if it does not include the right to marry the person of one’s choice, ***subject to appropriate government restrictions in the interest of public health, safety, and welfare.***” *Id.* at 958 (emphasis added). Of course the Massachusetts Court did not grapple, as this Court is doing, with what these historical “restrictions” might be, or whose job it is to decide such questions. Nor did the Court explain why its reasoning continues to limit marriage to just ***two*** people. Thus, according to the *Goodridge* court, the historical definition of marriage “must yield to a more fully developed understanding. . . .” *Id.* At least the *Goodridge* court was honest about what it was doing.

By admitting they already qualify for marriage as now exists, but prefer to redefine marriage by reference to desires, the Plaintiff parties deprive their proposed form of marriage of any constitutional grounding. In short, unless BRO Plaintiffs can articulate a constitutional justification for why marriage should be limited to ***two*** persons desirous of marrying, or why the courts, and not the Legislature, should decide what limitations are in the interest of “health, safety and welfare,” they have not made their case.

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B. ANSWER TO SECOND GENERAL CROSS-ASSIGNMENT OF ERROR, IN WHICH PLAINTIFFS ARGUE THAT MARRIAGE MUST BE EXTENDED TO BRO PLAINTIFFS.

1. CONCISE ANSWER TO SECOND GENERAL CROSS-ASSIGNMENT OF ERROR⁹.

The remedy posed by both the BRO Plaintiffs ignores the meat of the holding in *Hewitt*—that the Court must determine the remedy for an Article I, Section 20 violation by examining the legislative intent specific to the passage of the statute at issue. Because we cannot know what the Legislature’s policy would be if faced with constitutionally-mandated benefits for same sex unions, no such conclusion about the proper remedy can be reached here without a serious breach of the separation of powers principles embodied in Article III, Section 1 of the Oregon Constitution.

Additionally, BRO Plaintiffs’ invitation to the government to regulate their intimate relationships makes no sense, given the core rationale for the institution. Government interest in marriage in Western tradition and Anglo-American jurisprudence has been founded on—even if not strictly limited to—the state’s interest in orderly procreation and the perpetuation of society, not an official validation of emotional commitments or personal identity.

2. ARGUMENT: WE CANNOT KNOW THE LEGISLATIVE POLICY AROUND SAME SEX UNIONS.

⁹ Standard of Review: DOMC Intervenor accepts the standard of review set out in Multnomah County’s opening brief as a *de novo* standard under *Oregon State Police Officers’ Ass’n v. State*, 323 Or 356, 361, 918 P2d 765 (1996).

a. The Remedy Extended in Hewitt Hinged on this Court's Ability to Discern the Intent of the Legislature Upon Possible Nullification of the Statute; No Such Determination Can Be Made Here.

DOMC Intervenor discuss at length the role legislative history played in the *Hewitt* case's holding extending workers' compensation benefits after finding its denial of survivorship benefits to men was unconstitutionally under-inclusive. *DOMC Intervenor Opening Brief* at 63–65. To summarize the analysis, it was clear that, in passing the survivorship benefit statute at issue in *Hewitt*, the Legislature had certain goals and intentions. It was also clear that, had the Legislature known about the potential unconstitutionality of the statute, it would have passed the law anyway, preferring coverage of children of men who died, instead of withholding coverage for both widows and widowers alike. *Hewitt*, 294 Or at 48–49. That the Legislature would have chosen to extend the reach of the survivorship benefit statute in *Hewitt* was apparent from its unwillingness to forego coverage for widows alone.

BRO Plaintiffs, Multnomah County, and *amici* supporting BRO Plaintiffs all fail completely to recognize or discuss the role of legislative intent in *Hewitt*. The BRO Plaintiffs instead simply **assume** that extension of marriage to homosexuals or same sex couples is the legislatively indicated remedy. But BRO Plaintiffs and *amici* have not shown what the Oregon Legislature would do in this situation, or even what legislative “policy” would require. It might extend marriage, as Plaintiffs suggest. It might try to mandate civil unions. It might even get out of the marriage business altogether, as some Libertarians suggest— legislating only a domestic partnership—leaving it to churches and other social institutions to decide whether to accept, bless, or ratify these domestic certificates as marriage. Other options might also surface. The point is, there simply is no clear answer to the legislative policy if faced with a constitutional defect in ORS Chapter 106.

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b. Any Privilege or Immunity in Marriage Is Not Tied to Simple “Official Approval of Private Relationships,” but to the State’s Interest in Perpetuating Society and Key Social Institutions.

As previously outlined in their introduction to this brief, BRO Plaintiffs’ focus on official approval and regulation of their intimate relationships (seeking “a level of commitment that is universally recognized,” *BRO Plaintiffs’ Opening Brief* at 25), ignores the reason government licenses private relationships in the first instance. Indeed, the state’s traditional interest in marriage is not about affirming someone’s romantic choices— “romance” being itself a more recent expectation and basis for marriage. Instead, the only reason that the government has constitutionally been allowed to intrude into the zone of privacy surrounding one’s intimate relationships, and regulate the commencement and ending of those relationships, is the government’s compelling concern for the orderly reproduction of the next generation.¹⁰ Because same sex pairings cannot by biological fact accomplish this objective, the state has no underlying philosophic justification whatsoever to exercise control in the first instance over same sex couples. Any need to regulate property or other economic aspects of same sex partnerships could easily be done through other statutory devices, business or property laws, without government intrusion on private relationships.

The institution of wholly civil marriage as we know it arose, curiously, during the

¹⁰ That government also “regulates” relationships that do not produce or rear children, and regulates the division of property in divorce does not change the underlying justification for government regulation of marriage. Opposite sex couples are *presumed* fertile, and only massive invasions of privacy would enable the government to set aside that quite reasonable presumption, or to condition marriage on reproduction. See *Standhardt* quote from Arizona, part B.1. below.

Reformation. It was in Reformation Europe that sacramental marriage first began to be adjudicated by secular judges—albeit sitting as essentially ecclesiastical courts. George Elliot Howard, 1 A HISTORY OF MATRIMONIAL INSTITUTIONS: CHIEFLY IN ENGLAND AND THE UNITED STATES WITH AN INTRODUCTORY ANALYSIS OF THE LITERATURE AND THE THEORIES OF PRIMITIVE MARRIAGE AND THE FAMILY 391–92, 392 n3 (photo. reprint 1994) (1904). Cromwell’s Civil Marriage Act of 1653 established exclusive civil marriage in England (marriage recognized by the state as opposed to Canon Law), and the ceremony was severed from the Church—marriage took place before a magistrate, and while it required oaths before God, the marriage had to be registered in the equivalent of a county clerk’s register that also tracked christenings and deaths. *Id.* at 418–19, 424–25. Although the Civil Marriage Act died with Cromwell’s Commonwealth in 1660, the marriages were validated by subsequent royal approval. *Id.* at 434–35. Aside from removing marriage from control of the clergy, however, the history of the Act is obscure as to its deeper philosophical purposes.

In fact, the philosophic basis for state regulation of marriage in the West (even during the age of unity between the Church and State), has for at least a dozen centuries been considered tied to the procreative function:

The social connection linking marriage and procreation is as old as marriage itself. Indeed, implicit in the very word matrimony is the idea that a man and a woman unite in legal marriage, *in matrimonium ducere*, so that they may have children. Plato proposed that “marriage laws [be] first laid down” and that “a penalty of fines and dishonor” be imposed upon all who did not marry by certain ages because “intercourse and partnership between married spouses [is] the original cause of childbirths.” Likewise, Aristotle recommended that marriage regulations would be the first type of legislation “[s]ince the legislator should begin by considering how the frames of the children whom he is rearing may be as good as possible” Similarly, concern about the linkage between marriage and responsible procreation was one of the major purposes for marriage regulation in Roman law. During the centuries following the

Roman era, the primary intellectual justification for marriage and marriage regulations has remained the fostering responsible human reproduction. Procreation is the social interest underlying Rousseau's declaration that: "Marriage ... being a civil contract, has civil consequences without which it would be impossible for society itself to subsist." Locke agreed, and linked "the increase of Mankind, and the continuation of the Species in the highest perfection," with "the security of the Marriage Bed, as necessary thereunto." In the law, as in human tradition, marriage and procreation have been strongly linked. ***Indeed, the history of marriage regulation itself could be viewed primarily as the history of the regulation of sex, procreation, and child rearing, for those concerns have long outweighed such modern (and postmodern) interests as romantic love, companionate equality, interspousal intimacy, and economic maximization as the core societal concerns regarding marriage.***

Lynn D. Wardle, "*Multiply and Replenish*": *Considering Same-sex Marriage in Light of State Interests in Marital Procreation*, 24 Harv. J.L. & Pub. Pol'y 771, 784–786 (2001) (emphasis added) (citations omitted). With Locke, we can see the Enlightenment focus on individual liberty turn away from BRO Plaintiff's mistaken notion of governmental intrusion into intimate relationships simply to validate personal identity, and toward a view that government entanglement in private relationships is only warranted where it pertains to the perpetuation of the human species and the society. See John Locke, *TWO TREATISES OF GOVERNMENT* 183 (Cambridge Univ. Press 1988) (1690).

Civil marriage's link to procreation is not foreign to American jurisprudence either. Justice William O. Douglas explicitly tied marriage to the procreative function, stating for a unanimous Court that "[m]arriage and procreation are fundamental to the very existence and survival of the [human] race." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (prohibiting sterilization of criminals). See also *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (prohibiting bans on interracial marriage). The Court described marriage most eloquently in terms of the procreative function in *Maynard v. Hill*:

Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.

125 U.S. 190, 211 (1888) (territorial legislature can dissolve a marriage). Whatever marriage itself is now understood as encompassing, and whatever consequences, obligations or benefits it triggers, the only *justification* for government's initial and ongoing regulation and involvement is the state's interest in societal self-preservation. *See, e.g., Mirizio v. Mirizio*, 150 N.E. 605, 607 (N.Y. 1926) (marriage “shall exist with the result and for the purpose of the begetting of offspring”); *Turney v. Avery*, 113 A. 710, 710 (N.J. Ch. 1921) (“[the procreation of children] is the most important object of matrimony, for without it the human race itself would perish from the earth”). Of course, children are not born only to those who are married, but that is the historic exception to the rule. *See Mirizio v. Mirizio*, 150 N.E. at 607 (“However much [marriage] may be debased at times, it nevertheless is the foundation upon which must rest the perpetuation of society and civilization. If it is not to be maintained we have the alternatives either of no children or of illegitimate [sic] children, and the state abhors either result.”).

Indeed, marriage is—from the government's view—where children should come from, in an ideal legislative world. Justice Marshall in *Zablocki v. Redhail*, 434 U.S. 374 (1978), noted in relation to the right to procreate that marriage was—at that time, anyway—“the only relationship in which the State of Wisconsin allows sexual relations legally to take place.” 434 U.S. at 386. That extramarital sex is no longer illegal is beside the point; the link between marriage and procreation is the only underlying justification for government's role in marriage as such. *See, e.g., Boddie v.*

Connecticut, 401 U.S. 371, 389 (1971) (Black, J., dissenting) (“It is not by accident that marriage and divorce have always been considered to be under state control. The institution of marriage is of peculiar importance to the people of the States. . . . The States provide for the stability of their social order, for the good morals of all their citizens, and for the needs of children from broken homes. The States, therefore, have particular interests in the kinds of laws regulating their citizens when they enter into, maintain, and dissolve marriages.”); Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy; Balancing the Individual and Social Interests*, 81 Mich. L. Rev. 463, 507–508 (1983) (discussing importance of marriage regulations in society).

In crux, this intrusion and regulation by the state of intimate sexual or private relations is ***inexplicable and unjustifiable*** absent the ancient and venerated concern over the procreative function. Simply put, BRO Plaintiffs are asking the state to intervene where— without the possibility of procreation—the state has no business being in the first instance. It is notable that the state licenses every relationship that naturally produces children, but not every relationship that raises them.

BRO Plaintiffs may well reply that government is interested in maintaining stable personal relationships among its citizens. But such a reply misses the point. We do not license or regulate noble private friendships, platonic friendships, mentoring relationships— as important as those may be to the social order. The only legitimate basis for government intervention in intimate interaction between citizens comes down to the need for government’s interest in perpetuation of the next generation.

III. RESPONSE TO THE COUNTY’S FOURTEENTH AMENDMENT ARGUMENT

A. CONCISE SUMMARY OF ARGUMENT.

The County’s Fourteenth Amendment analysis is sorely lacking. First, it wholly ignores *Baker v. Nelson*, 191 N.W.2d 185, 186 (1971), which is controlling on the Oregon Supreme Court. Second, fundamental rights must always be defined as narrowly and precisely as possible. *Washington v. Glucksberg*, 521 U.S. 702 (1997) (rejecting such broadly defined claimed fundamental rights as “the right to determine one’s destiny” and requiring analysis of the alleged right of “killing yourself with the assistance of a doctor”). The claimed right here, when correctly and narrowly defined, is the right to marry someone of the same sex; it is not the broad right to “marry.” These plaintiffs each already have the right to “marry” on the exact same terms as all other citizens. This claimed right—to marry someone of their own choosing apart from the legislative requirements—is not found anywhere in the Nation’s history and traditions. Every marriage case that the United States Supreme Court has ever decided — in which the Court has recognized the fundamental right to marry—has involved a marriage between a man and woman. *Baker v. Nelson* represents a rejection of the idea that there is a fundamental right to marry someone of the same sex, and as DOMC explained in its opening brief, *Baker* is binding United States Supreme Court precedent *on the merits*. See *DOMC Intervenors’ Opening Brief* at 49–53.

B. ARGUMENT: FEDERAL LAW IS SETTLED: NO FOURTEENTH AMENDMENT RIGHT TO SAME SEX MARRIAGE.

Plaintiffs and the State both failed to answer the Court’s Fourteenth Amendment question, and have accordingly waived any right to address it. And even without *Baker v. Nelson* the County

falls far short of articulating a violation of the Fourteenth Amendment. Oregon’s marriage laws simply do not implicate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

1. MARRIAGE OF TWO PEOPLE OF THE SAME SEX IS NOT A FUNDAMENTAL RIGHT.

The County Intervenors ignore the fact that marriage has a social and legislative definition. *See County’s Opening Brief* at 19–21. They also ignore the fact that the state has not necessarily **created** marriage nor originally defined its meaning. *Cf. Meister v. Moore*, 96 U.S. 76, 78 (1877) (states may “regulate the mode of entering [marriage], but they do not confer the right”; the right existed at common law). As recognized by *Baker v. Nelson*, 191 N.W.2d 185, 186 (1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972), “marriage as the union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.” The United States Supreme Court recognized that marriage is the union of “one man and one woman” in 1885 in *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885), and the English term marriage has meant the union of a husband and wife, a man and a woman, since at least the Fourteenth Century. *See* MERRIAM WEBSTER’S COLLEGIATE DICTIONARY—TENTH EDITION 713 (definition of “marriage”). When the United States Supreme Court issued its fundamental right to marriage cases, the term “marriage” clearly meant the union of a man and a woman. *See, e.g., Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (describing “[m]arriage and procreation” as “fundamental to the very existence and survival of the race”); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (discussing importance of “marriage” in

context of birth control—hardly an issue for same sex couples). Thus, the fundamental right to marry is the right of a man and a woman to enter a legal union. The County makes no effort to explain how a fundamental right to an institution defined as the union of a man and a woman for some 700 years can be construed to mean that same sex couples have a “fundamental right” to have their relationships recognized by the state.

The County’s reliance upon *Loving v. Virginia*, 388 U.S. 1 (1967), *Zablocki v. Redhail*, 434 U.S. 374 (1978), and *Turner v. Safley*, 482 U.S. 78 (1987), to argue for a right for same sex couples to marry each other is likewise misplaced.¹¹ Each of those cases involved the union of a man and a woman—a marriage within the historical definition. None of the couples in those cases were prohibited from marrying by the common law, but instead were prohibited from marrying by ***recently enacted*** statutes or regulations. In regard to *Loving*, DOMC Intervenors are unaware of any case invalidating an interracial marriage based upon the common law. Indeed, although not necessarily “as old as the book of Genesis,” interracial marriage is at least as old as Moses.¹² In contrast, “marriage” for same sex couples is virtually non-existent historically, and was not available

¹¹ It is surely beyond dispute that there were interracial marriages long before *Loving*; marriages of deadbeat dads long before *Zablocki*; and married prisoners long before *Turner*. There simply is no similar history of marriages of same-sex couples. In fact, these cases highlight the fact that the Supreme Court has never redefined a fundamental right in order to apply it in another context. These cases did not require a redefinition or even a broadening of the right to marry. Rather, these cases removed recent statutory impediments to marriage without changing or re-defining the fundamental right.

¹² See Numbers 12:1, King James Version (Moses “had married an Ethiopian woman”). Statutes prohibiting interracial marriage were an American innovation of fairly recent vintage. For example, the first law against interracial marriage in Alabama was passed in 1852. J. Novkov, *Racial Constructions: The Legal Regulation of Miscegenation in Alabama*, 20 Law & Hist. Rev. 225, 230 (2002). Texas passed its law in 1837. A. Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 Quinnipiac L. Rev. 105, n.57 (1996).

under the common law. *Cf. DeSanto v. Barnsley*, 328 Pa. Super. 181, 476 A.2d 952, 955–56 (1984) (holding that two persons of the same sex cannot enter a common law marriage).

Something that was not available under the common law certainly cannot qualify as a fundamental right, which must be “objectively, deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed.” *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). Because the County’s claims do not hinge upon a fundamental right, strict scrutiny is not required.

Because the ancient definition of marriage does not infringe any constitutional right, the state need not justify it.¹³ Nevertheless, the state does have a legitimate interest in preferring marriage over other types of family relationships, as was shown in DOMC’s opening brief. *DOMC Intervenor’s Opening Brief* at 27–35.

The County’s argument that the state recognizes many types of families and provides some level of rights and responsibilities for them does not undermine the state’s interest in preferring marriage above those other family types. The government traditionally provides incentives to achieve results that it desires. Providing benefits to married couples is such an incentive. The fact that the state does not outlaw procreation or adoption outside of marriage does not mean that it has to treat other family arrangements the same as marriage. As the Arizona Court of Appeals recently held:

[A]lthough some same-sex couples also raise children, exclusion of these couples from

¹³ Any justification for the marriage laws need only satisfy rational basis analysis. “In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any rationally conceivable state of facts that could provide a rational basis for the classification.” *Federal Communications Comm’n v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

the marriage relationship does not defeat the reasonableness of the link between opposite-sex marriage, procreation, and child-rearing. Indisputably, the only sexual relationship capable of producing children is one between a man and a woman. The State could reasonably decide that by encouraging opposite-sex couples to marry, thereby assuming legal and financial obligations, the children born from such relationships will have better opportunities to be nurtured and raised by two parents within long-term, committed relationships, which society has traditionally viewed as advantageous for children. Because same-sex couples cannot by themselves procreate, the State could also reasonably decide that sanctioning same-sex marriages would do little to advance the State's interest in ensuring responsible procreation within committed, long-term relationships.

Standhardt v. Superior Ct., 77 P3d 451, 462–63 (Az Ct App 2003).

The cases the County cites about the importance and value of marriage make it undeniable that marriage as the union of a man and a woman has always been viewed as the foundation of our society and civilization. *County's Opening Brief* at 19–20. Oregon's marriage laws merely codify this age-old understanding. Taking notice of the historical value of marriage as the union of a man and a woman and preferring it through legal incentives is surely within the Legislature's province. *Cf. Wright v. Beveridge*, 120 Or 244, 251–52 (1927) (“the power of the Legislature over the subject of marriage as a civil status . . . is unlimited and supreme except as restricted by the Constitution”). “The marriage relation . . . has always been under the control of the legislature.” *Rugh v. Ottenheimer*, 6 Or 231, 237 (1877). The Legislature is far better situated than the courts to make value judgments about the optimal family arrangement for children.

Finally, the County's arguments about couples not being required to prove fertility, an intent to raise children, an ability to raise children, or the financial means to raise children prior to marrying adds nothing to their argument. *County's Opening Brief* at 22–23. Any effort to require such proof would clearly be unconstitutional under the cases the County cites at page 20 of its brief. *See Griswold v. Connecticut*, 381 U.S. 479 (1965) (describing right to privacy regarding procreation

choices); *Cleveland Bd. of Ed. v. La Fleur*, 414 U.S. 632, 639-40 (1974) (describing “freedom of personal choice in matters of marriage and family life [as] one of the liberties protected by the Due Process Clause of the Fourteenth Amendment”); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (striking down financial hurdle to marriage); *see also Standhardt*, 77 P3d at 462 (inquiring about ability or intention to procreate would implicate privacy concerns). The reality is that under rational basis review, legislation need not perfectly fit its purpose in order to pass muster. *Heller v. Doe*, 509 U.S. 312, 321 (1993). “The fact that the line could be drawn differently is a matter for legislative, rather than judicial, consideration, as long as plausible reasons exist for placement of the current line.” *Standhardt*, 77 P3d at 463 (rejecting argument that needs of children of same sex couples “negate[s] the State’s link between opposite-sex marriage, procreation, and child-rearing”).

2. ***ORS CHAPTER 106 DOES NOT DISCRIMINATE ON THE BASIS OF GENDER.***

Significantly, the County Intervenors cite no federal authority for the proposition that the historical meaning of marriage discriminates on the basis of sex. They cannot cite such authority because there is none. In fact, the United States Supreme Court rejected an equal protection claim based upon alleged sex discrimination in *Baker v. Nelson*, 409 U.S. 810 (1972). The jurisdictional statement for that appeal asserted that “[t]he discrimination in this case is one of gender,” and relied upon *Reed v. Reed*, 404 U.S. 71 (1971) (overturning Idaho statute preferring men over women as estate administrators). (Jurisdictional Statement at 16, DOMC Excerpts of Record, D-E-R 14.)

The Supreme Court’s dismissal of the appeal for want of a substantial federal question constitutes a rejection of the sex-discrimination claim and prohibits other Courts from coming to an opposite

conclusion on that claim. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977); *see also DOMC Intervenor’s Opening Brief* at 51–52.

The County only cites federal case law prohibiting sex discrimination against men or women in support of its claim. *County’s Opening Brief* at 23–25. That case law is inapposite because the marriage laws simply do not discriminate against men or women. Moreover, the County has failed to identify any harm, burden, disadvantage, or advantage accruing *to either sex as a sex* because of the marriage statutes. It is telling that in trying to define the class allegedly being discriminated against, the County describes it as “individuals who wish to marry a person of the same gender.” *County’s Opening Brief* at 25. That is not a description of a class *based on sex*.

It is nonsensical to assert that defining marriage as the union of a man and a woman discriminates against both men and women.¹⁴ Indeed, the County is unable to make a coherent argument in support of sex discrimination. Instead, it argues that because only men can marry women and only women can marry men, men and women are treated differently, and, accordingly, there is discrimination—apparently against both. But that is like saying that public restrooms for exclusive use by men and women discriminate against both men and women. A difference in treatment does not equal discrimination when both men and women have the same benefits and restrictions, with no unequal burden, stigma, or advantage accruing to either sex because of sex. The United States Supreme Court’s sex discrimination cases focus on the denial of “full citizenship” and “equal opportunity” to *either* men *or* women as a class based upon sex. *United States v.*

¹⁴ The difference between the alleged sex discrimination and the race discrimination at issue in *Loving* is palpable. In *Loving*, the Court pointed out that even though both races were facially treated the same, the statute was specifically intended to denigrate African Americans. *Loving*, 388 U.S. at 11. Oregon’s marriage laws do not denigrate either men or women.

Virginia, 518 U.S. 515, 532 (1996). Oregon’s marriage laws do not discriminate against men or women, as a class, because both have the equal opportunity to marry; both are equally restricted from “marrying” a person of the same sex. As the Vermont Supreme Court held in *Baker v. State*, 744 A.2d 864, 880 n.13 (1999), “[h]ere, there is no discrete class subject to differential treatment solely on the basis of sex; each sex is equally prohibited from precisely the same conduct. Indeed, most appellate courts that have addressed the issue have rejected the claim that defining marriage as the union of one man and one woman discriminates on the basis of sex.”

A union of two persons of the same sex is not the same as a union of two persons of the opposite sex because the “sexes are not fungible.” *Ballard v. United States*, 329 U.S. 187, 193 (1946), quoted in *United States v. Virginia*, 518 U.S. at 533. The United States Supreme Court has ruled that “a community made up exclusively of one [sex] is different from a community composed of both.” *Id.* It is surely permissible for the state to recognize that difference in choosing to steer procreation into marriage by granting incentives to that opposite-sex relationship.

3. ***FEDERAL LAW REGARDING MARRIAGE OF SAME SEX COUPLES IS UNAMBIGUOUS.***

In declining to answer the Court’s question of whether the marriage laws violate the Equal Protection Clause of the Fourteenth Amendment, the State curiously alludes to “the unsettled state of federal law in this area.” *State’s Opening Brief* at 65. However, as California Supreme Court Justice Kennard recently noted in her *Lockyer v. City and County of San Francisco*, 33 Cal. 4th 1055, 1126 (2004), concurrence, the current status of federal law is anything but “unsettled.” “Until the United States Supreme Court says otherwise, ***which it has not yet done***, *Baker v.*

Nelson defines federal constitutional law on the question whether a state may deny same sex couples the right to marry.” *Id.* at 1127 (emphasis added). And *Baker* “is a decision . . . binding on all other courts and public officials, that a state law restricting marriage to opposite sex couples does **not** violate the federal Constitution’s guarantees of equal protection and due process of law.” *Id.* at 1126 (emphasis in Justice Kennard’s concurrence).

Consistent with its refusal to defend the statutes at issue in this case, the State does not even acknowledge that *Baker v. Nelson* directly rejected a fundamental right to marriage for same sex couples under both equal protection and due process theories. See *DOMC Intervenor’s Opening Brief* at 51–52. Instead, the State suggests that “[s]ince *Baker* was decided, the Court has issued opinions that create some uncertainty about *Baker*’s continued validity. See, e.g., *Romer v. Evans*, 517 U.S. 620, 635 (1996) (holding that, even under rational basis review, moral disapproval of homosexuals as a class cannot be a legitimate government interest).” *State’s Opening Brief* at 65, n.49. Of course, the State makes no effort to explain how *Romer*, which dealt with a law that the Court said “deprives gays and lesbians even of the protection of *general laws and policies* that prohibit arbitrary discrimination in governmental and private settings,” *Romer*, 517 U.S. at 630 (emphasis added), has any bearing on laws codifying the historical meaning of marriage. The State surely cannot be suggesting that marriage, as historically understood, was created solely and purposefully to foster “moral disapproval of homosexuals as a class.” ORS Chapter 106 does not deny same sex couples the equal protection of the laws as understood by the 14th Amendment, *Baker v. Nelson*, and the binding United States Supreme Court acceptance of that case’s holding.

IV. RESPONSE TO ARGUMENTS OF *AMICI*

Sixteen *amici curiae* filed briefs in this action—eight support BRO Plaintiffs’ position to a greater or lesser degree, seven support the position of DOMC Intervenors, and one brief expresses a belief that a ruling favorable to BRO Plaintiffs from this Court will not change religious practice. DOMC Intervenors initially respond to some of these briefs below, and will provide further response to these and other briefs in the reply brief.

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A. RESPONSE TO AMICUS BRIEF OF PAULA ABRAMS, ET AL: HISTORY IS RARELY TRENDY, BUT IT *IS* HISTORY AND THIS COURT HAS SAID IT MATTERS.

Amici Paula Abrams, *et al* (hereinafter “Law Professor *Amici*”) suggest that “historical circumstances” are just one criterion among many that this Court looks to when interpreting and applying constitutional text. However, the Law Professor *Amici* seriously underestimate this Court’s repeated adherence to historical context. *See, e.g., State v. Kessler*, 289 Or 359, 368–69, 614 P2d 94 (1980) (indicating that modern trends regarding the meaning of words, phrases and/or concepts do not overrule historical context when it comes to interpreting and applying the Oregon Constitution). *Kessler* is a reflection of the importance which this Court places upon the history and context of the specific words which are used in the constitutional text.

Additionally, the Law Professor *Amici* suggest that a principled adherence to this Court’s jurisprudence would turn back the clock and usher in the return of racism and gender discrimination. Law Professor *Amici*, of course, direct their thunder at DOMC, rather than at this Court, suggesting implicitly that only bigots and reactionaries would look to history for any

constitutional support for traditional marriage—an insult that does not itself dignify a response. But their disagreement is really with this Court’s adherence to history; indeed, with this Court’s understanding of its own role in a constitutional democracy: to interpret and give meaning to the Constitution passed or amended by the citizens. It is that disagreement to which DOMC responds.

In *Kessler*, this Court traced the history of Article I, Section 27 of the Oregon Constitution and the historical meaning of the words “The people shall have the right to bear arms for the defense of themselves, and the State” back (a) through the Oregon constitutional founders’ borrowing of its language in 1859 from the Indiana constitution (1816), 289 Or at 363–66, (b) to the revolutionary war era through similar earlier borrowing from the respective constitutions of Ohio (1802), Kentucky (1799), and Pennsylvania (1776), *Id.* at 363–66, and eventually to (c) England during the reign of King James II in 1685 and adoption of the English Declaration of Rights in 1689. *Id.* at 363–64.

Based upon this historical analysis of the language contained within Article I, Section 27, the Court concluded that the right of the people to bear arms for defense of themselves and the state encompassed a right to maintain “arms” within the home for self-defense. *Id.* at 368. The court further concluded that the term “arms” includes “those modern day equivalents of the weapons used by colonial militiamen” and which were “commonly used for either purpose (*i.e.*, self defense or defense of the state), even if a particular weapon is unlikely to be used as a militia weapon.” *Id.* at 369. Because a modern day “billy club” or “blackjack” is a type of “hand carried weapon commonly used by individuals for personal defense,” not uncommon to the personal weapons used in colonial times for home defense and militia service, the Court found that Article I, Section 27 protected the right to maintain these items in the home. *Id.* at 372.

In *Kessler* the Court also made a point of emphasizing that no amount of popular modern thinking would cause it to divert from the clear historical meaning and context of a constitutional provision. Although fully acknowledging that a substantial body of modern thinking challenged the wisdom of the right to bear arms, the Court nonetheless held that regardless of the politics or popularity of its conclusion, it was its duty to remain true to both the historical meaning and context of Article I, Section 27. The Court explained:

“Despite the many variations in wording, the state’s constitutional provisions guaranteeing the right to bear arms share a common historical background. We begin first with an examination of this historical background and then with an examination of the meaning and purpose of the particular words chosen by the Oregon drafters. We are not unmindful that there is current controversy over the wisdom of a right to bear arms, and that the original motivations for such a provision might not seem compelling if debated as a new issue. ***Our task, however, in construing a constitutional provision is to respect the principles given the status of constitutional guarantees and limitations by the drafters; it is not to abandon these principles when this fits the needs of the moment.***”

289 Or at 362 (emphasis added).

Although this Court found historical information inapposite in *State ex. Rel. Juvenile Dept. of Klamath County v. Reynolds*, 317 Or 560, 857 P2d 842 (1993), the decision nonetheless confirms the Court’s devotion to historical analysis when it is asked to interpret and apply constitutional provisions. Unfortunately in *Reynolds* the Court somewhat blurred the distinctions between the analysis of historical words, analysis of historical context, and “historical exceptions,” by seemingly lumping them all together and applying what it described in that case as a “*historical approach* to state constitutional interpretation.” *Id.* at 564-65 (emphasis added). *Reynolds* addressed the question of whether the jurisdictional phase of a juvenile proceeding constituted a “criminal prosecution” so as to entitle an accused juvenile delinquent to a jury trial under Article I,

Section 11 of the Oregon Constitution. In addressing this question, the Court began by noting that “[f]requently, this court has approached constitutional questions under Article I of the Oregon Constitution by examining the historical context of the constitutional provision in question.” *Id.* at 564 *citing and quoting Kessler*, 289 Or at 362; *State v. Clark*, 291 Or 231, 236, 630 P2d 810 (1981).

Examining historical common law notions of a juvenile’s capacity to be held responsible for crimes, the Court concluded that at the time of the Oregon Constitution’s adoption in 1859, a juvenile in the position of the child in that case could have been criminally prosecuted for his crimes and, thus, would have been entitled to a jury trial under Article I, Section 11. *Id.* at 566.

However, because juvenile proceedings had been so radically changed statutorily between 1859 and the present time, such that “juvenile proceedings, as we now know them, did not exist in the nineteenth century in Oregon” *id.* at 567–70, the Court determined that the historical context was inapposite and rejected the juvenile’s claim for a jury trial. *Id.* at 575.

Vannatta v. Keisling, 324 Or 514, 931 P2d 770 (1997) is another case demonstrating the Court’s devotion to historical meaning and context. In *Vannatta* the Court utilized a historical analysis in the course of interpreting Article II, Section 8 of the Oregon Constitution. This Court began its Article II, Section 8 analysis by explaining that when interpreting the Oregon Constitution, the Court always considers the history of the constitutional provision at issue:

“To interpret a provision of the Oregon Constitution, this court considers “[i]ts specific wording, the case law surrounding it, **and the historical circumstances that led to its creation.**”

Id. at 529 (emphasis added) *quoting Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65

(1992).¹⁵ In reaching its ultimate conclusion that Article II, Section 8 of the Oregon Constitution does not specifically authorize campaign finance reform laws which limit campaign contributions and/or expenditures, the Court looked closely at both (1) the historical meaning of the specific words which are used in the constitutional text, *id.* at 529-31; and (2) the historical context in which the constitutional text was adopted as part of the Oregon Constitution. *Id.* at 533-35.

In finding that campaign finance reform did not fall within the scope of the textual language of Article II, Section 8, the Court emphasized that “when construing provisions of our constitution, we attempt to understand the wording in the light of the way that wording would have been understood and used by those who created the provision.” *Id.* at 530, *citing State v. Kessler*, 289 Or 359, 368-69, 614 P2d 94 (1980). The Court relied heavily in its decision on the fact that the word “election”—elections being the primary focus of Article II, Section 8, *id.* at 529-30—had a significantly different meaning in 1857 (“the pertinent time,” the date when Article II, Section 8 was ratified) than it does in modern time:

“However, the constitutional provision that we construe here was proposed in 1857, not in 1996. A dictionary relevant to that time gives a more limited definition of the word “election”: “The act of choosing a person to fill an office or employment, by any manifestation of preference, as by ballot, uplifted hands or viva voce[.]” WEBSTER’S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). The dictionary on which we rely has no definition of “campaign” that corresponds to present-day use of that word as a description of the effort to obtain public office or to obtain the passage of an initiated or referred measure. The concept of that time closest to what we now term “campaigning” was “electioneering,” which Noah Webster defined as “[t]he arts or practices used for securing the choice of one to office.” WEBSTER’S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). It thus appears that, whatever the

¹⁵ In *Priest* the Court looked to the historical context of the “right to bail” when interpreting Article I, Section 14 of the Oregon Constitution. The Court explained the appropriate constitutional analysis as follows: “There are three levels on which that constitutional provision must be addressed: Its specific wording, the case law surrounding it, and *the historical circumstances that led to its creation.*” 314 Or at 415-16 (emphasis added).

degree of their overlap today, the ideas of “electioneering” and “elections” were somewhat distinct at the pertinent time, *viz.* at the time that the Oregon Constitution was created. . . . To those who created the Oregon Constitution, “elections” were a relatively narrowly defined concept.”

Id. at 530-31. In *Vannatta*, after analyzing the history of the specific words contained within the constitutional text, the Court also analyzed the “historical context in which Article II, section 8, was adopted” as well as “[t]he context of the other sections in Article II[.]” *Id.* at 533-35.

In conducting this historical context analysis, the Court looked to the fact that Article II, Section 8 “derives from a similar provision in the Connecticut Constitution of 1818” which “empowered its legislature to enact laws ‘prescribing the manner of regulating and conducting *meetings of the electors*’” and “expressly limited its scope to such meetings.” *Id.* at 533-34. However, finding nothing conclusive in the historical context of Connecticut’s constitution, *id.* at 534, and finding that “[a]t statehood, the other sections in Article II dealt almost exclusively with the rights and qualifications for electors,” *id.* at 534-35, the Court found no reason to deviate from the clear path directed by the historical language. *Id.*

Priest represents another example of a case in which this Court has confirmed its devotion to historical constitutional analysis, despite eventually interpreting the relevant constitutional provision independent of historical context. In *Priest*, in order to determine whether Article I, Section 17 of the Oregon Constitution affords a person convicted of a crime the right to be released on bail pending completion of the appeal of their conviction, the Court traced the general history of Oregon’s constitutional provision back through its adoption in 1859, its prior incorporation into the Indiana constitution (1851), its adoption into the Pennsylvania and North Carolina constitutions (1776), its incorporation into the Pennsylvania Charter of Liberty (1682), and its incorporation into

the Massachusetts Body of Liberties (1641). 314 Or at 417–18.

After concluding that neither “the specific history of the Oregon constitutional provision nor the more general history of the parallel provisions found in many other state constitutions supports” the plaintiff’s claim for release on bail pending appeal, however, the Court rejected the claim principally because all of the other states with similar constitutional provisions which had been asked to consider the question (save Louisiana) had concluded that no such bail right existed. *Id.* at 419. The Court’s decisional analysis in *Priest* suggests that if the Court had found some relevant historical understanding regarding the right to release on bail pending appeal, then the Court would have enforced that historical understanding.

The above decisions, taken together, reflect that this Court shows significant respect to both the (1) historical meaning of specific words and phrases used within the text of Oregon’s Constitution and (2) the historical context within which specific provisions were adopted into it. In its search for relevant historical information, this Court has looked to various sources, including (1) information regarding the intent of the Oregon founders in 1857–1859, (2) dictionaries contemporary to that time, (3) the texts and histories of earlier constitutional provisions of other states from which Oregon borrowed its constitutional text, and (4) Oregon’s common law and statutory provisions existing at or prior to 1859. Where relevant historical information is available, either regarding the meaning of words or phrases contained within the constitutional text, or regarding the understanding of certain constitutional provisions based upon context, the Court gives effect to the historical meaning or understanding. There does not appear to exist even a single case in which this Court has found relevant historical meaning and context for a constitutional text or provision, but then determined to reject that history in favor of some more modern or popular or

evolving interpretation. As the Court noted in *Kessler*, “Our task . . . in construing a constitutional provision is to respect the principles given the status of constitutional guarantees and limitations by the drafters; it is not to abandon these principles when this fits the needs of the moment.” 289 Or at 362.

Accordingly, in construing and applying Article I, Section 20 of the Oregon Constitution in the context of Oregon’s marriage laws which limit marriage to civil contracts between “males” and “females” and do not allow for marriages between persons of the same sex, it is appropriate to begin with an examination of both the historical meaning of the constitutional provision and the historical context within which it was adopted into the Constitution. In fact that is what DOMC has urged in this case, both at the trial level and here. And, in point of fact, that is exactly the approach which this Court took regarding Article I, Section 20 in *State v. Clark*, 291 Or 231, 630 P2d 810 (1981). While placing greatest weight upon its decisions interpreting Article I, Section 20 during the years of its existence, and seemingly not utilizing non-judicial history in its application of the provision, the Court did trace the history of the provision as it was taken from the Indiana constitution of 1851, pre-dating both the Civil War and the equal protection clause of the fourteenth amendment:

“This guarantee, taken like most of article I from Indiana’s constitution of 1851, has been a part of the Bill of Rights since Oregon became a state in 1859. Antedating the Civil War and the equal protection clause of the fourteenth amendment, its language reflects early egalitarian objections to favoritism and special privileges for a few rather than the concern of the Reconstruction Congress about discrimination against disfavored individuals or groups. . . . Because the clause would ordinarily be involved by persons who wanted a privilege or immunity for themselves rather than to withdraw it from others, its protective effect was soon held to extend to rights against adverse discrimination as well as against favoritism. . . .”

Id. at 236-37.

Ironically, the Law Professor *Amici*'s contention that Article I, Section 20 should be read to encompass same sex marriage ignores a specific mention of the structure of traditional marriage elsewhere *in the Oregon Constitution*. Article XV, Section 5 of the Oregon Constitution—an original provision—reads:

“The property and pecuniary rights of every married woman, at the time of marriage or afterwards, acquired by gift, devise, or inheritance shall not be subject to the debts, or contracts of the husband; and laws shall be passed providing for the registration of the wife's separate (*sic*) property.”

Or Const Art XV, § 5. In this provision, the framers plainly recognize and accept that marriage is structured with a “wife” and a “husband”—words that meant and continue to mean woman and man. *See* Black's Law Dictionary 741, 1598 (6th ed. 1990) (“*husband*” is defined as “a married man,” and “*wife*” is defined as “a woman united to a man by marriage.”). Any more politically progressive notion of equality that the Law Professor *Amici* wish to impute to the framers falls flat when viewed alongside the requirement that courts “harmonize” all parts of the Oregon Constitution. *See In re Fadeley*, 310 Or 548, 560, 802 P2d 31 (1990). *See also State ex rel. Gladden v. Lonergan*, 201 Or 163, 177, 269 P2d 491 (1954) (courts must give effect “to every part and every word of a Constitution and that unless there is some clear reason to the contrary, no portion of the fundamental law shall be treated as superfluous.”).

If the traditional structure of marriage is ensconced in the Oregon Constitution—as it plainly is—as well as in its text and historical context, Article I, Section 20's notions of equality cannot legitimately extend to subvert that structure. Law Professor *Amici*, like any citizens, are free to work to amend the Constitution to change that meaning—as has been done as it pertains to race and gender—but they should not succeed in efforts to convince the Court that the Constitution

means something that, in all intellectual honesty, it simply does not.

B. RESPONSE TO *AMICUS* BRIEF OF OREGON MINORITY LAWYERS ASSOCIATION, ET AL: OUR CONSTITUTION IS NOT SIMPLY A BLANK SLATE UPON WHICH NEW OR PROGRESSIVE IDEAS CAN BE WRITTEN.

The *amicus* brief submitted by the Oregon Minority Lawyers Association, et al. (denoted in the title and hereinafter referred to as “Civil Rights and Historians *Amici*,”) argues with great and practiced rhetorical skill that traditional marriage to gays and lesbians is the equivalent of what racial segregation was to African-Americans. These *Amici* argue in all seriousness that a refusal to rewrite constitutional history as it pertains to marriage is the equivalent of re-instituting institutional and legal racism. Naturally, therefore, the Civil Rights and Historians *Amici* argue, the Oregon Constitution cannot legitimately be read to countenance such discrimination toward Oregon citizens. Such rhetoric largely misses the point of DOMC’s argument and this Court’s history-seeking precedent.

The Civil Rights and Historians *Amici* Brief falters because it consistently conflates this Court’s devotion to “historical meaning” of words and phrases in the Oregon Constitution with historical context and the “historical exceptions” doctrine, discussed by DOMC/Intervenors in their opening brief. The historical exception doctrine, in contrast to historical meaning, looks for clear areas of private or social life and public interaction— historical legal or social institutions—to which particular provisions of the Constitution or perhaps all provisions of the Constitution were not intended to apply (because otherwise they would have undone the established societal construct). *See State v. Robertson*, 293 Or 402, 412 (laws in existence at the time of the framing of the Oregon Constitution represent “historical exceptions” to a literal reading of constitutional provisions

that would render such laws—or their modern equivalents— unconstitutional). The right question is not whether the framers of the Oregon Constitution intended “equality” to extend to homosexuals—a question that no doubt never occurred to them—but instead whether they intended for Article I, Section 20 to radically re-define such a basic bedrock institution as marriage. The answer to that question is an obvious “no.”

These *Amici* also remain deliberately dense—there is no other possible explanation for their refusal to engage with a key portion of DOMC’s argument—about the effect of intervening constitutional amendments and legislative enactments on historical context. Of course historical circumstances or meaning no longer control a constitutional question *if* intervening constitutional amendments reverse or clarify constitutional concepts. So all the laments about a return to racism, or sexism, are disingenuous and beneath the gravity of the real issues in this case, apart from being another unfortunate attempt to link supporters of traditional marriage with racism and bigotry.

Simply put, if the citizenry has amended the Constitution to reverse a previous constitutional understanding of framer intent, as the people of Oregon have done with regard to race and gender, then original framer intent no longer matters; it has been replaced, supplanted. There are in essence *new framers*. That is the right and prerogative of the people in a constitutional democracy. But unless and until the citizenry has spoken, the original constitutional text and context still govern constitutional interpretation. At least in this State. At least according to this Court. At least up until now.

C. RESPONSE TO OTHER AMICI BRIEFS

- **AMICUS BRIEF OF AMERICAN PSYCHOLOGICAL ASSOCIATION**

Amicus American Psychological Association claims that gay and lesbian parents are as fit and capable as heterosexual parents, and their children are as psychologically healthy and well adjusted. *APA Amicus Brief* at 26. However, *APA Amicus* admits that no scientific research specifically shows that children are as well off in a home with two parents of the same sex, stating that the extant “research has not compared parenting by heterosexual couples with parenting by same sex couples in a committed relationship, however, and therefore ***does not permit any conclusions to be drawn about the consequences of having heterosexual versus non-heterosexual parents***, or two parents who are of the same versus different genders.” *APA Amicus Brief* at 27 (emphasis added).¹⁶ For this reason as well as common sense and reasons of institutional competence, it can be stated unequivocally that affidavits and social studies in judicial proceedings are a poor way to decide such fundamental social questions. This is why we have legislative bodies.

¹⁶ *APA Amicus*’ conclusion about same sex parents is particularly suspect when “most of the research compares development of children with custodial lesbian mothers to that of children with custodial heterosexual mothers” who are divorced. See Charlotte J. Paterson, *Family Relationships of Lesbians and Gay Men*, 62 *Journal of Marriage and the Family* 1052, 1059 (2000). Patterson is cited in the *APA Amicus Brief* at 26, 28, 29, 30, 31, 35.

Furthermore, when research is done for the purpose of supporting a position in litigation, it is inherently suspect. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995) (importance of whether research was done in support of position in litigation). Indeed, the authors of a meta-analysis cited in the *APA Amicus Brief* suggest that most of the research about children of homosexuals may have been done out of “a desire to produce evidence directly relevant to the questions of ‘harm’ that dominate judicial and legislative deliberations over child custody.” Judith Stacey & Timothy Biblarz, (*How*) *Does the Sexual Orientation of Parents Matter?*, 66 *American Soc. Rev.* 159, 176 (2001). See also Charlotte Patterson & R. Redding, *Lesbian and Gay Families with Children: Implications of Social Science Research for Policy*, 52(3) *Journal of Social Issues* 29, 45 (1996) (“the research findings can be brought to the attention of the courts in the form of *amicus* briefs”). Because of this recognized motivation for specific findings, the “remarkably consistent” scientific research cited by *APA Amicus* in its brief is best viewed with skepticism.

- **AMICUS BRIEF OF DRS. COLEMAN, ET AL.**

This *amicus* brief advances the single principle that in these doctors' opinion, homosexuality is immutable, as "a normal form of biopsychosocial development." *Doctor Amici Brief* at 6–8.

Doctor *Amici*s argue that "no data demonstrate that so-called "reparative" or conversion techniques are effective." *Id.* at 5.¹⁷ Even if true, this idea adds nothing to this case, since the question would *still* be one of disparate *impact*—a doctrine this Court has never applied in an Article I, Section 20 case. *See* DOMC Intervenors Opening Brief at 37-43.

- **AMICUS BRIEF OF JUVENILE RIGHTS PROJECT, ET AL.**

Amici Juvenile Rights Project, et al. advance the notion that stability is important in children's lives and that gay marriage would promote stability for homosexual couples. *See generally* *Juvenile Rights Project Amici's Brief* at 5–18. While this may or may not be the case,¹⁸ Juvenile Rights Project *Amici* miss the underlying legal justification for civil marriage in the

¹⁷ Doctor *Amici* ignore the studies cited in the *amicus* brief of the American Center for Law and Justice (ACLJ)—specifically the Spitzer study on "reparative" therapy. *See ACLJ Amicus Brief* at 26–29, citing Robert L. Spitzer, *Can Some Gay Men and Lesbians Change Their Sexual Orientation? 200 Participants Reporting a Change from Homosexual to Heterosexual Orientation*, 32 *Archives of Sexual Behavior* 403 (2003). Dr. Spitzer's study is significant in that Dr. Spitzer is a pro-homosexual medical professional who "led the charge to have homosexuality removed . . . as a mental disorder." *See* Jeffrey Kluger, *Can Gays Switch Sides? An Inflammatory Report Rekindles Old Arguments About Whether Homosexuality is a Matter of Choice*, *TIME*, May 21, 2001 at 62. The authoritative declarations of Doctor *Amici* are best taken with a grain of salt.

¹⁸ Showcasing the necessarily contradictory nature of so much advocacy research, in arguing that children of gay and lesbian couples face no social stigma, Juvenile Rights Project *Amici* directly contradict themselves from one paragraph to the next. *See Juvenile Rights Project Amici's Brief* at 17 (children of homosexual couples both do and do not experience social stigma as a result of their parent's orientation). In this, Juvenile Rights Project *Amici* also contradict the argument of APA *Amici* that "children of same sex couples may be secondary targets of stigma directed at their parents because of the parents' sexual orientation." *APA Amici's Brief* at 34.

first instance, as well as the thrust of BRO Plaintiffs’ Article I, Section 20 challenge. Simply because a particular course of action may be good policy does not make it constitutionally required. Like the APA brief, this *Amicus* argument is one designed for a legislative body, not a court deciding a constitutional matter.

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- **AMICUS BRIEF OF VERMONT FREEDOM TO MARRY TASK FORCE, ET AL.**

The brief of *amici* Vermont Freedom To Marry Task Force, et al. is devoted nearly entirely to explaining why civil unions in Vermont fall short of providing both the tangible and intangible benefits of marriage. *See VFM Amici Brief* at 18–31. The legislative choice made by the Vermont Legislature has absolutely no bearing on the interpretation of Oregon Constitutional provisions. Further, there is little doubt that the Oregon Legislative Assembly already *could* enact a civil union regime that provided state benefits equivalent to marriage. VFM *Amici’s* complaint with respect to recognition of same sex unions—whether these unions are called “marriage” or not—by the federal government and other states is a choice of federal law (1 U.S.C. § 7) and the laws of those other states. These laws are not subject to this Court’s ruling.

- **AMICUS BRIEF OF OGALLA, ET AL.**

OGALLA and its related *amici* urge this court to approve the reasoning of *Tanner v. OHSU*—*i.e.* that sexual orientation is immutable and homosexuality is a suspect class triggering heightened scrutiny. *OGALLA Amici’s Brief* at 2–3, 23–27. OGALLA *Amici* divide the

population into two classes: the favored heterosexual class and the disfavored homosexual class, and avoiding all other legal issues in this case, focus on whether homosexuals are comparably suited to heterosexuals to perform or contribute in society (which no one, including DOMC, doubts), and advance anecdotal evidence of stigma, exclusion from public life and fears for personal safety. *Id* at 4, 12-16. But it is manifestly unclear how the right of gays to marry can be expected to accomplish the interests OGALLA *Amici* advance.

- **AMICUS BRIEF OF LEGAL MOMENTUM (NOW-LDF), ET AL.**

Amici Legal Momentum (formerly NOW Legal Defense Fund), et al. posit, quite seriously, that marriage is simply shorthand for historically enforced gender stereotypes and prejudice. This tired political argument ignores the fact that most of the disabilities on wives were removed by the same provision of the Oregon Constitution that recognized the traditional structure of marriage, *see* Or Const Art XV § 5, and that in modern society, neither spouse is mandated a social role by law. NOW *Amici* further argue that gender stereotypes are at the root of anti-homosexual prejudice, conflating unconstitutional legislative prejudice alluded to in *Hewitt*, *see* 294 Or at 47, with individual's access to marriage. But gender assumptions, whether prejudicial or not, do not limit an individual's *access* to marriage on the basis of gender. BRO Plaintiffs have admitted as much in recognizing that they all "qualify" for marriage. *See BRO Plaintiffs' Opening Brief* at 17; *Multnomah County's Opening Brief* at 5.

- **AMICUS BRIEF OF AMERICAN FRIENDS SERVICE COMMITTEE, ET AL.**

American Friends Service Committee, et al. sincerely advance the argument that no

governmental body can require them to sanctify same sex marriages. While DOMC Intervenor agree with this as a general, current legal proposition—and hope it will remain strong—DOMC Intervenor remain concerned that American Friends *Amici* fail to note the potential danger of official sanction against religious organizations that refuse to adopt constitutionally sanctioned ideas, *see Bob Jones University v. United States*, 461 U.S. 574 (1983) (tax exempt status of university revoked for ban on interracial dating), as well as the myriad of other forums of political or legal coercion that can and will threaten the religious liberty of dissenting faith communities. In this way American Friends *Amici* are perhaps naive, or are engaged in wishful thinking, or both.

V. ANSWER TO STATE’S ASSIGNMENT OF ERROR ON MANDAMUS AND THE COUNTY AUTHORITY QUESTION

A. CONCISE ANSWER TO STATE’S ASSIGNMENT OF ERROR.¹⁹

The State is correct in assigning error to the trial court’s ruling that granted BRO Plaintiffs’s mandamus. However, the State does not advance all the reasons why the mandamus was improperly issued.

B. ARGUMENT: LOCAL OFFICIALS CANNOT CONTRAVENE STATE LAW, OR CHAOS WILL FOLLOW.

In it’s First Assignment of Error, the State demonstrates beyond serious debate that under ORS Chapters 106 and 432, the State—not any county—is charged with sole statutory responsibility to determine what constitutes a valid marriage. *State’s Opening Brief* at 16-26. But

¹⁹ Standard of Review: DOMC Intervenor accept the standard of review set out in State’s opening brief as an error of law standard under *State ex rel LaVasseur v. Merten*, 297 Or 577, 580–82, 686 P2d 366 (1984).

the State fails to close a logical loop by also demonstrating why the statutory scheme of ORS Chapter 432 is not subject to constitutional challenge by the County.

BRO Plaintiffs' likely response to the State's explanation of these statutes will be to argue that since (in their opinion) the underlying prohibition against same sex marriages in ORS 106.010 is unconstitutional, and since (again, in their opinion) the County has the responsibility to act according to its own interpretation of those statutes in light of its attorney's opinion, then all other statutes that prevent same sex couples from marrying, including those found in Chapter 432, must also give way to the paramount right of same sex couples to marry. Thus, goes the Plaintiffs' argument, no mere *statutory* scheme giving the state responsibility to determine what is a valid marriage can prevent the State from having to register marriages that the County has determined are *constitutionally* mandated.

The fatal flaw in that argument is that the County's first duty under the Oregon Constitution is to confine its actions to the sphere of responsibilities that the Constitution grants to counties under Article VI, Section IV. Regardless of a county's opinion of a statute's constitutionality, if the Oregon Constitution does not grant Multnomah County the right to act unilaterally on that belief, any attempt to do so is void—*ab initio*.

1. NOT ONLY DOES MULTNOMAH COUNTY LACK ANY AUTHORITY TO INTERPRET THE MARRIAGE STATUTES, IT IS WITHOUT AUTHORITY TO DIRECT A STATE AGENCY HOW TO INTERPRET THE LAW ON ANY SUBJECT.

DOMC Intervenor's have already explained that Article VI, section 10 of the Oregon Constitution denies counties and cities the power to assert any type of authority over matters of statewide concern, such as the marriage statutes. See *DOMC Intervenor's' Opening Brief* at 66-

72. Moreover, under a related line of decisions by this court, counties have no constitutional authority to instruct coequal or higher branches of government how to act. Thus, the state's second argument, that local officials may not impose their legal advice upon the State, is correct. *See State's Opening Brief* at 27.

It has been the law in Oregon since at least the beginning of the twentieth century that local officials cannot direct coequal or higher agencies of government how to administer the law. *Kiernan v. Portland*, 57 Or 454, 463, 111 P 379 (1910), *error dismissed* 223 U.S. 151 (1912), (provision of a Portland City Charter amendment directing the City to cede ownership of a bridge to Multnomah County without the county's consent was void.) The same principle informed the court's holding in *Multnomah Cty. v. \$5,650 in U.S. Currency*, 309 Or 285, 786 P2d 729 (1990), (Multnomah County could not use the state courts to enforce a county forfeiture ordinance). *Accord*, *State v. Logsdon*, 165 Or App 28, 995 P2d 1178 (2000) (voiding a provision of a Josephine County charter amendment governing the conduct of state and federal law enforcement officials when conducting searches in that county).

The principle underlying *Kiernan* and subsequent decisions acts as a limitation upon local power *per se*; it does not depend upon a finding that local officials have incorrectly interpreted any law. Only the state and its courts, not Multnomah County, its executives or its attorneys, can decide which marriages comply with the Oregon Constitution and statutes and are, therefore, entitled to registration by the state. Accordingly, it was improper for the County to attempt to circumvent the marriage statutes without a prior decision by an appropriate state court.

2. THIS COURT HAS NEVER AUTHORIZED LOCAL OFFICIALS TO DECLARE A

STATEWIDE LAW UNCONSTITUTIONAL, AND SHOULD NOT GIVE THEM THAT AUTHORITY NOW.

Subsection B of the State’s opening brief, beginning on page 27, ***does not go far enough*** to explain why local officials cannot make constitutional interpretations about statewide laws. While this court in the past has approved of the exercise of constitutional interpretation by some *state* executive authorities under certain limited circumstances, those decisions should be limited to their context. That is, only state agencies should be permitted to act on their opinions of the constitutionality of state statutes they are solely responsible to administer, and then only when judicial review is available as a matter of right. This court has never held, and should not do so now, that county or other local officials have the same authority over *state* statutes.

In *Cooper v. School Dist. 4J*, 301 Or 358, 723 P2d 298 (1986) and *Employment Div. v. Rogue Valley Youth for Christ*, 307 Or 490, 770 P2d 588 (1989), a state agency official with overall responsibility for administration of a statewide statutory program was called upon to determine the constitutionality of one provision of the statutory program the agency administers. In *Cooper* the State Superintendent of Public Instruction believed he did not have the authority to rule on the constitutionality of a statewide statute prohibiting teachers from wearing religious garb. This court told him he did. 401 Or at 364. In *Rogue Valley*, the Director of the Employment Department declared a statute to violate Article I, section 20, and this court agreed. 307 Or at 495. *Newport Church of the Nazarene v. Hensley*, 335 Or 1, 56 P3d 386 (2002) also involved a determination by the Employment Department that a provision of the Employment Act was unconstitutional—and so the agency promulgated a rule accordingly. This Court sustained the rule—and impliedly the Department’s authority to promulgate it—as an exercise in constitutional

interpretation. *Id* at 16.

Each of these opportunities for agency constitutional decision making happened in the context of contested case proceedings, in which the agency's opinion would be subject to prompt review by the Court of Appeals. ORS 183.480 *et seq.*²⁰

Here, by contrast, in the absence of litigation, without any administrative proceedings or public involvement, and in great secret, Multnomah County simply made a decision, announced at a press conference, that state statutes of over a century's vintage had become unconstitutional, and it would begin issuing marriage licenses to same sex couples the next morning. Only because DOMC Intervenor subsequently sued the county to put an end to its actions did the matter come before a court at all. *See Defense of Marriage Coalition, et al v. Multnomah County et al*, Multnomah County Circ. Ct. No. 0403-02362 (action for declaratory and injunctive relief filed March 5, 2004); *State ex rel Defense of Marriage Coalition et al v. Diane Linn et al*, Multnomah County Circ. Ct. No. 0403-02538 (Petition for Writ of Mandamus) filed March 9, 2004. Indeed, the County promptly took steps to try to *avoid* judicial review by moving to dismiss both cases.

Indeed, it was not even necessary for the county to act as it did. Any same sex couple denied a license could have filed suit to obtain a declaration that the Constitution requires the state to allow them to marry. The California Supreme Court recently chided San Francisco's mayor for

²⁰ Even as to state administrators, the opportunity for prompt judicial review of an executive's decision that a statewide statute is unconstitutional as a matter of right should be a necessary condition to that official's power to engage in constitutional decision making at all. In *Cooper*, Justice Linde's opinion was carefully tempered by caution that it would be unwise for an agency to declare a statute unconstitutional under circumstances where its decision might not be subject to immediate review by the state courts. 301 Or at 365. More recently, this court has twice emphasized the power must be exercised with caution. *See Outdoor Media Dimensions Inc. v. State of Oregon*, 331 Or 634, 662, 20 P3d 180 (2001); *Nutbrown v. Munn*, 311 Or 328, 346, 811 P2d 131 (1991), *cert denied*, 502 U.S. 130 (1992).

failing to wait for just such an orderly procedure to determine whether that state's ban on same sex marriages is constitutional:

“If the local officials charged with the ministerial duty of issuing marriage licenses and registering marriage certificates believed the state's current marriage statutes are unconstitutional and should be tested in court, they could have denied a same-sex couple's request for a marriage license and advised the couple to challenge the denial in superior court. *That* procedure—a lawsuit brought by a couple who have been denied a license under existing statutes is * * * the procedure apparently utilized in all of the other same-sex marriage cases that have been litigated recently in other states. The city cannot plausibly claim that the desire to obtain a judicial ruling on the constitutional issue justified the wholesale defiance of the applicable statutes that occurred here.”

Lockyer v. City and County of San Francisco, supra, 33 Cal 4th at 1099 (emphasis in original) (citations omitted).

Unlike state agencies, Multnomah County is subject to the jurisdictional limits of Article VI section 10. Moreover, Multnomah County competes with 35 other co-equal and hundreds of local authorities when it interprets statewide statutes it is charged to help administer. As the California Supreme Court recently stated in discussing this problem:

“[T]here are thousands of elected and appointed public officials in California's 58 counties charged with the ministerial duty of enforcing thousands of state statutes. If each official were empowered to decide whether or not to carry out each ministerial act based upon the official's own personal judgment of the constitutionality of an underlying statute, the enforcement of statutes would become haphazard, leading to confusion and chaos and thwarting the uniform statewide treatment that state statutes generally are intended to provide.”

Lockyer v. City and County of San Francisco, 33 Cal 4th at 1108. Constitutional interpretation by a state agency does not lead to inconsistent application of the law throughout the state, whereas inconsistent application of the law is the inevitable result when local officials decide to “invalidate” statewide statutes.

3. THIS COURT DISAPPROVES OF EXTRA-STATUTORY ACTIONS BY LOCAL OFFICIALS.

What Multnomah County did in this instance was similar to the attempt several decades ago by municipal officials to avoid placing an initiative measure on the ballot because they believed the measure to be unconstitutional. In *Johnson v. City of Astoria et al*, 227 Or 585, 363 P2d 571 (1961) this court rejected the local officials’ refusal to fulfill their statutory duties. The court stated,

the presumed or claimed unconstitutionality of an initiative measure does not justify or excuse an officer’s refusal to perform the mandatory duty of placing such a measure on the official ballot if all the preliminary statutory requirements have been complied with.

Id at 591.

In summary, a primary responsibility of a governmental body in upholding the state’s constitution is to respect the limits on its authority thereunder.

A paramount—indeed, an indispensable—ingredient of the concept of powers delegated to coequal branches is that each branch must recognize and respect the limits on its own authority and the boundaries of the authority delegated to the other branches.

US v. Will, 449 U.S. 200, 228 (1980). *See also, State v. Thorp*, 166 Or App 564, 586, 2 P3d 903 (2000) *appeal dismissed* 332 Or 559, 34 P3d 1177 (2001) where one judge on the Court of Appeals aptly wrote:

Although there are constitutional limits to the power of the legislature and the voters to establish minimum sentences for criminal offenses, there are also countervailing constitutional limits on judicial authority to nullify the legislative will. This is a close case, one in which we must tread softly at the margins in order to pay proper respect to the limits of our own authority.

166 Or App at 586 (Brewer, J., concurring). How much more is it true that to “tread softly” is necessary when a subordinate branch of government is tempted to exert its constitutional muscle in

derogation of a statewide statutory scheme? Multnomah County failed miserably in that responsibility by clumsily plowing its way through this fragile constitutional wetland. This Court should declare the County's *ultra vires* marriage licenses void.

4. THE STATE IS ONLY PARTIALLY CORRECT IN ITS DISCUSSION OF THE EFFECT OF THE GRANT OF MANDAMUS.

The State's third point of argument under its assignment of error is that mandamus should not have been used, in that the plaintiffs had alleged adequate remedies at law, and mandamus may not issue "where there is a plain, speedy, and adequate remedy in the ordinary course of the law." *State's Opening Brief* at 31, quoting *State ex rel Anderson v. Miller*, 320 Or 316, 322, 882 P2d 1109 (1994). DOMC Intervenor agree with that analysis. As the State observed, in addition to their mandamus claim, the plaintiffs also asserted claims at law that would have accomplished the same result, *id* at 32-33.

DOMC Intervenor and the State part company, though, when the state says the underlying constitutional issue under Article I, section 20 and the registration issue are not separate issues. *Id*. While it is true that if this court determines the marriage statutes are constitutional it may invalidate the prior same sex marriages for that reason, the opposite is not necessarily correct. For all the reasons DOMC Intervenor have argued in their opening brief and here, the previously-performed marriages should be deemed invalid, even if this court finds Article I, section 20 is violated. The licenses are void *ab initio*.

Moreover, in view of the extraordinary publicity given to the County's actions in March and April of 2004, this Court must make clear its denunciation of the County's unlawful grab of power.

Whether local officials may engage in derogation of their statutory responsibilities is an issue that transcends the marriage statutes, extending to the full range of generally applicable state laws which local governmental units play a part in administering: land use laws, elections laws, gun control laws—the list goes on and on, and brings to mind scenes of chaos as counties around the state buckle to political pressure and take the law into their own hands. Therefore, even apart from questions of the constitutionality of marriage statutes this Court should nevertheless pronounce the licenses to be *ultra vires* .

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VI. CONCLUSION

For the foregoing reasons, BRO Plaintiffs' and Multnomah County's Assignments of Error should fail.

RESPECTFULLY SUBMITTED this 25th day of October, 2004.

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