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

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

Plaintiffs,

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

16 Intervenor-Plaintiffs,

17 v.

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

Defendants,

24 - and -
25

26 DEFENSE OF MARRIAGE COALITION,

Case No. 0403-03057

INTERVENOR-DEFENDANT DEFENSE
OF MARRIAGE COALITION'S
RESPONSE TO PLAINTIFFS' AND
INTERVENOR-PLAINTIFFS'
MOTIONS FOR PARTIAL SUMMARY
JUDGMENT

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

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1 **INTRODUCTION:**

2 **INEVITABILITY, BIGOTRY, AND THE VERSES OF HISTORY**

3 It is critical to a reasoned resolution of this case first and foremost to recognize the way and
4 extent to which plaintiffs have presented their argument—as if same-sex marriage is inevitable, a *fait*
5 *accompli*, just the next obvious rung on the ladder of “progressive thinking,” or to quote them exactly: a
6 “more enlightened notion of equality.” *Plaintiffs’ Memorandum in Support of Plaintiffs’ Motion for*
7 *Partial Summary Judgment* at 35.

8 According to this reasoning, the only thing standing in the way of this Inevitable Evolution of
9 Human Consciousness is bigoted thinking. No matter that this “thinking” is no less than the collective
10 wisdom and tradition of virtually every human society in history, including ours for over three hundred
11 years. No matter that the so-called bigots are the citizens and legislatures of all fifty states—not one of
12 which has enacted same sex marriage through the democratic process. No matter that this “bigoted”
13 thinking is also of the U.S. Congress—which has neither passed a statutory measure approving of same
14 sex marriage under its enforcement powers to the Fourteenth Amendment, nor sent out a proposed
15 constitutional amendment approving same sex marriage. No matter that this group of the
16 “unenlightened” includes the US Supreme Court, which has never held that sexual orientation is a
17 federally protected class, and whose most recent pronouncement on an issue of homosexuality, by its
18 own terms, distinguished the decision from questions of marriage. No matter that those who hold such
19 retarded thinking include the framers of the Oregon Constitution—who by any historical reckoning
20 plainly would have intended traditional marriage to be excepted from any reading of their Equal
21 Privileges and Immunities Clause that disregards the time-honored templates and definitions of
22 marriage.

23 But Plaintiffs’ tactics do not stop with trying to shame this Court into ruling their way. In trying
24 to support their “inevitability” theme, they try to sing this Court into a trance by reciting historical court
25 cases enforcing prohibitions against racial discrimination, gender discrimination, even age
26 discrimination—as if sexual orientation discrimination is simply the next verse of this happy folk song,

1 the next domino of outdated thinking that must fall.

2 But all the time they sing, Plaintiffs must hope and pray that this Court will forget history.
3 Plaintiffs cannot or will not acknowledge in a principled and intellectually honest way that every one of
4 their historical examples was fundamentally different than their proposed massive social experiment. All
5 were court decisions either enforcing express constitutional amendments, enacted by the people after
6 time, events, and a number of thoroughly democratic debates had transpired (race and, to a lesser
7 extent, gender), or were mandated by federal courts under the Supremacy Clause because of
8 Fourteenth Amendment Equal Protection or Due Process caselaw (race, gender, age, disability). In
9 none of these cases did a plaintiff seek a near-instantaneous, radical redefinition of a fundamental social
10 institution without any express constitutional authority, without any direct or even indirect guidance from
11 any representative deliberative body, Legislature or Congress, and without any public debate,
12 deliberation, vote or mandate. Not one of the judicial cases cited by plaintiffs represent such a raw
13 judicial fiat as they seek—a constitutional right manufactured whole cloth by the courts in the absence
14 of even the beginnings of social or political dialogue, let alone the kind of constitutional or political
15 consensus represented in the cited decisions.

16 So it is that, “The Verses of History”, that sweet, silvery and seemingly irresistible tune sung in
17 Plaintiffs’ brief, turns out to be simply a street musician's cheap trick—a favorite melody stolen from a
18 great and noble symphony, but with a revised shrill ending that ignores all sound musical theory and
19 thus, in the clarity of morning, fades with last night's fog.

20 21 **ARGUMENT**

22 **I. NONE OF PLAINTIFFS’ ARGUMENTS SHOW THAT MARRIAGE IS UNCONSTITUTIONAL** 23 **UNDER ARTICLE I, SECTION 20, OR THAT ARTICLE I, SECTION 20 EVEN APPLIES IN THIS** 24 **CASE.**

25 First, Plaintiffs argue that the concept of marriage has “evolved” over time to allow interracial
26 unions, and thus fighting against intra-sexual unions is simply bigotry *redux*. Plaintiffs conveniently
ignore that the Civil War, federal and state constitutional amendments, and a shift in national

1 consciousness were the vehicles by which the change over race occurred—and changes to other
2 limiting aspects of marriage occurred through the democratic process, not the courts. Plaintiffs also
3 conveniently ignore Intervenor-Defendants’ “historical exceptions” argument, a doctrine which, applied
4 to traditional marriage outside of the racial context, would completely preclude Plaintiffs’ claims.¹

5 Second, the ACLU Plaintiffs argue that because procreation is not a **requirement** under the
6 marriage statutes—since the State permits gays and lesbians to raise children—it cannot be a legislative
7 **justification** for limiting marriages to a man/woman relationship. That a legislative goal is not a
8 requirement, or that an ideal does not restrict the means of accomplishing a goal, are not the standards
9 under which any statute is judged. Here and in their opening brief, Intervenor-Defendants amply set out
10 the reasons why it is permissible for a Legislature to make laws with an arguably discriminatory impact,
11 so long as those laws are not facially discriminatory or motivated only by animus to the disfavored class,
12 and contain an important, legitimate legislative rationale.

13 Third, ACLU Plaintiffs further attempt to fit same sex marriage into the Article I, Section 20
14 framework by arguing, again indirectly, that “couples” have unified and enforceable rights, and that the
15 recognition of the Plaintiffs’ emotional ties to one another are the purpose of Oregon’s civil marriage
16 statutes. Regardless of whether Plaintiffs are members of a “true” or even “suspect” class, Plaintiffs’
17 emotions and self-esteem are not sufficient to trigger the protections of Article I, Section 20.

18 Fourth, there is simply no intellectually honest argument to be made that marriage excludes
19 persons based on **their own** gender. Traditional marriage requires both sexes to participate, and is
20 open to all citizens of both sexes. Plaintiffs instead complain about their choice of mate being limited to
21 the opposite sex; but that is not a restriction based upon **their own** gender, but rather that of their
22 would-be spouse. Article I, Section 20 protects only the rights of individuals. Plaintiffs sexuality does
23 not extend a magical bubble by which the constitutional rights of their chosen partners may be asserted.

24 Plaintiffs next inexplicably turn to the question of remedies for the alleged constitutional infirmity

25
26 ¹ Intervenor-Defendants address Plaintiffs’ arguments in the order laid out in Intervenor-
Defendants’ motion for partial summary judgment.

1 of the marriage statutes. Tellingly, Plaintiffs’ remedy does not remove all the impediments marriage
2 places on all true or suspect classes, but only the restrictions on the class to which Plaintiffs self-identify.
3 Not only is Plaintiffs remedy argument misplaced in a partial summary judgment motion, but the
4 declaratory judgment act only allows for the remedy of declaring the statute unconstitutional. If the
5 statute is unconstitutional, it is void, and the Legislature must then re-draft a new marriage statute.
6 Notwithstanding Plaintiffs’ “enlightened” view of a constitutional republic, courts are not legislative
7 bodies and cannot fashion new statutes—Athena-like—fully formed from their brow.

8 Defendant State of Oregon and the individual named State officials (collectively referred to as
9 “the State” or “Defendant”) raised the issue of whether the County has the ability to alter statewide law
10 that is not within the core area of county concern. In this brief, Intervenor-Defendants join in and
11 amplify the State’s critique with an analysis of Article VI, Section 10 regarding the authority in cases
12 involving a state statute of general concern.

13 Finally, Plaintiffs have also raised numerous questions related to Intervenor-Defendants’
14 standing to raise counterclaims. Plaintiffs’ standing questions are not only inappropriate in light of the
15 procedural history of this case, but are also deficient as a matter of law. Plaintiffs have the right and
16 ability to bring their affirmative defenses and counterclaims.

17
18 **A. PLAINTIFFS’ “MARRIAGE EVOLUTION” CLAIM IGNORES THE HISTORICAL AND**
19 **CONSTITUTIONAL REALITY OF THE CHANGES TO MARRIAGE OVER THE YEARS, AND**
COMPLETELY FAILS TO ADDRESS THE “HISTORICAL EXCEPTION” ARGUMENT.

20 Hoping to convince this Court to constitutionally remold the institution of marriage into a radical,
21 new social experiment, Plaintiffs note that “socially and legally, marriage has evolved to redress such
22 exclusions, restrictions, and inequalities” as the former prohibitions (1) barring epileptics from marrying,
23 (2) forbidding interfaith or interracial marriages, and (3) disadvantaging women within the institution of
24 marriage itself. *Plaintiffs’ Memorandum* at 34–35. What Plaintiffs overlook in their thesis, however,
25 is the patent fact that this so-called “evolution” of marriage was not an overnight “revolution”—surely
26 not even Plaintiffs will claim that Multnomah County’s secret and clandestine overnight process was an

1 “evolution”—imposed upon the populace via the means of judicial fiat without support from the popular
2 branches of government. Rather, the “evolution” of marriage—if it can be called that—took place
3 within the bounds of the democratic process, either through amendments to constitutions proposed by
4 Congress and state legislatures and then ratified by the people, or through the legislative enactments of
5 Congress and the state legislatures.²

6 Plaintiffs’ bare attempt at addressing Intervenor-Defendants’ historical exception argument is to
7 note a single passage out of a lone Oregon Court of Appeals judge’s concurrence (not joined by either
8 of his colleagues), issued to “benefit [the public] from a more detailed explanation of the decision,” in a
9 case in which there was no dissent. *See Cox ex rel. Cox v. State*, 191 Or App 1, 5, 7, 80 P.3d 514
10 (2003) (Schuman, J., concurring) (“I *presume* [to state my understanding of Article I, Section 20]”)
11 (emphasis added). With respect, Judge Schuman’s voluntary exposition on his thoughts about Article I,
12 Section 20 is interesting, and instructive to an extent in knowing what Judge Schuman thinks. But Judge
13 Schuman’s thoughts are not the law, and not even persuasive authority; the *Cox* concurrence is
14 ultimately only the opinion of one judge on the Oregon Court of Appeals.

15 Plaintiffs have offered no substantive argument relating to Intervenor-Defendants “historical
16 exception” affirmative defense, even though they were well-aware from the pleadings of what the
17 argument was to be. Marriage is a clear and well-recognized historical exception to any absolutist
18 reading of Article I, Section 20 that would require same-sex marriages. *See generally State*
19 *v. Robertson*, 293 Or 402, 649 P2d 569 (1982) (historic exception to Article I, Section 8); *State v.*

21 ² Furthermore, Plaintiffs cite to pleadings to establish facts concerning this “evolution.”
22 Plaintiffs apparently cite to Intervenor-Defendants Answer in Intervention and Defendant State’s
23 Answer for the evolutionary steps marriage has taken over the years. This is of course a typographical
24 error, and Plaintiffs are assumed to be citing to their own amended complaint. However, the underlying
25 error is more fundamental. A motion for summary judgment ordinarily relies on evidence beyond the
26 pleadings. *See* ORCP 21 B; ORCP 47D; *Humphrey v. Coleman*, 86 Or App 511, 514–15, 739 P2d
1081 (1987). In summary judgment, a party cannot rely only on the facts pleaded in their complaint,
but must prove them by citation to authority or the presentation of evidence. Because Plaintiffs have
done neither in this case, their “evolutionary” argument has not been grounded in fact or law.

1 Henry, 302 Or 510, 732 P2d 9 (1987) (same); State v. Ciancanelli, 181 Or App 1, 45 P3d 451
2 (2002) (same); Dwyer v Dwyer, 299 Or 108, 698 P2d 957 (1985); State ex rel Hathaway v. Hart,
3 300 Or 231, 708 P2d 1137 (1985) (historic exception to Article I, Section 11) ; Delgado v. Souders,
4 334 Or 122, 46 P3d 729 (2002) (same); Molodyh v. Truck Insurance Exchange, 304 Or 290, 744
5 P2d 992 (1987) (historic exception to Article I, Section 17). Plaintiffs’ motion for summary judgment
6 should fail. Read with a clear eye, it is based merely on their unsubstantiated belief that marriage has
7 “evolved” to include gay marriage, bolstered only by Judge Schuman’s non-binding thoughts on Article
8 I, Section 20.

9 Furthermore, contrary to Plaintiffs’ entreaty for judicial activism, the changes made to the legal
10 status of a wife under ORS 108.010 is a reflection of how the legislative process appropriately,
11 effectively, and exclusively shines modern enlightenment upon whatever archaic prejudices which might
12 be found lurking in Oregon law. Quite simply, the limitations upon marriage in Oregon have eased in
13 some areas over time, not as a result of an Oregon court taking Article I, Section 20 into its hands and
14 refashioning the meaning of marriage according to the latest political fad into something that would have
15 been unrecognizable in 1857, but instead because the United States Congress, the Oregon Legislature,
16 and the people (both of the Nation as a whole and the State of Oregon in particular) have
17 democratically and constitutionally taken action to correct past wrongs.

18
19 **B. PLAINTIFFS CONFUSE WHAT IS ACCEPTED ON A PRACTICAL LEVEL AND WHAT IS**
20 **PERMISSIBLE AS A LEGISLATIVE GOAL. PROCREATION AND CHILD REARING ARE**
LEGITIMATE, NON-DISCRIMINATORY JUSTIFICATIONS FOR TRADITIONAL MARRIAGE.

21 In an attempt to show that there are no differences between homosexual couples and
22 heterosexual couples, Plaintiffs try to make much of the unremarkable fact that procreation and child
23 rearing can occur outside of traditional marriages. But a distinction made by statute, even one involving
24 a “suspect class,” may be justified by specific biological differences between the distinguished classes.
25 See Hewitt v. SAI, 294 Or 33, 49, 653 P2d 970 (1982) (class distinctions legitimate if “based on
26 intrinsic [biological] differences between the sexes”). Plaintiffs here throw common sense to the wind

1 and argue that there is no biological difference between same-sex couples and opposite sex couples
2 that justifies different treatment of the couples *qua* couples. Assuming for the sake of this argument that
3 couples are capable of asserting individual rights arguments (*see* Section I.D, *infra*), Plaintiffs in this
4 argument mistake the exception for the rule, and ignore the prerogative of a rational, unbiased
5 Legislature.³

6 The Hewitt test for justifying a law based on “biological differences”⁴ is whether the Legislature
7 could have had any valid, non-prejudicial reason for enacting the law. Hewitt v. SAIF, 294 Or 47 (“a
8 statutory classification relying on gender as legislative shorthand for dependency is the kind of
9 stereotype that cannot withstand an article I, section 20 challenge”). Finding none, the court in Hewitt
10 struck down the worker’s compensation law at issue there. Here, whether Plaintiffs agree with or
11 disagree with the legislative policy choice that heterosexual couples are the best means to ensure that
12 “the [human] race may be perpetuated in an orderly manner, and children raised in such surroundings as
13 to make them desirable future citizens, and that such children shall not become a burden or a charge on
14 the community,” *see* Heisler v. Heisler, 152 Or 691, 694, 55 P2d 727 (1936), these are all choices
15 properly left to the Legislature, rationally based on specific biological differences between same-sex
16 and opposite sex couples.

17 “Orderly” perpetuation of the human species and rearing of healthy children are in fact the
18 recognized goals of the *marriage statutes*—as opposed to the isolated policies of some state
19 agencies—in countenancing the institution of marriage. Heisler, 152 Or at 694 (“*The interest of the*
20 *state* in the [marriage] contract is that the [human] race may be perpetuated . . .”) (emphasis added).

21 ³ Ruling the school funding statutes constitutional, the Oregon Court of Appeals noted that it
22 “should not be interpreted to mean that we are of the opinion that the Oregon system of school
23 financing is politically or educationally desirable. Our only role is to pass upon its constitutionality.”
24 Withers v. State, 163 Or App 298, 310, 987 P.2d 1247 (1999).

25 ⁴ “[W]hen classifications are made on the basis of gender, they are, like racial, alienage and
26 nationality classifications, inherently suspect. *The suspicion may be overcome if the reason for the*
classification reflects specific biological differences between men and women.” Hewitt v. SAIF,
294 Or at 45 (emphasis added).

1 See, e.g., ORS 106.081 (fetal alcohol syndrome pamphlet distributed to marriage license applicants).
2 Ignoring this binding precedential authority and frank recognition of why the State cares about marriage
3 in the first instance is extraordinarily disingenuous.

4 Indeed, Plaintiffs fail to produce any authority suggesting that the State has *no* interest in
5 procreation and child rearing, but instead focuses on how gays and lesbians “bring children into their
6 *families*.” Plaintiffs conveniently ignore the biological fact that 100% of gay and lesbian couples are
7 sterile *as couples*. Bringing children into families is not bringing children into the world, and an
8 adoption worker’s recognition that children need loving adults in their lives—all kinds of loving
9 adults—is not the same as the legislative goal of fostering families with two blood parents of opposite
10 sex in the first place. Assisted reproductive technologies—while no doubt a benefit to society—are a
11 far cry from the “orderly” regeneration of the species. Furthermore, the fact that the State treats
12 homosexuals equally with heterosexuals in adoption and custody proceedings—where the best interests
13 of a single child are preeminent—has nothing to do with whether the Legislature can legitimately think it
14 best to codify heterosexual unions as the optimal child rearing environment in the first instance.⁵

15 To assert that there are “no *legitimate* biological differences” between same-sex couples and
16 opposite sex couples is to ignore nature. While individual gays and lesbians may—and no doubt
17 do—make fine parents, the Legislature is within its power to restrict marriage to those whom it
18 believes, in general, afford the best opportunity for procreation and child rearing.⁶ These are why the
19 State cares about marriage in the first place. See Heisler, 152 Or at 694.

20
21 **C. PLAINTIFFS CANNOT ARTICULATE ANY TANGIBLE PRIVILEGE OR IMMUNITY GRANTED WITHIN**

22
23 ⁵ See Section II.B.2 of Intervenor-Defendants’ Memorandum in Support of Summary
24 Judgment at 24.

25 ⁶ As a further factual grounding as to why an unbiased Legislature would limit marriage to
26 opposite sex couples, and to address other Article I, Section 20 analytical issues Intervenor-
Defendants submit a second affidavit from Dr. Satinover. See *Satinover Affidavit in Support of
Summary Judgment Response*, attached.

1 **THE CONFINES OR SPECIFIC TERMS OF ORS CHAPTER 106, AND THEREFORE CANNOT SHOW**
2 **THAT MARRIAGE IS ITSELF SUBJECT TO ARTICLE I, SECTION 20.**

3 The State—through marriage—is not interested in creating “dignity.” Indeed, the only reason
4 the State licenses *private* intimate relationships has to do with the perpetuation of the human species
5 and the rearing of well-adjusted children. Heisler, 152 Or at 694. The statutes which establish
6 marriage do not grant or restrict any privileges or immunities themselves; all of the benefits sought by
7 Plaintiffs—including the supposed “dignity” Plaintiffs attach to a marriage license—are found outside of
8 ORS Chapter 106.

9 Plaintiffs cite to a *law review article* as authority for the definition of privileges and immunities
10 under Article I, Section 20. *See Plaintiffs’ Memorandum* at 20. A law review article defines nothing.
11 Nothing Plaintiffs can point to would bring the benefits and responsibilities tied to marriage into the
12 challenged statutory scheme itself. In this sense, Plaintiffs are challenging the wrong statutes. The
13 statutory benefits, privileges and rights tied to marriage but existing outside of ORS Chapter 106 are
14 obviously not a part of ORS Chapter 106—the sole statutory provision challenged by Plaintiffs.
15 Plaintiffs themselves call these “rights and benefits *based on* the Oregon statutory code.” *Plaintiffs*
16 *Memorandum* at 3 (emphasis added). But in all cases invoking Article I, Section 20 the privilege or
17 immunity sought after was found *in the statute challenged*. *See, e.g., Jensen v. Whitlow*, 334 Or
18 412 (immunity from suit in tort); Hewitt, 294 Or 33 (survivorship benefits); Huckaba v. Johnson, 281
19 Or 23, 573 P2d 305 (1978) (tax benefit); Anderson v. Gladden, 234 Or 614, 383 P2d 986 (1963)
20 (right to jury of one’s own race); Mendiola v. Graham, 139 Or 592, 10 P2d 911 (1932) (grazing
21 rights); In re Oregon Tunnel Dist. No. 1, 120 Or 594, 253 P. 1 (1927) (right to vote); Tanner, 157 Or
22 App 502 (health benefits); Northwest Advancement, Inc. v. State, Bureau of Labor, Wage and Hour
23 Div., 96 Or App 133, 772 P2d 934 (1989) (exemption from government regulation); Hoffman v.
24 Highway Division of Dept. of Transp., 23 Or App 497, 543 P2d 50 (1975) (compensation for removal
25 of roadside signs). Employer-granted benefits are not within the reach of Article I, Section 20 under
26 this analysis for the same reason—ch106 does not grant benefits from private employers.

1 As an aside, Article I, Section 20 analysis diverges significantly from federal due process
2 analysis that Plaintiffs attempt to invoke obliquely. *See Plaintiffs' Memorandum* at 28 n6. Plaintiffs
3 wrongly suggest that "privileges and immunities" are Article I, Section 20 scrutiny is not heightened to a
4 strict level based on the burden to a "fundamental right." *See State v. Day*, 84 Or App 291, 294, 733
5 P2d 937, 939 (1987) ("This federal 'fundamental rights' analysis does not apply to privileges and
6 immunities challenges under the Oregon Constitution.") *citing Olsen v. State*, 276 Or. 9, 554 P2d 139
7 (1976). Plaintiffs' invocation of protection based on marriage's "fundamental" status is inapposite.

8 Marriage is a "civil contract" under the statute. ORS 106.010. Plaintiffs are limited in their
9 right to this contract to the same extent as all other Oregonians. But the right to this contract is the only
10 "privilege and immunity" at issue here. If the Plaintiffs wish to challenge the spousal immunity
11 evidentiary privilege, for example, or intestate succession, they should, like the Plaintiffs in *Tanner*, bring
12 an action challenging that particular statute, or a single action challenging the "500 rights, responsibilities,
13 benefits, and obligations that are *predicated on* marriage." Amended Complaint at ¶ 5 (emphasis
14 added). Plaintiffs are not entitled to be lazy about asking for what they really want.

15 Plaintiffs further attempt lackadaisically to use "marriage" to mean exactly what they want it to
16 mean—social acceptance, self-esteem, community recognition—and not what marriage means within
17 the universe of the statute. Plaintiffs cannot legislate social acceptance. They have not and cannot
18 prove that radically redefining marriage to accommodate gays and lesbians will increase the general
19 acceptance of homosexuals in society. But like government benefits "predicated on" marriage, neither
20 social acceptance nor employer-provided benefits are within the ambit of ORS Chapter 106.

21 In all, the benefits Plaintiffs seek are not to be found in the marriage statutes. Plaintiffs simply
22 have not proven that marriage itself is an independent privilege or immunity subject to the protections of
23 Article I, Section 20.

24
25 **D. MARRIAGE IS THE EPITOME OF GENDER EQUALITY, BECAUSE EACH GENDER IS NECESSARY**
26 **FOR A MARRIAGE. ALSO, HOMOSEXUALS ARE NOT EXCLUDED FROM MARRIAGE *PER SE*.**
"COUPLES" HAVE NO RIGHTS UNDER ARTICLE I, SECTION 20.

1 Plaintiffs make the curious argument that the marriage statutes discriminate based on *gender*.
2 However, there is no constitution—of the United States or any State—that grants a “right” to marry a
3 *specific individual* no matter what. Indeed, to whatever degree marriage can be said to
4 “discriminate,” it does not discriminate on gender of individual, but on the gender of the *potential*
5 *partner*. No individual discrimination can be cited by Plaintiff except to the extent they want to marry a
6 specific person of the same sex. But that is not discrimination against an individual Plaintiff on the basis
7 of her gender, it is a distinction based on who she *wants* to marry—at worst this is “discrimination”
8 affecting couples as couples. But Article I, Section 20 does not protect the rights of “couples” or
9 “preferences,” but only the privileges and immunities of individuals. Additionally, marriage does not
10 prohibit homosexuals from marrying; it only prevents them from marrying their preferred choice of
11 partner. This is no different from the statutory restrictions prohibiting them from marrying 1) someone
12 under 17; 2) close kin; 3) someone already married; and 4) someone who cannot legally
13 consent—even if one of those potential partners is someone who a would-be plaintiff would *really*
14 *want* to marry! Quite simply, lesbians and gays as individuals already have the right to enter marriage
15 “on the same terms” as all other Oregonians.

16 In their gender discrimination argument, the Plaintiffs read Hewitt v. SAIF completely wrong.
17 Plaintiffs present Hewitt as holding that “it was enough that the [unconstitutional] law was defined in
18 reference to gender.” *See Plaintiffs Memorandum* at 26. The Plaintiffs argue that in Hewitt, the
19 Oregon Supreme Court found a gender-based classification in the statutory worker’s compensation
20 scheme which triggered strict scrutiny under Article I, Section 20 despite the fact that there was a
21 disadvantage to both men and women—*i.e.* gender “neutrality” in the statutory scheme. Amazingly,
22 and totally contrary to what Hewitt *actually* says, Plaintiffs claim that Hewitt stands for the proposition
23 that strict scrutiny is applied to a gender neutral statutory scheme simply because the statutory scheme
24 has some “reference” to gender. *See Plaintiffs Memorandum* at 26. Plaintiffs’ argument is an
25 unmitigated fabrication of the law.
26

1 Plaintiffs argument distorts the holding of Hewitt beyond recognition. It is true that the Court in
2 Hewitt looked at the discrimination in the statutory scheme from “both sides” of the equation, namely
3 from both the survivor’s perspective and the decedent’s perspective. Based upon this thorough
4 analysis, the Court concluded that the law was subject to strict scrutiny because it created a disparity
5 **based on gender**. Hewitt in no way held that this statute was “gender neutral” just because one sex
6 was benefitted on one situation and the other sex was benefitted in the **opposite** situation. The Plaintiffs
7 here have engaged in a nonsensical contrast of “apples to oranges,” or to borrow Justice Gillette’s
8 words from State v. Bonenbrake, 303 Or 361, 366, 736 P2d 1020 (1987), a contrast of people who
9 are “not similarly situated.”⁷

10 The law in Hewitt cannot be seen as providing a gender neutral scheme unless comparing
11 dissimilarly situated individuals. The law in Hewitt discriminated against **surviving unmarried men** as
12 compared to **surviving unmarried women**. Hewitt’s gender discrimination scheme was
13 impermissible because it treated similarly situated people—whether survivors **or** decedents—
14 differently based on prejudicial assumptions of gender. Hewitt, 294 Or at 46–47 (the statute assumed
15 “women . . . to be dependent on men more often than the reverse . . . [and] [t]he assumption of female
16 dependency is an archaic and overbroad generalization”) (citation and internal quotation marks
17 omitted).

18 Plaintiffs’ argument makes no more sense than would a claim that voting age limitations trigger a
19

20 ⁷ Quoting State v. Freeland, 295 Or 367, 372, 667 P2d 509 (1983). In Bonebrake, the
21 Supreme Court rejected “the claim that criminal defendants are entitled to the discovery standards of
22 the rules of civil procedure” because “[c]ivil litigants and criminal defendants are not similarly situated.”
23 After detailing the differences between criminal and civil proceedings, Justice Gillette summarized the
Court’s conclusion as follows:

24 Given the different purposes of civil litigation and criminal prosecution and the different
25 obligations the state has toward the parties in each, defendant cannot successfully compare
criminal defendants to civil litigants.

26 303 Or at 367, 736 P2d at 1023.

1 “gender based” Article I, Section 20 strict scrutiny, because men over 18 can vote while women under
2 18 cannot vote. The proper “gender” comparison in such a case for Article I, Section 20 purposes
3 would be as between those similarly situated people over 18 (where both men and women can vote)
4 and those *similarly situated* people under 18 (where neither men nor women can vote), just as in
5 Hewitt the proper comparison was as between those similarly situated decedents and similarly situated
6 survivors. 294 Or at 42-43.

7 The Plaintiffs make the same error in analyzing Frontiero as a “gender-neutral” law. *See*
8 Frontiero v. Richardson, 411 US 677 (1973). In Frontiero, whether one looked at the situation from
9 the perspective of the military member or from the perspective of the non-military spouse there was
10 gender disparity. The serviceman was granted housing, medical, dental etc. allowances and benefits
11 for his non-dependent wife but the servicewoman was not granted housing, medical, dental etc.
12 allowances and benefits for her non-dependent husband. *Id.* at 678-79. On the flip side of the
13 equation, the gender disparity existed as well because the non-dependent *wife* of a serviceman
14 received the allowances and benefits but the non-dependent *husband* of a servicewoman did not. *Id.*

15 The laws at issue in both Hewitt and Frontiero excluded benefits to individuals *as individuals*
16 *themselves* based on gender. The statutes at issue in Hewitt and Frontiero specifically excluded
17 certain parties as individuals from the operation of the law on the basis of gender, and thus were not in
18 any respect “gender-neutral” in the ultimate analysis.

19 In this case, the marriage laws do not forbid any individual from entering the institution of
20 marriage based upon that individual’s gender. Thus, ORS Chapter 106 does not facially “disparately
21 treat” any true class based upon “gender.” The only individuals *disparately treated* by the marriage
22 laws across the board are children under the age of 17—where the “suspect classification” is “age”—or
23 people already married—where the “suspect classification” is “marital status.” Plaintiffs’ rejoinder to
24 this argument is that they “do not *seek to* enter into marriages with persons of a different sex.”
25 *Plaintiffs’ Memorandum* at 21 n3 (emphasis added). Tellingly, here Plaintiff’s implicitly admit that
26 they are not excluded from marriage based on their own *gender*, but instead on their *preference*. But

1 the marriage statutes repeatedly restrict choices and preferences, all for legitimate and non-prejudicial
2 reasons. Plaintiffs are, and remain, free to marry irrespective of *their own* gender.

3 So too, Plaintiffs are free to marry irrespective of their sexual orientation. Homosexuals are not
4 individually, categorically excluded from marrying. Neither Roemer v. Evans, 517 US 620, 634-35
5 (1996), nor Lawrence v. Texas, 123 S Ct 2472, 2484 (2003), lend support to the Plaintiffs' claims in
6 this case. First, in Roemer the Court struck down Colorado Amendment 2— an initiative amendment
7 that forbade any government body from protecting the “status” of homosexuality—because it was “at
8 once too narrow and too broad.” 517 US at 633. It was too narrow because it characterized a class
9 of people by a single trait. Id. It was too broad because, on the basis of that single trait, it “then
10 denie[d] them protection across the board” in all areas of the law. Id. Based upon this combination of
11 specific targeting of a group plus potentially limitless breadth, the Court found that Amendment 2 was
12 “inexplicable by anything but animus toward the class that it affects.” Id. at 632. Like the laws struck
13 down in Loving and Hewitt, Colorado Amendment 2 was not logically defensible apart from pure bias.

14 Oregon's historical marriage definition is easily explained without any resorting to prejudice.
15 See Section I.D., *supra*; Section II.B.2 of *Intervenor-Defendants' Memorandum in Support of*
16 *Summary Judgment* at 24. ORS Chapter 106 bears no similarity to Colorado Amendment 2.
17 Marriage in Oregon is neither too narrow—it is open to all unmarried people who are of the age of
18 majority and have capacity to consent regardless of any other personal trait or characteristic which they
19 might have—nor is it too broad—it only covers the closed universe of marriage. In Roemer, Colorado
20 Amendment 2 was struck down (under a rational basis, not strict scrutiny, analysis) because it
21 “purposefully oppressed a specific group of people.” 517 US at 632. Only a fool would assert that
22 marriage was designed solely to oppress homosexuals.

23 In Lawrence, the Court struck down as unconstitutional (also under a rational basis analysis) a
24 Texas statute outlawing homosexual sex acts as between consenting adults in the privacy of their home.
25 123 S Ct at 2475-76, 2484. “The present case,” the Court pointed out, “does not involve whether the
26 government must give formal recognition to any relationship that homosexual persons seek to enter.”

1 Id. at 2484. Nothing in Lawrence applies to the Plaintiffs' claims for marriage. Id. at 2487–2488
2 (“Texas cannot assert any legitimate state interest here, such as national security *or preserving the*
3 *traditional institution of marriage.*”) (O’Connor, J., concurring). Moreover, unlike Lawrence, the
4 Plaintiffs in this case do not ask for “privacy” regarding their intimate relationships within their own
5 homes, but instead they ask for the exact opposite of what was at stake in Lawrence—they seek here
6 public recognition, public status, and public benefits for such relationships. Lawrence simply speaks in
7 no way to the present case.

8 There is absolutely no evidence that the marriage laws have a disparate impact upon either
9 women or men as individuals, and no evidence that marriage laws were *intended* to discriminate on the
10 basis of gender or homosexuality. Any unmarried man or woman in Oregon who is at least 17 years
11 old and capable of consent may marry. ORS 106.150. Indeed, marriage is the epitome of *gender*
12 *equality* because a marriage does not exist unless both a man and a woman are included in the
13 equation. Moreover, marriage does not discriminate against homosexual individuals, because it does
14 not exclude them as individuals from the institution.

15
16 **II. THE STATE’S MOTIONS FOR SUMMARY JUDGMENT SHOULD BE GRANTED FOR A MORE**
17 **FUNDAMENTAL REASON — MULTNOMAH COUNTY VIOLATED ARTICLE VI, SECTION 10 BY**
ISSUING MARRIAGE LICENSES TO SAME SEX COUPLES.

18 Intervenor-Defendants support the State Defendants motion for summary judgment “order[ing]
19 intervenor Multnomah County to comply with current Oregon statutes governing the licensing of civil
20 marriages pending final resolution of this case” as well as “affirm[ing] defendants’ actions taken in
21 compliance with current statutory requirements pending a final resolution of this case. . . .” State
22 Defendants’ Motions for Summary Judgment at 2. The latter motion refers to the state’s refusal to
23 register the certificates of marriage of same sex couples. Intervenor-Defendants (DOMC) agree
24 Multnomah County should be ordered to comply with Oregon’s marriage statutes pending the final
25 outcome of this case, and that the state’s refusal to register the Multnomah County same-sex marriages
26 must be upheld by this Court. In addition to the grounds advanced by the State, there are even more

1 compelling constitutional reasons why the state's motion is correct.

2
3 **A. THE COUNTY'S AUTHORITY TO AFFECT STATE LAW.**

4 Multnomah County is powerless under the Oregon Constitution to declare a statewide statute
5 of general applicability to be unconstitutional. Or. Const. Art. VI, § 10. By continuing to issue marriage
6 licenses at this time, Multnomah County presumes to tell the State of Oregon what marriages to
7 recognize, contrary to the Legislature's intent as embodied in the clear terms of Oregon's marriage
8 statutes. Yet, it is established beyond argument that local officials cannot direct coequal or higher
9 bodies of government how to administer the higher body's law, and the State's refusal to be directed
10 by Multnomah County in that regard is well taken. *See Kiernan v. Portland*, 57 Or 454, 463, 111 P
11 379 (1910) (provision of Portland City Charter amendment directing City of Portland to cede
12 ownership of the new Broadway Bridge to Multnomah County, without the county's consent, is void);
13 *State v. Lagsdon*, 165 Or App 28, *rev denied* 330 Or 362 (2000) (Josephine County charter
14 provision purporting to govern conduct of state and federal officials in conducting searches in that
15 county is void). Nonetheless, Multnomah County continues to issue marriage licenses to same-sex
16 couples, forwarding certificates of marriage for registration by unwilling state officials, all without a
17 statewide judicial interpretation of the statutes it only belatedly now challenges.

18 Confusion in the law is palpable when a county is allowed to continue acting as its own
19 autonomous arbiter of the meaning of statewide law. If Oregon's 36 counties are to be allowed to
20 dictate the meaning of a state law based on only the opinions of their respective county attorneys, it is
21 reasonable to expect as many as three dozen different opinions to result.⁸ Such anarchy exemplifies the
22 infirmity of Multnomah County's methodology for constitutional interpretation. The Oregon
23 Constitution does not permit such rogue decision making, and, contrary to Ms. Sowles' opinion,

24
25 ⁸ Witness that Benton County currently refuses to issue marriage licenses to *any* couples.
26 Thus far, only Lane County has published an opinion of its counsel about the marriage statutes and has
subsequently decided to follow state law until all the issues are resolved by the state's courts.

Oregon Supreme Court decisions do not require it.

B. COUNTIES CANNOT DECLARE STATEWIDE STATUTES TO BE UNCONSTITUTIONAL.

Home rule counties derive their authority from Article VI, section 10 of the Oregon Constitution, which states, in relevant part: “A county charter may provide for the exercise by the county of authority over *matters of county concern*.” Or Const Art. VI, §10 (emphasis added). That provision grants home rule counties plenary authority over matters pertaining to their form of local government, and it allows them coextensive jurisdiction with the State to act with respect to all other matters of county (as opposed to statewide) concern. But this provision also acts as a strict limitation—it deprives home rule counties of any power to act contrary to the terms of state statutes of general applicability, especially where the state has preempted the field. *See State v. Lagsdon*, 165 Or App 28; *Buchanan v. Wood*, 79 Or App 722, *rev den* 302 Or 158 (1986).

Before 1958, all county powers were statutory, and all counties were strictly limited to powers granted them directly by statute. Counties without home rule charters were statutorily impeded in the same manner until 1973. *GTE Northwest v. Oregon Public Utility Commission*, 179 Or App 46, 50 (2002) (“Under then-existing law, a county was presumed to be unable to take any given action unless it could find a specific, enumerated power somewhere in the statutory framework that bestowed the specific power. Otherwise, counties were limited to the exercise of specifically delineated powers that the legislature conferred by statute.”). In 1958, Article VI, section 10 was added to the Constitution, allowing counties to enact home rule charters and act pursuant to them, as to matters “of county concern.” *See* Or Const Art. VI, §10

Multnomah County enacted its charter—the source of the county commissioners’ authority—under Article VI, section 10. The Multnomah County Home Rule Charter (MCHRC) Section 2.10 parallels Article VI, section 10, stating:

Except as this charter provides to the contrary, *the county shall have authority over matters of county concern* to the fullest extent granted or allowed by the constitutions and laws of the United States and the State of Oregon, as fully as though each

1 particular power comprised in that general authority were specifically listed in the
2 charter.

3 MCHRC § 2.10 (emphasis added). Thus, under the Constitution and under its charter, Multnomah
4 County has authority only over matters of county concern. Multnomah County has no power—and in
5 fact has never had any power—to act in any matter of statewide concern.

6 The Oregon Constitution provides that the charter may prescribe the organization of county
7 government and provide for powers and duties of county officers as the county deems necessary.
8 “Such officers shall among them exercise all the powers and perform all the duties, as distributed by the
9 county charter . . . by the Constitution or laws of this state, granted to or imposed upon any county
10 officer.” Or Const Art. VI, § 10. Nowhere does the constitution give any county officer any powers
11 that are not in furtherance of “matters of county concern.”

12 Since counties cannot act on matters of statewide concern, the Constitution does not give
13 county officials authority to declare statewide statutes unconstitutional, nor to take action based on that
14 opinion without authorization by a state judicial officer with power to make such a decision. Numerous
15 decisions of Oregon’s appellate courts confirm this contention. For example, in State v. Lagsdon, 165
16 Or App 28, the Court of Appeals summarized the principles governing the division of state and local
17 authority under Article VI, section 10. The court explained that the home rule amendment provides
18 counties (and cities) with ultimate authority to determine the organization of local government, and that
19 there are areas “of county concern” that are also matters of state concern, so that both levels of
20 government may act on them. 165 Or App at 31–32. The use of charter powers to act in areas of
21 overlapping jurisdiction is a separate question from whether the matter is one of statewide concern so
22 that “the local government’s authority affirmatively has been preempted by a conflicting state
23 enactment.” 165 Or App at 32.

24 In Lagsdon, Josephine County had enacted a charter amendment providing greater protection
25 from police searches in private residences than is contained in corresponding federal and state
26 provisions. The amendment purported to be binding not just on local law enforcement officials, but on

1 state and federal officials as well. The Oregon Court of Appeals said:

2 Although the perimeters of city and county home rule authority may defy easy
3 delineation, certain qualifications of that authority may be stated with some confidence.
4 In particular, it is well established that, whatever else local government authority may
5 entail, ***it does not include governing the conduct of state and federal officials.***
6 *See, e.g., Multnomah County v. \$5,650 in U.S. Currency*, 309 Or 285, 289, 786 P2d
7 729 (1990) (“The fact that a county acts under a home rule charter does not mean that
8 it can call upon the state courts to enforce ordinances or otherwise to exercise their
9 jurisdiction in any case that the county wishes.”)

10 In this case, section 29.4 of the Josephine County Charter, by its terms, purports to
11 govern the conduct of any “public official,” whether elected or appointed, and “any
12 agent of the government.” Indeed, it declares that no one—no ‘individual, group, or
13 federal, state or local governmental body or agency’—may enforce any law that is
14 contrary to section 29.4. No county has the authority to do that. Section 29.4 goes
15 well beyond any matter that legitimately may be regarded as a ‘county concern.’ It
16 follows that section 29.4 is invalid . . .

17 165 Or App at 32-33 (emphasis added) (some citations omitted). Thus, local action in areas
18 preempted by state law are “invalid.” Like Josephine County in Lagsdon, Multnomah County’s actions
19 purport to decide for state officials (the Governor, Attorney General, and the State Registrar of Vital
20 Statistics, among others) what constitutes a legal marriage in Oregon. That it cannot do. *See also N.*
21 *W. Bell v. Multnomah Co.*, 68 Or App 375, 378, 681 P2d 797 (1984) (“Legislative enactments,
22 however, remain preeminent in substantive matters of statewide concern”).

23 Likewise, in Buchanan v. Wood, 79 Or App 722 (1986), the Court of Appeals held that the
24 Legislature’s 1985 reorganization of the Circuit and District Courts to make them exclusively state
25 functions included the establishment of the State office of District Court Clerk. Creation of the state
26 court clerk job preempted the county office of district court clerk created just the preceding year by
27 county charter, so the job was eliminated by the reorganization. *Id.* at 728. The court declared, “[t]he
28 effect of the Act on county governments is a result of the state’s implementation of its substantive
29 policy. In such a case, the state statute ‘prevails over contrary policies preferred by some local
30 governments if it is clearly intended to do so, unless the law is shown to be irreconcilable with the local
31 community’s freedom to choose its own political form.” *Id.* (quoting LaGrande/Astoria v. PERB, 281
32 Or 137, 156, *aff on reh’g* 284 Or 173 (1978)).

1 Also, in Fischer v. Miller, 228 Or. 54 (1961), the sheriff of Linn County was sued to enjoin
2 enforcement of a county ordinance purporting to regulate the hunting of migratory waterfowl. The
3 Supreme Court determined that the state’s comprehensive regulation of hunting and fishing “preempted
4 the field” and prevented the county from exercising any jurisdiction in the matter whatsoever. 228 Or at
5 57-58.

6 Presumably it is not necessary to convince the court that Oregon’s marriage statutes are
7 comprehensive, statewide in application, and are not matters “of county concern”—the State’s
8 comprehensive enactments preempt the field in this area. The marriage statutes create a uniform
9 system of regulation of marriage throughout the state. They establish statewide limitations on age, ORS
10 106.010, and degrees of consanguinity, ORS 106.020. They determine what marriages are voidable.
11 ORS 106.030. They contain detailed regulation concerning what is required to be included in the
12 marriage license and application form. ORS 106.041. The statutes determine exactly who is
13 authorized to solemnize marriages. ORS 106.120. The Director of the Department of Human Services
14 is empowered to enact uniform regulations for the form of marriage certificates. ORS 106.165.
15 Statewide criminal penalties attach for certain violations of the marriage statutes, such as against a
16 county clerk who issues licenses in violation of the requirements of statute and against persons who
17 unlawfully officiate at marriage ceremonies. ORS 106.990.⁹ Further, the state has a strong interest in
18 the uniform regulation of marriage in Oregon because marriages solemnized here are, with certain
19 exceptions, entitled to full faith and credit throughout the country under the US Constitution.

21 **III. STANDING**

22 At the most basic level, Intervenor-Defendants have legal interests sufficient to support standing
23

24
25 ⁹ The parties have established through their prior pleadings the existence of comprehensive
26 regulation of marriage in Oregon historically, first by the territorial government, followed by the state
government. The importance of marriage as a matter of historic statewide regulation should not be in
dispute.

1 to participate in this lawsuit. Plaintiffs and Intervenor-Plaintiff Multnomah County assert in their motions
2 for summary judgment that Intervenor-Defendants lack standing seemingly even to participate in the
3 instant litigation.¹⁰ *Plaintiffs' Memorandum* at 45-49; *Multnomah County Motion* at 7-14. Their
4 arguments fail because: (1) each had previously acknowledged that DOMC, the Thomases, Dan Mates
5 and Dick Osborne have an interest in the litigation as part of a negotiated agreement among the parties;
6 (2) the individual Intervenor-Defendants have demonstrated standing as taxpayers for Multnomah
7 County and Oregon under Oregon's Uniform Declaratory Judgment Act (UDJA); (3) the individual
8 Intervenor-Defendants have established a legally sufficient interest in a justiciable controversy and
9 standing under the Public Meeting Law; and (4), DOMC has established legally sufficient interest in a
10 justiciable controversy to have representational standing under Rendler v. Lincoln County, 302 Or 177
11 (1986) and other authorities.

12
13 **A. PLAINTIFFS AND MULTNOMAH COUNTY HAVE PREVIOUSLY ACKNOWLEDGED THAT DOMC,**
14 **THE THOMASES, DAN MATES AND DICK OSBORNE HAVE AN INTEREST IN THE LITIGATION AS**
PART OF A NEGOTIATED AGREEMENT AMONG THE PARTIES.

15 As the court is aware, most of the parties to this proceeding were parties in predecessor
16 lawsuits arising out of the same subject matter of marriage, and all engaged in a case management
17 conference on March 18, 2004 with Judge Henry Kantor. At that time, counsel for each of the parties
18 and the court engaged in the following colloquy:

19 THE COURT: I gather, nobody here, none of the parties here, are going to oppose any
20 party's request to intervene in any of these—in either the new case here or in the Benton
21 County case or anything else.

22 MS. SOWLE: Any of these parties?

23
24 ¹⁰ The standing arguments advanced by Plaintiffs and Intervenor-Plaintiff do not except
25 specifically Intervenor-Defendants' affirmative defenses from their challenges to the Intervenor-
26 Defendants' counterclaims *as such*. Intervenor-Defendants assume that Plaintiffs and Intervenor-
Plaintiff are not objecting to Intervenor-Defendants' ability to raise affirmative defenses, as this would
be a wholesale abrogation of the settlement agreement in the prior cases. *See Affidavit of Kelly Clark*.

1 THE COURT: Right. We're all agreeing we're not going to oppose intervention by
anybody else.

2 MR. FLETCHER: By County or by Mr. Clark's clients.

3 MS. SOWLE: We reserve the right to oppose intervening by—

4 THE COURT: Other people?

5 MS. SOWLE: Yes. Outside of this room, yes.

6 MR. CLARK: A detail I don't want to forget, judge, is our commitment to the ACLU that
7 if the existing Multnomah County litigation is refiled after it's dismissed, that we will not
oppose their intervention either in the legal case or mandamus.

8
9 *See Affidavit of Kelly Clark*. See also Stipulated Facts, ¶¶ 8, 15.

10 On the strength of that agreement, Intervenor-Defendants filed their unopposed motion to
11 intervene, asserting their interest in the litigation as required by ORCP 33C, and agreed to dismiss their
12 pending lawsuits without prejudice precisely because they believed doing so avoided further contention
13 over standing questions. On the strength of that agreement, DOMC and the individual intervenors
14 dismissed the prior litigation. On the strength of that agreement, intervenors did not file motions
15 challenging the standing of ACLU, BRO or Multnomah County, as has now been done to them.¹¹

16
17 ¹¹ Intervenor-Defendants have not raised the unavoidable difficulties raised by Plaintiffs from
18 outside Multnomah County instituting an action against a county outside of that county's jurisdiction.
19 *See* ORS 28.110 ("Courts of record ***within their respective jurisdictions*** shall have power to
20 declare rights, status and other legal relations...") (emphasis added); League of Oregon Cities. v. State,
334 Or at 652. Several of the Plaintiffs have no viable claims, but the Intervenor-Defendants cannot
raise such issues under their understanding of the settlement agreement.

21 According to plaintiffs' amended complaint, plaintiffs Vetri and DeWitt reside in Linn County (¶
22 41), plaintiffs Frankel, Kiefer, Williams and Belisle are residents of Benton County (¶¶ 64, 73), and
23 plaintiffs Sheklow, Lefton, Farrera and Korican are residents of Lane County (¶¶ 46, 55). None of
24 those counties issues marriage licenses to same-sex couples, and none of those counties is a party to
25 this litigation. None of those plaintiffs is prevented from traveling to Portland to obtain a marriage
26 license if they choose, and their interests are no different from those of other same sex couples already
in the lawsuit. Moreover, their legal differences are with the counties in which they reside, and the venue
for resolving those differences lies in the circuit courts of their own respective county. It is apparent as
a matter of law that Multnomah County has no power to declare rights for residents outside Multnomah

1 For Plaintiffs and Multnomah County to assert now that Intervenor-Defendants lack standing to
2 raise their counterclaims is at best disingenuous, and the court should reject their motions on that ground
3 alone. Also conspicuously absent from their briefing is any explanation or citation of authority why
4 plaintiffs and Multnomah County believe that an acknowledged “interest” threshold for purposes of
5 ORCP 33C is less than the “interest” required for purposes of the UDJA:

6 [T]he question presented [in Rendler] was whether ORCP 33C countenanced the
7 intervention of an organization asserting the collective interests of all its members. The
8 Supreme Court held that it did. The court did not address whether an organization has
standing to initiate a declaratory judgment action in the first instance on behalf of its
members.

9 Oregon Taxpayers United PAC v. Kiesling, 143 Or App 537, 543, 924 P.2d 853 (1996). Simply put,
10 Intervenor-Defendants have standing sufficient to remain in this litigation and to raise their
11 counterclaims.

12
13 **B. CECIL AND NANCY THOMAS, DAN MATES AND DICK OSBORNE INDIVIDUALLY HAVE**
14 **STANDING AS TAXPAYERS IN MULTNOMAH COUNTY AND THE STATE TO SEEK AFFIRMATIVE**
15 **RELIEF.**

16 The individual intervenors are all residents of Multnomah County, and Dan Mates is also a
17 business owner in the county. *See Affidavit of Cecil and Nancy Thomas; Affidavit of Dan Mates;*
18 *Affidavit of Dick Osborne. See also Amended Answer, ¶ 3.* Each individual Intervenor-Defendants
19 also has alleged they pay taxes to the county, to a school district, and to various local governmental
20 units, *as well as to the State. Id.* As such, they have a demonstrable, concrete financial interest in the
21 recognition of marriages of same-sex couples because of its inevitable impact on their respective tax
22 burdens. Their interest is far from speculative or abstract.

23 The Oregon Supreme Court set out the standard for pleading and proving taxpayer standing
24 under the Uniform Declaratory Judgments Act as follows:

25 [A] taxpayer’s standing as such to demand equitable relief in his own name in Oregon has

26 _____
County where none of those residents allege any specific interest arising from decisions in or by
Multnomah County. Those parties have no stake in this fight and should be seeking recourse elsewhere.

1 depended on allegations that the challenged governmental action had actual or potential
2 adverse fiscal consequences. When a suit under ORS 28.020 is grounded on ‘taxpayer’
3 standing, these fiscal consequences presumably represent the effect on plaintiff required by
4 that statute.

5 Plaintiffs have alleged . . . that Measure 5 will have the effect of making them pay
6 proportionally more for the same (or fewer) services; they have not alleged that Measure
7 5 will have the “fiscal consequence” of raising their taxes. However, ***a direct effect on the
8 amount of one’s tax bill is not required to show taxpayer standing.*** . . . [P]laintiffs
9 sufficiently have alleged fiscal consequences that affect them and, therefore, have standing
10 to seek relief under ORS 28.020

11 Savage v. Munn, 317 Or. 283, 291, 856 P.2d 298 (1993) (citations omitted) (emphasis added).

12 Intervenor-Defendants easily meet this standard. First, one need look no further than Plaintiffs’
13 Amended Complaint for proof of higher tax burdens for intervenors and other taxpayers. Plaintiffs
14 themselves (and Multnomah County through incorporation by reference) allege there are “over 500
15 rights, responsibilities, benefits and obligations” not available to same-sex couples, many of which are
16 rights to receive public benefits. *See* Amended Complaint, ¶5. Many of those rights involve the
17 expenditure of state and local tax funds, and others involve costs imposed upon employers, such as the
18 costs of the Oregon workers’ compensation and unemployment compensations systems, both of which
19 extend benefits to surviving spouses, but not to unmarried cohabitants absent children.

20 Contrary to the conclusory assertions of Plaintiffs, *Plaintiffs’ Memorandum* at 48, and the
21 County, *County Motion* at 14, these costs are not limited to those already attributable to existing
22 domestic partnership benefits extended to same sex couples by Multnomah County. Indeed, only a
23 small minority of the “married” same sex couples are employed by the county, and many of the
24 additional costs result from costs that would be imposed on all governmental bodies if same sex
25 marriages are approved. Moreover, the status of being married will directly reduce some same sex
26 couples’ state and local income tax burdens, thereby increasing the relative share of taxes needing to be
27 paid by all other taxpayers, including the Intervenor-Defendants.

28 Examples of how extending marriage to same sex couples will increase the Intervenor-
29 Defendants’ tax costs, and Intervenor-Defendant Mapes’ business costs, include but are certainly not
30 limited to:

1 a) Employers including Intervenor-Defendant Mapes face increased workers'
2 compensation costs due to surviving spouse benefits mandated under ORS 656.204(2),
3 656.208 and 656.218(5). These benefits are not paid to surviving unmarried domestic
4 partners.

5 b) Employers including Intervenor-Defendant Mapes face higher unemployment
6 insurance costs due to surviving spousal benefits mandated under ORS 657.255(2). Those
7 benefits are not paid to surviving unmarried domestic partners.

8 c) Costs to Oregon's Medicaid system will increase dramatically if same sex couples
9 are allowed to marry, because married couples are allowed to keep substantial assets that
10 single persons must spend before they can qualify for Medicaid.

11 On this latter point, Plaintiffs themselves highlight the cost to the Medicaid system in paragraph
12 5 of their Amended Complaint. Single persons seeking Medicaid-waivered services benefits must
13 spend all their assets except \$2000 to qualify for Medicaid. OAR 461-160-0015(8). When an
14 unmarried person leaves his or her home to reside in a care facility, the person must sell his or her home
15 and spend the proceeds, as well as virtually all other available assets, before Medicaid benefits will be
16 paid. Id. The result (which is exactly the purpose of the rules) is to delay the single person's Medicaid
17 eligibility until the individual is impoverished, thereby preserving state-paid Medicaid funds. But when
18 the same individual is married, the Medicaid rules allow him or her to transfer the family home to the
19 other spouse without selling it, and the rules also allow the other spouse to keep half the couple's
20 remaining resources up to about \$90,000, plus the \$2000 the ill spouse can keep. OAR
21 461-145-0220; 461-160-580.

22 With proper Medicaid eligibility planning by married couples, the assets retained by the healthy
23 spouse are permanently preserved, with recovery by the State often being impossible. The result of
24 these anti-impoveryishment rules, then, is that the spouse of just one individual needing to live in a care
25 facility can permanently retain hundreds of thousands of dollars of assets that would have to be spent
26 for care if the ill spouse was not married. That difference is paid by Medicaid. Oregon's Medicaid
costs, paid in large part by state income taxes, will skyrocket if same sex couples are allowed to marry.

Continuing down the list of tax impacts, additional impacts to Intervenor-Defendants as
Multnomah County and Oregon taxpayers are:

1 d) All public bodies in Oregon are liable for their employees' torts. ORS 30.265. If
2 a same sex couple is married and one spouse is killed due to the negligence of a public
3 employee during course and scope of employment, the surviving spouse has a wrongful
4 death claim against the public body, a claim that an unmarried domestic partner does not
5 have, regardless of the terms of the deceased's will. ORS 30.020. All increased financial
6 exposure for settlements and judgments arising from negligence of employees of all public
7 bodies must be paid by additional revenue, meaning a higher tax burden for the intervenor
8 defendants.

9 e) ORS 307.250 exempts certain real property owned by a surviving spouse of a war
10 veteran from property taxation, thereby increasing the share of local government costs
11 imposed on all other property taxpayers.

12 f) All public employers in Oregon, including cities, school districts, parks districts,
13 water districts, and counties, for example, face higher PERS contribution costs due to
14 spousal benefits granted under that system. All taxpayers will be affected by the increased
15 costs of the PERS system to Oregon's public employers;

16 g) Spouses of public safety officers killed in the line of duty qualify to receive financial
17 awards from the Public Safety Memorial Fund created by ORS 2433.950, a publicly
18 funded account whose assets are derived from state income taxes;

19 h) Under ORS Chapter 316, the personal income tax burden of married couples
20 where only one spouse has taxable income is substantially reduced by the deemed splitting
21 of the incomes under ORS 316.042, and by allowing two personal exemption credits on
22 the joint return permitted by ORS 316.085, whereas the exemption credit for an unmarried
23 person without income tax liability goes to waste. These two effects can reduce the taxes
24 of married couples by hundreds of dollars per year. If same sex couples are allowed to
25 marry, the resultant reduction in some of their taxes must ultimately be made up by higher
26 taxes for all others, including the Intervenor-Defendants;

i) The Multnomah County income tax is also lower for married couples where one
spouse has income, because the amount of income exempt from tax is doubled from
\$2,500 to \$5,000. *See Affidavit of Kelly Clark* (Multnomah County Income tax form
and instructions). Again, the resultant reduction in income must be made up by the county's
other taxpayers.

This list of tax impacts from recognizing the marriage licenses already granted to these Plaintiffs and
others, while extensive, is not exhaustive. Plaintiffs cannot claim that they are somehow being denied
tax benefits and then turn around and claims that taxpayers have no standing to object.

Authorities relied upon by Plaintiffs, *Plaintiffs' Memorandum* at 47–48, and the County,
County Motion at 13–14, are readily distinguishable. In Gruber v. Lincoln Hospital District, 285 Or.
3, 588 P.2d 1281 (1979), the plaintiff alleged only residence in the county, being an inhabitant of the
hospital district, and status as a taxpayer without demonstrating any resulting consequence or tax

burden. *Id.* at 7. Similarly, in *Chadwick v. Alexander*, 310 Or 700 (1990):

[T]axpayer failed to allege any interest sufficient to establish standing under ORS chapter 28...He concedes, however, that the content of the property tax statement that he received caused him no actual or potential financial harm. Instead, taxpayer claims only that he has “a legally recognized interest in the truth.” Although laudable, such a claim reduces taxpayer’s complaint to one that alleges only “an abstract interest in the correct application or the validity of a law.

Id. at 704. *See also League of Oregon Cities v. State*, 334 Or. 645, 658–660 56 P.3d 892 (2002)

(merely being landowners was not sufficient for some plaintiffs to have standing, but other plaintiffs alleged specific financial impacts that were “plausible, concrete ramifications”).

The concrete increased tax burdens on the Intervenor-Defendants and the reduced income tax liability of many of the Plaintiffs more than meet the showing required to establish taxpayer standing.

C. DOMC, CECIL AND NANCY THOMAS, DAN MATES AND DICK OSBORNE HAVE SUFFICIENTLY ALLEGED FACTS TO GRANT THEM STANDING TO SEEK AFFIRMATIVE RELIEF UNDER OREGON’S DECLARATORY JUDGMENT STATUTES.

There are two related, but distinct, issues necessary to consideration of declaratory relief: (1) the parties must have standing; and (2) there must be a justiciable controversy between parties having adverse legal interests that result in specific relief through binding decree. *Oregon AFSCME v. State*, 150 Or App 87, 91-92, 945 P.2d 102 (1997). The central issue before the court on these standing motions is whether Intervenor-Defendants have “rights, status or other legal relations affected by” the constitution or statute at issue here. ORS 28.020. *See Northwest Alliance for Market Equality v. Tri-Met*, 85 Or App 26, 29, 735 P.2d 1236 (1987). If so, they are entitled to remain as parties. Each of them can demonstrate, and has demonstrated, such interests.

ORS 28.110 requires inclusion of “all persons who have or claim any interest which would be affected by the declaration.” ORS 28.110. *See also Oregon AFSCME v. State*, 150 Or App at 92. Declaratory relief “is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and is to be liberally construed and administered.” ORS 28.120. *Eckles v. State*, 306 Or 380, 760 P.2d 846 (1988),

discussed the types of interests that pass muster under the UDJA:

The interest perhaps most often recognized as sufficient for standing under ORS 28.020 is a present or foreseeable financial interest such as that of a taxpayer, but many other interests have been recognized as well, including the interests of voters, or users of a road. On the other hand, a taxpayer who alleged only an interest in the proper expenditure of public funds without alleging that the challenged government action would have an effect on his taxes was held to have no standing.

Eckles v. State, 306 Or at 385 (citations omitted).

As Plaintiffs acknowledge, *see Plaintiffs' Memorandum* at 45, the Intervenor-Defendants have asserted a variety of interests in their amended answer upon which they base standing, including:

a) All oppose the county's action on political, philosophical, moral or religious grounds;

b) Cecil and Nancy Thomas, Dan Mates and Dick Jordan are all Multnomah County "residents, voters and taxpayers with an interest in the open and public functioning of lawfully limited government, and thus have been adversely affected by the subject actions";

c) DOMC and the Thomases have an interest in defending traditional marriage in Oregon as the union of one man and one woman;

d) Cecil and Nancy Thomas, Dan Mates and Dick Jordan are all Multnomah County taxpayers "concretely affected" by the extension of marriage rights to same-sex couples "and attendant costs to the taxpayers of the County"; and

e) The Thomases are disenfranchised constituents of Commissioner Lonnie Roberts due to his exclusion from the decisionmaking process.

Amended Answer, ¶¶ 2 and 3.

While plaintiffs and Multnomah County discount the legitimacy of intervenors' interests solely as political, religious, moral and philosophical objections to issuance of marriage licenses to same-sex couples (Plaintiffs' Memorandum at 47 "no injury beyond general offense"; County Motion at 11–13), the truth is they have alleged and demonstrated "rights, status or other legal relations" that are concrete rather than abstract or speculative, more than sufficient to meet the standing requirements of the UDJA. ORS 28.110. *See League of Oregon Cities v. State*, 334 Or 645, 658 (2001).

D. DOMC HAS REPRESENTATIONAL STANDING TO SEEK AFFIRMATIVE RELIEF UNDER BOTH

1 **ORCP 33C AND ORS 28.020.**

2 While it is true Oregon does not generally recognize “representational standing,” Benton County
3 v. Friends of Benton County, 294 Or 79 (1982), neither is it unheard of. As noted above, a plaintiff
4 suing under ORS chapter 28 must show he is a person “whose right, status or other legal relations are
5 affected by the challenged instrument...” Northwest Alliance for Market Equality v. Tri-Met, 85 Or
6 App at 29 (citation omitted).

7 The critical point for representational standing is to establish an interest that is discernibly
8 different from that of the public at large. In Northwest Alliance, the Court of Appeals held that an
9 organization can have standing on behalf of its members, ruling that the plaintiff organization sufficiently
10 alleged standing and a justiciable controversy. 85 Or App at 33. A close reading of Rendler v. Lincoln
11 Hospital District demonstrates that the “Friends of Road 804” had standing distinct from the public at
12 large because they were a group of persons who actually used the road in question and organized to
13 sustain their continuing right to do so. Rendler v. Lincoln County, 302 Or at 184. *See also* Automobile
14 Club of Oregon v. State, 314 Or 479, 840 P.2d 674 (1992) (standing to challenge to underground
15 storage tank assessment and motor vehicle emission fee upheld because plaintiffs demonstrated either
16 direct or indirect financial impact); Eckles v. State, 306 Or at 386 (plaintiff had standing to challenge
17 transfer of Industrial Accident Fund from SAIF to state general fund on behalf of other similarly situated
18 employers because he alleged legally cognizable injuries of an employer receiving workers
19 compensation insurance through SAIF). Indeed, Rendler supports DOMC’s standing in this case
20 because DOMC can establish an interest under both ORCP 33C and Oregon’s declaratory relief
21 statutes.

22 In this case, Oregon Family Council has alleged and shown it has a long history of “defending
23 and preserving family and marriage issues in the public arena for over 24 years.” *Affidavit of Michael*
24 *White*. During the exact time defendants were secretly plotting to change the County’s law defining
25 marriage, plaintiffs were engaged in steps to bring resolution of this issue into the forefront in Oregon by
26 establishing the Defense of Marriage Coalition and by filing a ballot measure to define marriage under

1 the Oregon Constitution as a union between one man and one woman. Id. Oregon Family Council and
2 its Defense of Marriage Coalition has actively participated, and continues to participate, in any public
3 process to consider the possible granting of licenses to same sex couples.

4 Furthermore, it is utterly inconsistent to reject the claims of DOMC on the basis of standing but
5 permit Basic Rights Oregon (BRO) and the ACLU to participate as Plaintiffs. BRO is “dedicated to
6 advocacy for equal rights,” “has a strong interest in marriage equality for lesbian and gay couples” and
7 “has devoted a considerable amount of its resources to educating Oregon communities and their leaders
8 about why same-sex couples need and deserve equal marriage rights.” Amended Complaint, ¶¶ 80, 81.
9 Similarly, the ACLU’s allegations of its interests herein conspicuously lack allegations of affected
10 “rights, status or other legal relations”: “The ACLU of Oregon is a statewide organization dedicated to
11 defending the civil liberties and advancing the civil rights of all Oregonians, including lesbian and gay
12 Oregonians”; “preserving and advancing the rights guaranteed by the federal and state constitutions...”;
13 and “has a strong interest in marriage equality for lesbian and gay couples.” Amended Complaint, ¶¶
14 82, 83, 85.

15 How can it be that BRO and ACLU have representational standing to advocate a position
16 consistent with their own values when they argue an organization with a contrary point of view lacks
17 standing? To the extent the court accepts plaintiffs’ and County’s premise DOMC lacks
18 representational standing herein, the court must likewise reject the claims of BRO and ACLU and
19 dismiss them for lack of standing.

20
21 **E. PLAINTIFFS HAVE NO STANDING TO SEEK RELIEF BASED ON THEIR DESIRE FOR SOCIAL**
22 **ACCEPTANCE AND AMORPHOUS SENSE OF SECURITY, AND THE COUNTY HAS NO STANDING**
TO RAISE THE PLAINTIFFS’ CONCERNS.

23 While plaintiffs and Multnomah County find it easy to dismiss the political, religious, moral and
24 philosophical objections of these intervenors- as well as their other concrete interests- to the issuance of
25 marriage licenses to same-sex couples, their own pleadings and arguments make it clear their interests
26 in the issuance of those licenses is similarly value-driven. Lest Multnomah County claim its interests are

1 different from plaintiffs, one need look no further than its complaint, which recites, “For its complaint,
2 intervenor-plaintiff Multnomah County (“County”) joins in Plaintiffs’ First Amended Complaint in its
3 entirety, and adopts it as the County’s complaint.” The County claims no interests in this litigation apart
4 from the Plaintiffs.

5 Similarly, without belittling plaintiffs’ understandable human feelings, a review of their First
6 Amended Complaint amply demonstrates they seek predominantly acceptance and validation, not clear
7 statutory rights. Individual Plaintiffs allege:

8 a) Burke and Doyle are “college sweethearts” who had friends and family members
9 “endorse and celebrate their union,” who are concerned with “a threat to their family’s
10 security and future,” and who “want to live with the confidence that, if one of them
unexpectedly dies or becomes disabled or sick, the other will have all of the protections
that marriage affords” (Amended Complaint, ¶¶ 18, 21, 22, 24);

11 b) Potter and Moen seek “social recognition...for themselves and their daughters”
12 and “are concerned that the exclusion of same-sex couples from marriage sends a message
13 to their daughters that their family is unworthy. They want their daughters to be able to feel
like they fully belong in the community” (Amended Complaint ¶¶ 33, 34);

14 c) Knox and Warshaw “hope...their children no longer need to feel that their family
15 is less worthy in the eyes of others for lack of ‘the piece of paper’” (Amended Complaint
¶ 40);

16 d) Sheklow and Lefton “want their relationship to be recognized as a legal marriage”
(Amended Complaint ¶ 53);

17 e) Farrera and Korican believe “the state sends a stigmatizing message that they are
18 less worthy” and “they are being treated like second-class citizens” (Amended Complaint
¶¶ 60 and 63);

19 f) Frankel and Kiefer “feel strongly about their community and the equal treatment
20 of same-sex couples that they expect from it” (Amended Complaint ¶ 72); and

21 g) Williams and Belisle “want a greater sense of security, safety and equality”
(Amended Complaint ¶ 77)

22 If values are immaterial to determining standing, plaintiffs must comply with the same standards to which
23 they seek to hold intervenors.

24 CONCLUSION

25 For the foregoing reasons, Plaintiffs’ motions for partial summary judgment on their first
26

1 and second claims for relief should be denied and Intervenor-Defendants' motions for partial summary
2 judgment on their first and fourth affirmative defenses and counterclaims should be granted.

3 DATED this _____ day of April, 2004.

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