

IN THE SUPREME COURT OF THE STATE OF OREGON

MARY LI and REBECCA KENNEDY;
STEPHEN KNOX, M.D., and ERIC
WARSHAW, M.D.; KELLY BURKE and
DOLORES DOYLE; DONNA POTTER and
PAMELA MOEN; DOMINICK VETRI and
DOUGLAS DEWITT; SALLY SHEKLOW
and ENID LEFTON; IRENE FARRERA and
NINA KORICAN; WALTER FRANKEL and
CURTIS KEIFER; JULIE WILLIAMS and
COLEEN BELISLE; BASIC RIGHTS
OREGON; and AMERICAN CIVIL
LIBERTIES UNION OF OREGON,
Plaintiffs-Respondents, Cross-
Appellants,

MULTNOMAH COUNTY,

Intervenor-Plaintiff-Respondent,
Cross-Appellant,

vs.

STATE OF OREGON; THEODORE
KULONGOSKI, in his official capacity as
Governor of the State of Oregon; HARDY
MYERS, in his official capacity as Attorney
General of the State of Oregon; GARY
WEEKS, in his official capacity as Director of
the Department of Human Services of the State
of Oregon; and JENNIFER WOODWARD, in
her official capacity as State Registrar of the
State of Oregon,
Defendants-Appellants, Cross-
Respondents,

DEFENSE OF MARRIAGE COALITION,
CECIL MICHAEL THOMAS, NANCY JO
THOMAS, DAN MATES, and DICK JORDAN
OSBORNE,
Intervenors-Defendants-Appellants,
Cross-Respondents.

Multnomah County Circuit Court
Case No. 0403-03057

CA No. A124877

SC S51612

INTERVENOR-PLAINTIFF-
RESPONDENT, CROSS-APPELLANT
MULTNOMAH COUNTY'S RESPONSE
TO DEFENDANTS-APPELLANTS,
CROSS-RESPONDENTS' OPENING
BRIEF

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STATEMENT OF THE CASE

Plaintiff-Intervenor relies upon the statement of the case as stated in its opening brief.

SUMMARY OF THE ARGUMENT

1 Article I, section 20, of the Oregon Constitution prohibits discrimination in marriage on the basis of an individual's sexual orientation or gender. Historical analysis, application of Article I, section 20 analysis to discriminatory laws, and examination of marriage as a privilege all support the conclusion that ORS Chapter 106 impermissibly denies marriage to same-sex couples. Further, examination of federal case law regarding the fundamental right to marry and gender discrimination under the Fourteenth Amendment support the conclusion that denying marriage to same-sex couples most likely violates the United States Constitution as well.

2. All Article I, section 20, jurisprudence indicates that, when possible, a court should extend the privileges and immunities that are being denied a particular class, rather than eradicate the privilege or immunity for all classes. Article I, section 10, of the Oregon Constitution requires a court, not the legislature, to craft an appropriate remedy when a constitutional violation is found.

3. Multnomah County acted under state granted authority, not county authority, when it began issuing marriage licenses to same sex couples. The limitation of Article VI, section 10, that instructs charter granted powers can only apply to matters of countywide concern is inapplicable when a county official is acting under powers granted to him or her by the state. The Multnomah County Chair appropriately acted under the powers granted to her via ORS Chapter 106 and the marriage licenses issued under her

directive are legally sound. The California Supreme Court's recent decision in *Lockyer v. City and County of San Francisco*, 33 Cal. 4th 1055, 95 P.3d 459 (2004), is inapplicable because of fundamental structural differences in Oregon and California government.

ANSWER TO INTERVENOR-DEFENDANTS' FIRST ASSIGNMENT OF ERROR

The trial court appropriately held that excluding same-sex couples from the benefits of marriage was a violation of Article I, section 20.

ARGUMENT IN SUPPORT OF ANSWER TO INTERVENOR-DEFENDANTS' FIRST ASSIGNMENT OF ERROR

I. Intervenor-Defendants' analysis of Article I, section 20, is not supported by applicable precedent.

Article I, section 20, of the Oregon Constitution states:

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

The Court has created a single test to determine if a law violates Article I, section 20, and that test has been consistently applied for the last 23 years. Simply stated, when a law is challenged under Article I, section 20, the law is reviewed to determine if it offers privileges or immunities to an individual or class of individuals in favor of other Oregonians. If the law does favor a true class of people, the government must supply an adequate justification for the disparate treatment. The courts do not entertain balancing tests, arguments of subjective morality or rely upon unfounded prejudice to review a law's compliance with Article I, section 20.

¹ Though Intervenor-Plaintiff maintains, as it did in its opening brief, that the trial court erred by not extending the privilege of marriage to same-sex couples.

This test was established in *State v. Clark*, 291 Or 231, 630 P.2d 810, *cert denied*, 454 US 1084, 102 S Ct 640, 70 L Ed 2d 619 (1981), and Multnomah County urges the Court to continue employing it.

A. The proper historical analysis of Article I, section 20 requires a review of text and context, prior case law, and the historical circumstances of its creation.

Proper historical analysis of Article I, section 20, requires that the provision be interpreted in light of (1) its specific wording, “text and context,” (2) prior case law, and (3) the historical circumstances of its creation. *Priest v. Pearce*, 314 Or 411, 840 P2d 65 (1992)(establishing the three-prong analysis). This Court undertook this analysis of Article I, section 20 in *State v. Clark*.

The *Clark* court examined the specific wording of Article I, section 20: “[the] 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.” *Clark*, 291 Or at 236. It observed that the “[o]riginal concern with special privileges or monopolies’ was the basis of early decision concerning the licensing of sailors’ boarding houses. .or fishing rights” *Id.* at 236-237. Further, “[b]ecause the clause would ordinarily be invoked 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” and concluded that “its use against discriminatory or otherwise unequal adverse treatment is long established.” *Id.* at 237 (citations omitted). Finally, the Court noted that “for most purposes analysis under article I, section 20 and under the federal equal protection clause will coincide.” *Id.* at 243.

The Court has relied upon this analysis of Article I, section 20, in numerous cases since *Clark*. See *Hewitt v. State Accident Insurance Fund*, 294 Or 33, 42, 653 P2d 970 (1982)(reciting *Clark*'s analysis); *State ex rel. Juvenile Dept. v. Reynolds*, 317 Or 560, 565, 857 P2d 842 (1993)(noting that the *Clark* court effectively employed the three prongs of *Priest* analysis).

Intervenor-Defendants suggest that the Court is now required to apply additional historical analysis, the historical exception doctrine, to divine the "true" intent of the framers. They are incorrect. A reexamination of previous precedent is only appropriate when "a party presents to [the Court] a principled argument suggesting that, in an earlier decision, this court wrongly considered or wrongly decided the issue in question." *Stranahan v. Fred Meyer*, 331 Or 38, 54, 11 P.3d 228 (2000). A party requesting such a drastic measure by the Court should "present new information as to the meaning of the constitutional provision at issue or that demonstrate some failure on the part of this court at the time of the earlier decision to follow its usual paradigm for considering and construing the meaning of the provision in question." *Id.* Intervenor-Defendants have failed to present *any* argument suggesting that the Court incorrectly analyzed the intent of the framers regarding Article I, section 20, in its previous decisions.

Even if Intervenor-Defendants had presented a sufficient showing to necessitate a reexamination of this Court's precedent regarding the intent of Article I, section 20, the historical exception doctrine still would not apply to Article I, section 20. The historical exception doctrine is a means of determining the intent of the framers only in specific, narrow circumstances: (1) when reviewing laws that are directed at the content of speech or writing, *State v. Robertson*, 293 Or 402, 412, 649 P.2d 569 (1982), (2) when determining if an individual has the right to a jury in a criminal trial, *State ex. rel. Dwyer*

v. *Dwyer*, 299 Or 108, 698 P.2d 957 (1985), and (3) when determining if an individual has the right to a jury in a civil trial, *Molodyh v. Truck Ins. Exchange*, 304 Or 295, 744 P.2d 992 (1987). Outside of these three circumstances, the Court has not applied the historical exception doctrine to determine the intent of the Oregon Constitution.

The Court has already established the appropriate historical analysis of Article I, section 20, and Intervenor-Defendants provide no justification for questioning the validity of that analysis.

B. Article I, section 20, applies to laws that are discriminatory on their face and as applied.

Defendant-Intervenors argue that ORS Chapter 106 is facially neutral and therefore Article I, section 20, does not apply to it. To the contrary, Article I, section 20 applies equally to facially discriminatory laws and laws that are discriminatory when applied.

Article I, section 20, “may be invoked by an individual who demands equality of treatment with other individuals as well as by one who demands equal privileges or immunities for a class to which he or she belongs.” *Clark*, 291 Or at 237. If one is arguing for equal privileges or immunities for a class, that class must be a “true class”; a class independently inchoate from the law being challenged. *Id.* at 240. A class created by the law being challenged may not invoke the protections of Article I, section 20.

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ORS Chapter 106 limits marriage to unions between a man and a woman. Intervenor-defendants argue that the marriage laws are facially neutral because they do not prohibit anyone from getting married, provided one’s partner is of the opposite sex. Intervenor-defendants’ Opening Brief, pg. 39-40. This requirement underscores the

facial discrimination of ORS Chapter 106 based on sexual orientation because it requires persons such as plaintiffs to marry contrary to their sexual orientation. By requiring persons to marry as “husband and wife,” the statute discriminates on its face against people whose sexual orientation does not allow them to so marry.²

Moreover, in *Zockert v. Fanning*, 310 Or 514, 800 P.2d 773 (1990), the Court ruled that all laws, both laws on their face and as applied, must meet the stringent requirements of Article I, section 20. Intervenor-Defendants attempt to distinguish *Zockert*, but the decision clearly establishes that if disparate treatment arises when a statute is applied, the state must be able to justify the discrimination. *Id.* at 523. Accordingly, the Court applies Article I, section 20, analysis regardless of whether the constitutional infirmity arises from the text of the statute or as it is applied.

Intervenor-Defendants also suggest that the discrimination in *Zockert* was expressed in the text of the statute. Intervenor-Defendants Opening Brief, pg. 42. This is inaccurate – the law challenged in *Zockert*, was silent as to an indigent parent’s right to counsel. A related statute provided for provision of counsel for an indigent parent. The discrimination arose because, as both of the statutes were applied, similar parents in extremely similar situations were being treated differently without justification. *Zockert*, 310 Or 520-521. Thus, the challenge in *Zockert* was “as applied.”

Intervenor-Defendants’ argument that Article I, section 20, does not apply to laws that are discriminatory when applied and is without merit and is not supported by the case law they themselves cite.

² Intervenor-Defendants assert that this makes traditional marriage unconstitutional. Intervenor-Defendants Opening Brief at 41. Plaintiff-Intervenor cannot fathom where this belief arose from as it has never been argued by any party at any point throughout the litigation. Recognition that same-sex couples have access to marriage will in no way impact the legal rights of opposite-sex couples.

C. Marriage is a privilege for purposes of Article I, section 20.

Intervenor-Defendants' argument that marriage is not a privilege is inconsistent with Article I, section 20, jurisprudence. Marriage licenses, the state of marriage, and the benefits that flow from marriage are all separate and distinct privileges under Article I, section 20. Intervenor-Defendants' arguments to the contrary have no merit.

"Whenever a person is denied some advantage to which he or she would be entitled but for a choice made by a government authority, Article I, section 20, requires that the government decision to offer or deny the advantage be made 'by permissible criteria and consistently applied.'" *City of Salem v. Bruner*, 299 Or 262, 268-69, 702 P.2d 70(1985), citing *State v. Freeland*, 295 Or 367, 377, 667 P.2d 509 (1983).

To be married in Oregon, one must have a valid marriage license. ORS 106.041 Without a marriage license one is prohibited from being married and, therefore, from receiving the state and federal benefits that flow from marriage. The ability to receive a marriage license is surely an advantage and licenses have consistently been viewed as "privileges" under Article I, section 20. See generally *State v. Wright*, 53 Or 344, 100 P. 296 (1909)(peddler's license), *United States Auto. Service Club v. Van Winkle*, 128 Or 274, 274 P. 308 (1929)(motor club license), *State v. Winegar*, 157 Or 220, 69 P.2d 1057 (1937)(license to transport fish), and *State ex. rel Peterson v. Martin*, 180 Or 459, 474, 176 P.2d 636 (1947)(a license is a privilege).

The state of marriage itself confers an advantage upon the two individuals involved. Husbands and wives, because they are married, have access to myriad state and federal privileges and immunities. See generally, Appendix to Plaintiff-Respondent's Opening Brief, pgs 3-6. That access to privileges and immunities is a privilege in and of itself, distinct from the benefits that flow from marriage. A couple

may not receive the benefits of marriage unless they are married, and to be married a couple must receive a grant of authority from the State. ORS Chapter 106. Therefore, being married is an advantage given by choice of government authority and it is a privilege that must be provided Oregonians in accordance with Article I, section 20.³

Oregon supplies hundreds of benefits to individuals who are married solely because they are married. The benefits cover intestate succession, privacy within the marriage relationship, standing to bring legal action in the event of spouse's death, rights to support in the event of dissolution of the relationship and much more. Appendix to Plaintiff-Respondent's Opening Brief, pgs 3-6. While the state, arguably, may reserve these benefits to married individuals for rational justifications, it may not prohibit individuals from receiving these privileges based on gender or sexual orientation. *Hewitt*, 294 Or 33 (1982); *Tanner v. Oregon Health and Sciences University*, 157 Or App 502, 971 P.2d 435 (1999). The privileges and immunities that flow from marriage are granted by choice of government authority and therefore must be provided in accordance with Article I, section 20.

D. ORS Chapter 106 inappropriately confers privileges on the basis of gender and sexual orientation.

Marriage is not freely available to all Oregonians. Certain Oregonians are denied the right to marry because of their gender and their sexual orientation. This type of favoritism is precisely what Article I, section 20 was designed to prevent.

³ Intervenor-Defendants compare the denial of marriage to persons under seventeen years old and those closely related by blood to the denial of marriage to same-sex couples. The comparison is inarticulate. Sexual orientation is not addressed in the statute, while age and consanguinity are. Additionally, Oregon has never specifically addressed its reasons for prohibiting same-sex couples from marriage, but it has articulated reasons for limiting marriage based on age and consanguinity. It is inappropriate and unfounded to assume that the State would have similar objections relating to same-sex marriages as it does for under-age or intra-familial unions.

Intervenor-Defendants champion the argument that if both men and women are equally discriminated against, they are equally treated. Intervenor-Defendants' Opening pgs. 39-40. Not only does this argument improperly focus on the negative behavior of the government, it misunderstands the uniqueness of Article I, section 20. Article I, section 20, does not contain a caveat allowing for favoritism if everyone is being mistreated equally. The constitutional provision simply prohibits the government from playing favorites. Intervenor-plaintiff notes that this form of reasoning- "everyone is discriminated against equally" – has been repeatedly rejected by the U.S. Supreme

Brown v. Board of Education of Topeka, 347 US 483, 74 S Ct 686, 98 L Ed 873 (1954); *Loving v. Virginia*, 388 US 1, 12, 87 S Ct 1817, 18 L Ed 2d 1010 (1967).

ORS Chapter 106 limits marriage to unions between one man and one woman. Men are freely allowed to marry women, but not other men, and women are freely allowed to marry men, but not other women. This proscription on the right to marry discriminates based on the gender of the individual applying for a marriage license because men and women are forced to engage in different actions to receive identical benefits from the state.

Oregon's marriage laws also discriminate on the basis of sexual orientation. ORS Chapter 106 forces individuals such as plaintiffs to choose between entering life's most intimate and sacred union with someone they do not love, or never marrying. Intervenor-defendants retort that plaintiffs have the right to marry, so long as they, like heterosexuals, marry a person of the opposite gender. This argument misses the point entirely. Heterosexuals, by definition, have a desire to create a sacred, sexually and

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emotionally intimate, life-long bond with a person of the opposite sex. Homosexuals, by definition, would have no desire to do so. Intervenor-defendants' argument that homosexuals and heterosexuals have equal access to marriage is incorrect and illogical.

Further, Intervenor-Defendants argue that the state may discriminate based on sexual orientation because *as a couple*, opposite-sex couples and same-sex couples are fundamentally biologically different. This argument is irrelevant. Article I, section 20, protects *individual* rights. *Clark*, 291 Or at 236-239. Therefore, any fundamental biological difference must exist between two *individuals*, not two groups of individuals. See *Hewitt*, 294 Or at 46-47 (difference needed to be between men and women as individuals, not differences between groups of men and women). Additionally, the fundamental biological differences must be relevant to the privilege or immunity being offered. *Id.* The fundamental biological differences between opposite-sex and same-sex couples is irrelevant to marriage. Procreation or proof of the ability to procreate is not a requirement of marriage.

In Oregon, the privilege of marriage is only extended to those who wish to marry individuals of the opposite sex. This discriminates on the basis of gender and sexual orientation and is prohibited by Article I, section 20.

II. Federal Case Law Does Not Clearly Prohibit Same-Sex Marriage.

Intervenor-Defendants contend that the federal questions posed by this Court are controlled by the Supreme Court's 1972 summary dismissal of a Minnesota Supreme Court case that dealt with same-sex marriage. See *Baker v. Nelson*, 191 NW 2d 185 (Minn. 1971), *dismissed for lack of a federal question*, 409 US 810 (1972). They are not. Significant subsequent doctrinal developments have made the precedential value of *Baker* virtually worthless.

Intervenor-Defendants are correct that in 1972 the Supreme Court was obligated to review decisions appealed from state supreme courts. The Supreme Court was not obligated to consider each case after a full briefing and oral argument, however. were often dismissed or affirmed without opinion. Summary dispositions of such matters, whether by affirmation or a dismissal, created some precedential value for the issues the cases presented, but not much. *Wis. Dep't of Revenue v. Wrigley Co.*, 505 US 214, 224 n2, 120 L Ed 2d 174, 112 S Ct 2447 (1992). The precedential value of these decisions is narrow and tempered by subsequent doctrinal developments. *Hicks v. Miranda*, 422 US 332, 344-45, 45 L Ed 2d 223, 95 S Ct 2281 (1975).

Subsequent to *Baker*, the Court addressed the significance of the fundamental right to marry in two separate cases. *Zablocki v. Redhail*, 434 US 374, 384, 98 S Ct 673, 54 L Ed 2d 618 (1978) and *Turner v. Safley*, 482 US 78, 107 S Ct 2254, 96 L Ed 2d 64 (1987). Where *Loving v. Virginia*, 388 US 1, 12, (1967), had merely referenced the fundamental nature of the right to marry, *Zablocki* and *Turner* underscored the power of marriage and drew narrow boundaries within which the state could constitutionally deny marriage to individuals. *Zablocki*, 434 US at 383-386; *Turner*, 482 US at 95-97.

two cases took *Loving* farther than it had been when *Baker* was summarily dismissed by the Supreme Court.

Similarly, the Court has expounded upon gender discrimination and the Fourteenth Amendment since *Baker*. The Court appears to have returned to its roots when reviewing discrimination challenges under the Fourteenth Amendment: *United States v. Carolene Products Co.*, 304 US 144, 153 n4, 58 S Ct 778, 82 L Ed 1234 (1938). In *Carolene Products* Justice Stone commented on the role the Fourteenth Amendment could play in protecting discrete and insular minorities from discrimination that could not

adequately be dealt with by the political process. *Id.* Justice Stone's footnote became the basis for early Fourteenth Amendment jurisprudence and the ideas of political equality spawned by Footnote Four were the torch bearers for application of the Fourteenth Amendment's protections outside of racial discrimination. *See City of Cleburne v. Cleburne Living Ctr.*, 473 US 432, 472 n.24, 105 S Ct 3249, 87 L Ed 2d 313 (1985) (J. Marshal, concurring in part, dissenting in part) ("Because prejudice spawns prejudice, and stereotypes produce limitations that confirm the stereotype on which they are based, a history of unequal treatment requires sensitivity to the prospect that its vestiges endure.")

The gender cases since *Baker* have taken *Carolene Products* commentary to heart and crafted protections against discrimination that ignore prejudicial stereotypes and encourage equality of political power. *See Craig v. Boren*, 429 US 190, 198-199, 50 L Ed 2d 397, 97 S Ct 451 (1976); *Mississippi University for Women v. Hogan*, 458 US 718, 730, 102 S Ct 3331, 73 L Ed 2d 1090 (1982); and *United States v. Virginia*, 518 US 515, 116 S Ct 2264, 135 L Ed 2d 735 (1996).

Too much has changed in the jurisprudence of the fundamental right to marry and gender discrimination since *Baker* was dismissed for this Court, or any court, to lay great weight on its holding. This Court should not rely on *Baker* should it review the applicability of the Fourteenth Amendment to ORS Chapter 106.

ANSWER TO INTERVENOR-DEFENDANTS' SECOND ASSIGNMENT OF ERROR

The trial court correctly crafted a remedy that extended the benefits of marriage to same-sex couples, but inappropriately allowed the legislature to craft the details of that remedy.

ARGUMENT IN SUPPORT OF ANSWER TO INTERVENOR-DEFENDANTS SECOND ASSIGNMENT OF ERROR

The remedy solutions offered by Intervenor-defendants to declare the marriage statutes void or leave the remedy to the legislature have no base in Oregon law. The only appropriate remedy in this case, should the Court find a violation of Article I, section 20, is to extend the privilege of marriage to same-sex couples.

Article I, section 10, of the Oregon Constitution requires this Court, not the legislature, to craft an appropriate remedy for violations of law. Article I, section 10, states that “every man shall have remedy by due course of law for injury done him in his person, property, or reputation.” It is a “directive to courts, as guardians of constitutional rights, to determine the constitutionality of legislatively created remedies respecting such rights.” *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 115, 23 P.3d 333 (2001). To pass on to the legislature the unique responsibilities of the courts would be violative of Article I, section 10.

Finally, Intervenor-Defendants’ suggestion that justice would be best served by this Court denying marriage to all Oregonians should a violation of Article I, section 20 be found is absurd. Such a remedy is contrary to this Court’s jurisprudence. *Hewitt*, 294 Or at 53. It also likely violates the Fourteenth Amendment’s guarantee of the fundamental right to marry. *Zablocki*, 434 US 374 (1978).

ANSWER TO INTERVENOR-DEFENDANTS’ THIRD ASSIGNMENT OF ERROR

The trial court did not err in ordering the State to register the valid marriage licenses of same-sex couples.

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**ARGUMENT IN SUPPORT OF ANSWER TO INTERVENOR-DEFENDANTS
THIRD ASSIGNMENT OF ERROR**

Intervenor-Defendants assert that the County overstepped its constitutional home rule authority by extending marriage licenses to same-sex couples, citing to a portion of Article VI, section 10: “A county charter may provide for the exercise by the county of authority over matters of county concern.” Intervenor-Defendants ignore the provision of Article VI, section 10, which states:

Such [county] officers shall among them exercise all the powers and perform all the duties, as distributed by the county charter or by its authority, now or hereafter, *by the Constitution or laws of this state*, granted to or imposed upon any county officer.
Or Const, Art VI, §10 (emphasis added).

Multnomah County did not act under its charter authority in this matter, but under the authority granted to it by ORS Chapter 106. Therefore, the portion of Article VI, section 10, limiting counties to exercise authority only over matters of county concern is irrelevant to a determination in this case.

A. The State, through ORS Chapter 106, grants counties the authority to administer the marriage laws.

Although the state clearly regulates marriage through ORS Chapter 106, the authority to issue marriage licenses has been delegated to the counties. ORS 106.041(1) states: “All persons wishing to enter into a marriage contract shall obtain a license therefore from the county clerk upon application.” The county clerk is required to make the determination of whether an applicant is of age, and whether consent of a parent or guardian is required, prior to issuing the license. ORS 106.050 and ORS 106.060. ORS 106.077 specifically requires *counties* to determine whether all legal requirements for issuance of a marriage license have been met: “When the county clerk has received the

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written application for the marriage license from both applicants, and all other legal requirements for issuance of the marriage license have been met, the county clerk shall issue a marriage license.”

The state reserves no authority for itself to determine the legality of marriage licenses. The State Registrar “shall” register a marriage license forwarded to her by the issuing county. ORS 432.405. The State Registrar is not empowered to reject marriage licenses based on questions of legality. *See* OAR 333-011-0006, *et seq.* There are no state regulations regarding what a county clerk must do with licenses after they are returned to the county and before they are delivered to the State Registrar for Vital Statistics. *Id.* Regulations for dealing with missing or incorrect information, lost licenses, and requested amendments to licenses during this time are left to the discretion of the county.

B. The Multnomah County Chair was exercising the authority granted by the State through ORS Chapter 106 when she directed employees to issue marriage licenses to same-sex couples.

The Multnomah County Chair was exercising state granted authority, not county authority, when she instructed employees to issue marriage licenses to same-sex couples. The County has never claimed authority over the issuance of marriage licenses, other than the authority granted to it by the state.

The Multnomah County Charter grants the Chair authority as “the chief executive officer and personnel officer of the county.” Multnomah County Charter §6.10 (1). The Chair also has the “sole authority to appoint, order, direct and discharge administrative officers and employees of the county, except for the personal staff, employees or agents of elective county offices.” Multnomah County Charter §6.01(3).

The Multnomah County Charter is silent regarding the issuance of marriage licenses. Multnomah County does not have a single individual who operates as “the county clerk.” Instead, the Multnomah County Code established the Department of Business and Community services and assigned it numerous functions including “marriage license and domestic partner registration services.” MCC §7.001(T). There are no further County ordinances, resolutions, orders or executive rules regarding marriage licensure.

While it is true that the Chair was using her authority as the CEO and personnel officer of the County as designated in the County Charter when she directed employees to issue marriage licenses to same-sex couples, she could not have directed them to take action regarding marriage licensure but for the authority granted to Multnomah County and all other Oregon counties by ORS Chapter 106. Even though the Chair can direct administrative officers and employees of the County, absent the authority granted by ORS Chapter 106, the Chair cannot direct any employee to issue a marriage license to *any couple*. However, because ORS Chapter 106 directs counties to issue marriage licenses, the Chair must ensure that those duties are lawfully performed in accordance with “the Constitution and laws of this state.” Or Const, Art VI, §10; *see also* Or Const, Art XV, §3 (“Every person elected or appointed to any office under this Constitution, shall, before entering on the duties thereof, take an oath or affirmation to support the Constitution of the United States, and of this State, and also an oath of office.”).

The Chair was acting under statutory authority and her duty to uphold the Constitution when she extended marriage license to same-sex couples.

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C. Article VI, section 10, of the Oregon Constitution does not limit a county official from exercising statutory authority in accordance with the Constitution.

A government official does not violate Article VI, section 10, when he or she executes duties prescribed by state law in a manner that abides by the Oregon Constitution.

Article VI, section 10, directs county officials to “exercise all the powers and perform all the duties as distributed by the Constitution or laws of this state.” Article XI, section 3, requires all officials to “take an oath or affirmation to support the Constitution of the United States, and of this State.” In *Cooper v. Eugene School Dist. No. 4J*, 301 Or 358, 723 P.2d 298 (1986), this court stated that Article XI, section 3, expresses the expectation that state officers will conduct themselves in accordance with the constitution at all times. The Multnomah County Chair, and all county officials in Oregon that exercise state authority, have been commanded by Article VI, section 10, Article XI, section 3, and *Cooper* to ensure that their actions are constitutional. When the Chair directed County employees to issue marriage licenses to same-sex couples, she was fulfilling her duty as a county officer.

Intervenor-Defendants place great weight in the California Supreme Court decision of *Lockyer v. City and County of San Francisco*, 33 Cal.4th 1055, 95 P.3d 459 (2004). That opinion, however, will be of little help to this Court because of a substantial difference in the structure of California government.

The Clerk of San Francisco, though an employee of a home rule City and County, is essentially a state officer when performing her duties in granting marriage licenses. *Lockyer*, 33 Cal. 4th at 1080. The City and County of San Francisco cannot direct the Clerk to perform her duties as a state officer in a particular manner. *Id.* at 1080-1081. As

a state officer engaging in an administrative function, the Clerk is provided an envious level of liability protection. *See* Cal. Const., Article III, §3.5.⁴ If, in performing her state mandated duties, she violates the constitutional rights of an individual, she, and the City and County for whom she works, are completely protected from liability. The *state* is the liable party, as it has directed the Clerk to administer her duties without concern for their constitutional implications. *Id.*

In Oregon, however, the state maintains no control over county clerks who issue marriage licenses.⁵ The state also offers no immunity to a local government or its employees who unintentionally violate an individual's constitutional rights while performing his or her duties in accordance with state law. These two significant differences negate the value of *Lockyer* to this Court and it cannot be depended upon as a guiding opinion.

Multnomah County was properly acting under state granted authority when it issued marriage licenses to same-sex couples.

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⁴ Cal. Const, Art III, §3.5, reads "An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

(b) To declare a statute unconstitutional;

(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations."

⁵ In the past, the State has asserted control over local officials it felt performed important duties under a grant of authority from the State. *See Buchanan v. Wood*, 79 Or App 722, 720 P.2d 1285, *review denied* 302 Or 158, 727 P.2d 128 (1986).

CONCLUSION

For the reasons stated above, Intervenor-plaintiffs urge the Court to grants the claims for relief as articulated in its opening brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 25, 2004, I served two true copies of **INTERVENOR-PLAINTIFF-RESPONDENT, CROSS-APPELLANT MULTNOMAH COUNTY'S RESPONSE TO INTERVENOR-DEFENDANTS-APPELLANTS, CROSS-RESPONDENTS' OPENING BRIEF** on:

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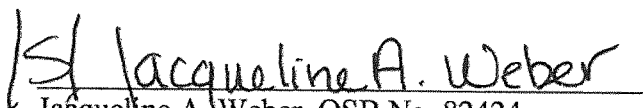
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