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4 IN THE CIRCUIT COURT OF THE STATE OF OREGON
5 FOR THE COUNTY OF MULTNOMAH
6

7 MARY LI and REBECCA KENNEDY;
8 STEPHEN KNOX, M.D., and ERIC
9 WARSHAW, M.D.; KELLY BURKE and
10 DOLORES DOYLE; DONNA POTTER and
11 PAMELA MOEN; DOMINICK VETRI and
12 DOUGLAS DEWITT; SALLY SHEKLOW
and ENID LEFTON; IRENE FARRERA and
NINA KORICAN; WALTER FRANKEL and
CURTIS KIEFER; JULIE WILLIAMS and
COLEEN BELISLE; BASIC RIGHTS
OREGON; and AMERICAN CIVIL
LIBERTIES UNION OF OREGON,

13 Plaintiffs,

14 and

15 MULTNOMAH COUNTY,

16 Intervenor-Plaintiff,

17 v.

18 STATE OF OREGON; THEODORE
19 KULONGOSKI, in his official capacity as
20 Governor of the State of Oregon, HARDY
21 MYERS, in his official capacity as Attorney
22 General of the State of Oregon; GARY
23 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,

24 Defendants,

25 and
26

Case No. 0403-03057

DEFENDANTS' MEMORANDUM IN SUPPORT
OF MOTION FOR SUMMARY JUDGMENT

1 DEFENSE OF MARRIAGE COALITION,
2 CECIL MICHAEL THOMAS, NANCY JO
3 THOMAS, DAN MATES and DICK
OSBORNE,

4 Intervenor-Defendants.
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INTRODUCTION

Marriage in the traditional sense rests on profound religious, moral, social and personal beliefs. Marriage in the legal sense is a civil contract that carries with it secular benefits and protections defined in a wide variety of statutes. That civil contract in Oregon is now limited by statute to opposite-sex couples. In turn, those secular benefits and protections that depend on marriage—the legal incidents of marriage—are automatically provided under current law only to opposite-sex couples who choose to marry.

The constitutionality of Oregon's current statutory policies relating to marriage has rapidly emerged as perhaps the most pressing—certainly the most visible—legal issue in Oregon today. Equally important is the question of whether public officials can choose not to enforce the policies embodied in those statutes before a court decides the constitutional issue. Pending the onset of this litigation, and ultimate decision by the Supreme Court of Oregon, these issues have called forth legal analysis from various sources, including a March 12, 2004 opinion letter from the Oregon Department of Justice (DOJ) provided to, and released to the public by, Governor Kulongoski.

In submitting this brief, the State of Oregon does not intend to proceed as if DOJ's earlier analysis did not exist and was not in the public domain. By the same token, the earlier analysis cautioned that its conclusions—its predictions on how the Oregon Supreme Court might analyze and decide the constitutional issue—were not free from uncertainty. It is an important responsibility of the Attorney General, as chief lawyer for state government, to seek to sustain policy choices of the Legislative Assembly—or of the people made through the initiative or referendum processes—if legitimate legal arguments in support of those policy choices can be advanced. That responsibility applies regardless of the Attorney General's—or the Governor's—preferred choice of public policy. To that end, it is the purpose of the State's brief to help ensure, in conjunction with the work of the original and intervening parties, that all legal

1 arguments with substance—including those that counter the analysis or conclusions of DOJ’s
2 earlier opinion—are presented to the court.

3 Beyond the merits of the constitutional issue lies the important question of remedy if the
4 court holds that Oregon’s current marriage statutes violate Article I, section 20, of the Oregon
5 Constitution in any respect. Thus, part of the State’s brief is devoted to analyzing the remedy
6 issue and the proper roles of the judicial and legislative branches in resolving the policy choices
7 that arise if the current policy choice transgresses the limits on lawmaking imposed by Article I,
8 section 20. Immediately issuing marriage licenses to same-sex couples is not the only option. A
9 sudden change in the marriage laws could have disruptive and unforeseen consequences. A
10 better approach—one that is consistent with the Oregon Supreme Court’s constitutional
11 jurisprudence—would give the legislature an opportunity to decide what form of remedial
12 legislation it wants to enact while continuing to enforce the current marriage laws pending the
13 legislature’s decision. The Vermont Supreme Court successfully utilized this approach when it
14 confronted the same problem nearly five years ago. A similar approach should be adopted here
15 if the court holds that Oregon’s current marriage statutes violate Article I, section 20.

16 BACKGROUND

17 I. Summary of plaintiffs’ claims.

18 Plaintiffs are nine gay and lesbian couples¹ “who seek to protect themselves and their
19 children by availing themselves of marriage” and the social and legal incidents of marriage.²
20 Four of the plaintiff couples have received marriage licenses from Multnomah County.³ The
21 other plaintiff couples reside in counties that have declined to issue marriage licenses to same-
22 sex couples.⁴ Plaintiffs acknowledge that “[t]he Oregon statutory code does not permit

23 _____
24 ¹ Two organizations, Basic Rights Oregon and American Civil Liberties Union of Oregon, have
also joined as plaintiffs.

25 ² Complaint, ¶ 5.

26 ³ Complaint, ¶¶ 10, 18, 27, 36.

⁴ Complaint, ¶¶ 41, 46, 54, 64, 73.

1 marriages of same-sex couples.”⁵ They allege that this “has the practical effect of directly and
2 substantially harming all plaintiff couples in that it excludes them from marriage, the social
3 validation that it confers, and the hundreds of rights, responsibilities, benefits, and obligations
4 that it affords.”⁶

5 Each of the four claims for relief alleged in the complaint is premised on the allegation
6 that this “exclusion” constitutes an “unjustified denial of a privilege or immunity based on sexual
7 orientation or gender” in violation of Article I, section 20 of the Oregon Constitution.⁷ Plaintiffs
8 also assert in each claim a violation of the “substantive due process guarantees of the Oregon
9 constitution[.]”⁸

10 **II. Oregon’s marriage laws.**

11 Oregon’s marriage statutes are codified in ORS chapter 106. ORS 106.010 sets out the
12 legal significance of and basic qualifications for marriage. It states: “Marriage is a civil contract
13 entered into in person by males at least 17 years of age and females at least 17 years of age, who
14 are otherwise capable, and solemnized in accordance with ORS 106.150.” Although this section
15 does not state expressly that a marriage must consist of a man and a woman, the reference to
16 ORS 106.150, as well as other statutes that provide context for ORS 106.010, leave no doubt that
17 a marriage license can only be issued to two people who are joined as “husband and wife.”⁹ The

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19 ⁵ Complaint, ¶¶ 111, 118, 126, 134.

20 ⁶ Complaint, ¶ 107.

21 ⁷ Complaint, ¶¶ 113, 120, 127, 135.

22 ⁸ Complaint, ¶¶ 114, 121, 128, 136. Plaintiffs do not identify the constitutional source of this
23 “guarantee”; Oregon courts have not found a substantive due process provision anywhere in the
24 Oregon Constitution. *State v. Moen*, 309 Or. 45, 98, 786 P.2d 111 (1990) (rejecting “substantive
25 due process” claim because “Oregon’s constitution does not contain a due process clause”); *State*
26 *v. Clark*, 291 Or. 231, 235 n. 4, 630 P.2d 810 (1981) (noting that the phrase “due process” “does
not appear in the Oregon Constitution”); *State v. Stroup*, 290 Or. 185, 200, 620 P.2d 1359 (1980)
 (“the Oregon Constitution does not have a due process clause of its own”). *See also* H. Linde,
Without “Due Process”: Unconstitutional Law in Oregon, 49 Or. L. Rev. 125, 145-46 (1970).

⁹ *See, e.g.* ORS 106.150(1) (parties to marriage must declare “that they take each other to be
husband and wife”); ORS 106.041(1) (requirements for marriage license specify that parties are
to join “as husband and wife”).

1 terms "husband" and "wife" as used in the marriage statutes are unambiguous. "Husband"

2 means "a married man," and "wife" means "a married woman."¹⁰ Thus, a civil marriage license

3 can be issued only to a man and a woman.

4 The civil nature of marriage described in ORS chapter 106 is significant. It is a secular

5 relationship that has always been subject to control by the legislature.¹¹ A religious ceremony is

6 not necessary to solemnize a marriage.¹² Marriages in Oregon, at least as established under ORS

7 106.010, are civil and secular in nature.

8 The parties to a civil marriage contract receive, by reason of their status as "married"

9 persons, secular benefits and protections provided by Oregon law. For example, "[i]n any civil

10 or criminal action, a spouse has a privilege to refuse to disclose and to prevent the other spouse

11 from disclosing any confidential communication" between them "during the marriage."¹³

12 Oregon law authorizes the "decedent's surviving spouse" to bring a wrongful death action.¹⁴ A

13 "surviving spouse" has the right of intestate succession and may elect a statutory share of the

14 deceased spouse's estate.¹⁵ Upon dissolution of the marriage, a "spouse" may be entitled to

15 receive money from the other for spousal support or support of the couple's children.¹⁶ The legal

16 status of being "married" in Oregon also affects the administration of several state programs,

17 many of which hinge on determining who qualifies as a "spouse."¹⁷

18 Webster's Third New International Dictionary, 1104, 2614 (unabridged ed. 1993).

19 ¹¹ See *Maynard v. Hill*, 125 U.S. 190, 1 L.Ed. 654, 8 S.Ct. 723 (1888).

20 ¹² See ORS 106.120 (authorizing judges and county clerks to perform marriages).

21 ¹³ ORS 40.255(2).

22 ¹⁴ ORS 30.020.

23 ¹⁵ ORS 112.025; 112.035; 114.105.

24 ¹⁶ ORS 107.105.

25 For example, the Oregon Medical Insurance Pool (OMIP) provides health insurance coverage
26 to persons whose medical conditions do not allow them to obtain coverage in the private sector.
27 The "spouse" of a medically eligible person is entitled to coverage. ORS 735.615(1)(c).
28 Oregon's Family Health Insurance Assistance Program (FHIAP) subsidizes the purchase of
29 health insurance for eligible individuals who meet certain income tests. Eligibility is determined
30 based on family income and family size. See ORS 735.726. A "family" includes an adult and
31 the adult's "spouse." ORS 735.720(2)(b) and (c). Under the Oregon Insurance Code, group

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1 **III. Article I, section 20—analytical framework.**

2 Article I, section 20, of the Oregon Constitution provides:

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

5 Oregon courts previously interpreted this provision to provide the same protection as the
6 federal Equal Protection Clause.¹⁸ In *State v. Clark*,¹⁹ however, the Oregon Supreme Court took
7 a different approach, interpreting Article I, section 20 independently from the case law
8 developed under the federal constitution.²⁰ The first question under the court’s current Article I,
9 section 20 jurisprudence is determining whether the statutes involve a privilege or immunity that
10 is distributed in such a way that disparately affects a “true class.” A true class is one whose
11 members share characteristics that they have apart from the challenged statute itself, *i.e.*, they
12 share “antecedent personal or social characteristics or societal status.”²¹ The level of scrutiny
13 will depend on the nature of the class. At one end of the spectrum are those classes identified by
14 fundamental antecedent personal characteristics like race or gender.²² A statute classifying on

15 health plans are required to treat marriage as a qualifying event that entitles an employee to
16 change enrollment options outside the open enrollment period. Also, group health insurance
17 plans that provide insurance for “dependents” must do so on a nondiscriminatory basis. In other
18 words, if the employer provides coverage for dependents, the dependents of all employees must
19 be covered. See ORS 743.734(6)(b). Dependents are defined to include the “spouse” of a
20 covered employee. ORS 743.730(10). Under Oregon’s workers’ compensation laws, if the
21 death of a covered employee results from an accidental injury, wage replacement benefits are
22 paid to the worker’s surviving “spouse.” ORS 656.204(2).

18 See, e.g., *Sch. Dist. No. 12 v. Wasco County*, 270 Or. 622, 627-28, 529 P.2d 386 (1974).

19 *State v. Clark*, 291 Or. 231.

20 The Supreme Court has recently stated that it will reexamine its construction of a
constitutional provision if it is asked to do so and provided with a principled argument
demonstrating that its prior construction of that provision was inconsistent with the court’s
template for constitutional construction. *Stranahan v. Fred Meyer, Inc.*, 331 Or. 38, 54, 11 P.3d
228 (2000). And the court has also stated that it will construe the constitution to effectuate the
original intentions of the enactors. *Smothers v. Gresham Transfer, Inc.*, 332 Or. 83, 23 P.3d 333
(2001) (illustrating principle). Whether the court would reconsider its section 20 analysis in light
of the intentions of the framers in 1857 and, if so, what the result would be are unresolved.

21 *Hale v. Port of Portland*, 308 Or. 508, 525, 783 P.2d 506 (1989). See also *Clark*, 291 Or. at
240.

22 E.g., *Hewitt v. SAIF*, 294 Or. 33, 43-46, 653 P.2d 970 (1982); *Clark*, 291 Or. at 240-41.

1 those grounds is “suspect” and must, at a minimum, reflect real rather than stereotypical
2 differences between those who receive and those who are denied the benefit in question.²³ At the
3 other end of the spectrum are those distinctions created by the challenged legislation itself, which
4 are not considered classes at all for purposes of Article I, section 20.²⁴ Laws making that type of
5 distinction do not violate Article I, section 20. In between are statutes that disparately affect a
6 “true class” that is not a “suspect” class. Such statutory classifications are subject to “rational
7 basis” scrutiny.²⁵

8 IV. The *Tanner* decision.

9 In *Tanner v. OHSU*,²⁶ the Oregon Court of Appeals held that OHSU’s denial of insurance
10 benefits to unmarried domestic partners of its homosexual employees violated Article I,
11 section 20. The court concluded that (1) unmarried homosexual couples “are members of a true
12 class”;²⁷ (2) this class is a “suspect class” defined by its members’ sexual orientation because
13 homosexuals “have been and continue to be the subject of adverse social and political
14 stereotyping and prejudice”;²⁸ and (3) denying the “privilege” of insurance benefits to the
15 members of this class is not “justified by genuine differences” between the class and those who
16 receive insurance benefits.²⁹

17 In reaching that conclusion, the *Tanner* court explained that the effect of OHSU’s
18 practice of denying insurance benefits to unmarried domestic partners, “while facially neutral as
19 to homosexual couples,” effectively prevented them from obtaining coverage “because, under
20

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22 ²³ *Hewitt*, 294 Or. at 46-47, 49-50.

23 ²⁴ *Sealey v. Hicks*, 309 Or. 387, 397, 788 P.2d 435 (1990); *Clark*, 291 Or. at 240-43.

24 ²⁵ *In re Marriage of Crocker*, 332 Or. 42, 54, 22 P.3d 759 (2001).

25 ²⁶ *Tanner v. OHSU*, 157 Or. App. 502, 971 P.2d 435 (1998).

26 ²⁷ *Id.* at 523.

²⁸ *Id.* at 524.

²⁹ *Id.*

Oregon law, homosexual couples may not marry.”³⁰ The court expressly declined to address “the constitutionality of prohibiting homosexual couples from marrying.”³¹

V. Current status of same-sex “marriages” in Oregon.

Multnomah County is currently the only county in Oregon to begin issuing marriage licenses to same-sex applicants.³² The county took that action after receiving a legal opinion from its county counsel. That opinion concluded that (1) current statutes authorize issuance of marriage licenses to opposite-sex couples only; and (2) those statutes violate Article I, section 20. Others have issued legal opinions on the issue, but the question has not been decided by any Oregon court.

Ordinarily, marriage licenses issued by a county are filed with the Oregon Center for Health Statistics, and registered by the State Registrar of the Center for Health Statistics.³³ Here, the State Registrar has declined to register the licenses issued by Multnomah County to plaintiffs and other same-sex couples, consistent with the advice provided by the Attorney General and directions from Governor Kulongoski.³⁴ A judicial resolution of the constitutional issues presented in this case is necessary to allow the county and the State to proceed with the orderly administration of the marriage license laws and other state programs.

³⁰ *Id.* at 516.

³¹ *Id.* at 516, n.3.

³² Intervenor Benton County was prepared to begin issuing marriage licenses to same-sex couples, but it decided to refrain from issuing *any* marriage licenses pending resolution of this case.

³³ *See* ORS 432.405.

³⁴ That alone is sufficient to create a justiciable controversy between the parties. *See Employment Div. v. Rogue Valley Youth for Christ*, 307 Or. 490, 496, 770 P.2d 588 (1989). Moreover, the nine gay and lesbian couples named as plaintiffs are directly affected by current state law. That is sufficient—in the State’s view—to give them standing.

1 VI. Summary of relevant decisions from other jurisdictions.

2 A. United States Supreme Court decisions.

3 The United States Supreme Court has long recognized that the right to marry is “of
4 fundamental importance for all individuals.”³⁵ The right to marry is, according to the Court,
5 “part of the fundamental right of privacy implicit in the Fourteenth Amendment’s Due Process
6 Clause.”³⁶ Marriage “is an association that promotes a way of life, not causes; a harmony in
7 living, not political faiths; a bilateral loyalty, not commercial or social projects.”³⁷ In *Loving v.*
8 *Virginia*, the Court held that a Virginia statute that made it a crime for a white person to marry a
9 black person violated the Equal Protection Clause.

10 Although the Court has yet to address whether homosexual citizens can enter into a same-
11 sex marriage, its decisions concerning other laws affecting homosexual citizens reflect an
12 attitude that has evolved over time. In a 1986 decision—*Bowers v. Hardwick*³⁸—the Court
13 sustained a Georgia statute that made sodomy between two consenting adults a crime. Justice
14 White, writing for the majority, first stated the Court’s disagreement with the suggestion that the
15 constitutionally-protected right of privacy “extends to homosexual sodomy[.]”³⁹ The Court
16 noted that legal “[p]roscriptions against that conduct have ancient roots.”⁴⁰ Hardwick argued
17 that Georgia’s justification for its statute—“the presumed belief of a majority of the electorate in
18 Georgia that homosexual sodomy is immoral and unacceptable”—was an “inadequate rationale
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20
21 ³⁵ *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978). See also, *Loving v. Virginia*, 388 U.S. 1, 12
22 (1967) (“Marriage is one of the basic civil rights of man, fundamental to our very existence and
23 survival”).

24 ³⁶ *Zablocki*, 434 U.S. at 384. See also, *Loving v. Virginia*, 388 U.S. at 12 (“The freedom to
25 marry has long been recognized as one of the vital personal rights essential to the orderly pursuit
26 of happiness”).

³⁷ *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

³⁸ *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841, 92 L.Ed.2d 140 (1986).

³⁹ 478 U.S. at 190.

⁴⁰ *Id.* at 192.

1 to support the law.”⁴¹ The court’s majority disagreed, stating that the law “is constantly based on
2 notions of morality, and if all laws representing essentially moral choices are to be invalidated
3 under the Due Process Clause, the courts will be very busy indeed.”⁴²

4 Ten years later, in *Romer v. Evans*,⁴³ the Court held that an amendment to Colorado’s
5 constitution which expressly denied homosexuals the protection offered by state anti-
6 discrimination laws violated the Equal Protection Clause. The Court concluded that such a
7 provision was “born of animosity” toward homosexuals, and that it was not rationally related to
8 any legitimate governmental purpose.⁴⁴

9 Last year, in *Lawrence v. Texas*,⁴⁵ the Court expressly overruled *Bowers v. Hardwick*.
10 The Court held in *Lawrence* that a Texas law that made sodomy between two consenting adults
11 of the same sex a crime violated the right to privacy protected by the Due Process Clause.
12 Justice Kennedy, writing for the five-member majority, emphasized that the case “does not
13 involve whether the government must give formal recognition to any relationship that
14 homosexual persons seek to enter.”⁴⁶ Rather, the case involved “two adults who, with full and
15 mutual consent from each other, engaged in sexual practices common to a homosexual
16 lifestyle.”⁴⁷ Those individuals, wrote Justice Kennedy, “are entitled to respect for their private
17 lives. The State cannot demean their existence or control their destiny by making their private
18 sexual conduct a crime.”⁴⁸ *Bowers*, wrote the Court, “was not correct when it was decided, and
19 it is not correct today.”⁴⁹

20 ⁴¹ *Id.* at 196.

21 ⁴² *Id.*

22 ⁴³ *Romer v. Evans*, 517 U.S. 620, 116 S. Ct. 1620, 134 L.Ed.2d 855 (1996).

23 ⁴⁴ *Id.* at 634.

24 ⁴⁵ *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

25 ⁴⁶ *Id.* at 2484.

26 ⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 2484.

Justice O'Connor, concurring in the judgment, asserted that the Texas statute should have been invalidated under the Equal Protection Clause. She noted that Texas could not "assert any legitimate state interest * * * such as * * * preserving the traditional institution of marriage."⁵⁰ Justice O'Connor specifically rejected the notion that "moral disapproval" of homosexuals was "a legitimate state interest" that would be sufficient "to satisfy rational basis review under the Equal Protection Clause."⁵¹

B. Decisions from other states.

Appellate courts in four states have addressed the issue of same-sex marriage. In 1993, the Hawaii Supreme Court concluded in *Baehr v. Lewin*⁵² that (1) the Hawaii constitution does not give same-sex couples a fundamental right to marry; (2) a statute that restricted "marriage" to opposite-sex couples established a gender-based classification; and (3) such a classification is subject to "strict scrutiny" under Hawaii's constitution. The case was remanded for further proceedings. Two justices dissented. They concluded that the statute's classification "is clearly designed to promote the legislative purpose of fostering and protecting the propagation of the human race through heterosexual marriages, and bears a reasonable relationship to that purpose."⁵³

Last year, in *Standhardt v. Superior Court*,⁵⁴ a three-judge panel of the Arizona Court of Appeals unanimously held that (1) the plaintiffs did not have a fundamental right under the Arizona constitution to enter into a same-sex marriage; (2) the constitutionality of Arizona statutes prohibiting same-sex marriages are subject to scrutiny only under a "rational basis" test; (3) the statutes were rationally related to Arizona's legitimate interest in encouraging procreation

⁵⁰ *Id.* at 2487-88 (O'Connor, J., concurring).

⁵¹ *Id.* at 2486.

⁵² *Baehr v. Lewin*, 852 P.2d 44 (Hawaii 1993).

⁵³ *Id.* at 74 (Heen, J., dissenting).

⁵⁴ *Standhardt v. Superior Court*, 77 P.3d 451 (Ariz. App. 2003).

1 and child-rearing within marriage; and (4) the statutes did not violate substantive due process or
2 privacy rights protected under the Arizona or United States constitutions.

3 One month later, in *Goodridge v. Department of Public Health*,⁵⁵ the Massachusetts
4 Supreme Court held—by a vote of four to three—that Massachusetts laws limiting the
5 protections, benefits and obligations of civil marriage to opposite-sex couples “violates the basic
6 premises of individual liberty and equality under law protected by the Massachusetts
7 constitution.”⁵⁶ In formulating a remedy, the court declined to strike down the existing marriage
8 laws: “Eliminating civil marriage would be wholly inconsistent with the Legislature’s deep
9 commitment to fostering stable families and would dismantle a vital organizing principle of our
10 society.”⁵⁷ Instead, the court (1) “construed” civil marriage “to mean the voluntary union of two
11 persons as spouses, to the exclusion of all others”;⁵⁸ and (2) remanded to the trial court for entry
12 of judgment, with entry “to be stayed for 180 days to permit the Legislature to take such action
13 as it may deem appropriate[.]”⁵⁹

14 C. The Vermont approach.

15 In *Baker v. State*,⁶⁰ the Vermont Supreme Court held—unanimously—that excluding
16 same-sex couples from the secular benefits and protections incident to marriage violated the
17 “common benefits” clause of the Vermont constitution.⁶¹ The court declined to decide whether

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19 ⁵⁵ *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).

20 ⁵⁶ *Id.* at 968.

21 ⁵⁷ *Id.* at 969.

22 ⁵⁸ *Id.*

23 ⁵⁹ *Id.* at 970. Earlier this year, the Massachusetts Supreme Court concluded—in response to a
24 request for an advisory opinion from the legislature as permitted in Massachusetts—that a “civil
25 union” statute would also be unconstitutional. *Opinions of the Justices to the Senate*, 802 N.E.2d
26 565, 570 (Mass. 2004).

27 ⁶⁰ *Baker v. State*, 744 A.2d 864 (Vt. 1999).

28 ⁶¹ That provision states: “That government is, or ought to be, instituted for the common benefit,
29 protection, and security of the people, nation, or community, and not for the particular
30 emolument or advantage of any single person, family, or set of persons, who are a part only of
31 that community[.]” Vt. Const., ch. I, art. 7.

1 “the denial of a marriage license operates per se to deny constitutionally-protected rights[.]”⁶²
2 Instead, the court issued a more limited ruling, holding that “plaintiffs are entitled under
3 Chapter I, Article 7, of the Vermont Constitution to obtain the same benefits and protections
4 afforded by Vermont law to married opposite-sex couples.”⁶³ Justice Dooley concurred in the
5 result but disagreed with the majority’s framework for analyzing the Vermont constitution. He
6 expressed his preference for “the general framework adopted by the Oregon courts in *Hewitt* and
7 *Tanner*.”⁶⁴

8 The Vermont justices did not fully agree on the remedy either. The majority noted that a
9 “sudden change in the marriage laws or the statutory benefits traditionally incidental to marriage
10 may have disruptive and unforeseen consequences.”⁶⁵ It declined “to infringe upon the
11 prerogatives of the Legislature to craft an appropriate means” of remedying the constitutional
12 violation.⁶⁶ The majority explained that, “[a]bsent legislative guidelines defining the status and
13 rights of same-sex couples, consistent with constitutional requirements, uncertainty and
14 confusion could result.”⁶⁷ As a result, the court’s mandate was that “the current statutory scheme
15 shall remain in effect for a reasonable period of time to enable the Legislature to consider and
16 enact implementing legislation in an orderly and expeditious fashion.”⁶⁸ The court warned that,
17 if “the benefits and protections in question are not statutorily granted, plaintiffs may petition this
18 Court to order the remedy they originally sought.”⁶⁹ In response to this decision, the Vermont
19 legislature promptly enacted a “civil union” statute that is codified at Vt. Stat. Ann. Tit. 18,
20 §§ 5160-5169 (2003). No further relief from the court has been sought.

21 ⁶² *Id.* at 886.

22 ⁶³ *Id.*

23 ⁶⁴ *Id.* at 893 (Dooley, J., concurring).

24 ⁶⁵ *Id.* at 887.

25 ⁶⁶ *Id.* at 886.

26 ⁶⁷ *Id.* at 887.

⁶⁸ *Id.*

⁶⁹ *Id.*

Justice Johnson concurred with the main holding but dissented from the court's mandate. In her view, "this is a straightforward case of sex discrimination."⁷⁰ She thought the appropriate remedy would be "granting plaintiffs the license they seek."⁷¹ She explained that her dissent "is grounded on the government's limited interest in dictating public morals outside the scope of its police power, and the differing roles of the judicial and legislative branches in our tripartite system of government."⁷²

ARGUMENT

I. Under *Tanner*, plaintiffs may be entitled to the same legal benefits afforded to married couples of the opposite sex, but they do not have a constitutional right to a marriage license.

This court is bound by the Court of Appeals' decision in *Tanner*; the Oregon Supreme Court is not. Under *Tanner*'s Article I, section 20 analysis, ORS 106.010 would be treated as a statute that disparately affects a true class as defined by the members' sexual orientation. That class, under *Tanner*, would be a "suspect" class. The *Tanner* decision left unresolved the question presented here. Resolving this case under the *Tanner* analysis will require the court to (1) define the nature of the "privilege" for purposes of Article I, section 20; and (2) determine whether denying that privilege "may be justified by genuine differences" between opposite-sex couples and same-sex couples.⁷³

On the first issue, courts in other states have usually defined the "privilege" as not just the marriage license itself, but also the "secular benefits and protections" provided under state law to persons who are married.⁷⁴ However, the Arizona Court of Appeals in *Standhardt*

⁷⁰ *Id.* at 905 (Johnson, J., concurring in part and dissenting in part).

⁷¹ *Id.* at 904.

⁷² *Id.* at 898.

⁷³ *Tanner*, 157 Or. App. at 524.

⁷⁴ See *Baker*, 744 A.2d at 870 (noting that the Vermont law denying same-sex couples a marriage license "effectively excludes them from a broad array of legal benefits and protections incident to the marital relation"); *Goodridge*, 798 N.E.2d at 955-56 (describing "some of the statutory benefits conferred by the Legislature on those who enter into a civil marriage").

1 analyzed the constitutional challenges to Arizona's marriage license law as they were presented
2 in that case by focusing on the marriage license itself without addressing the other statutory
3 benefits and protections provided under state law to persons who are married. An Oregon court
4 could follow the Arizona approach. And if the only issue is the license itself—*i.e.*, if all of the
5 benefits and protections incident to marriage are ignored—the court could find that this alone is
6 not a constitutionally-protected “privilege” or “immunity” within the meaning of Article I,
7 section 20, or that limiting the license to opposite-sex couples in order to maintain the traditional
8 institution of “marriage” does not violate the constitution.⁷⁵

9 On the second issue, the *Tanner* court concluded that denying insurance benefits to the
10 class could not be “justified by their homosexuality.”⁷⁶ That conclusion logically applies to
11 most, and perhaps all, of the other secular benefits and protections that are granted to married
12 persons under Oregon law. As applied to the marriage license itself, an Oregon court could
13 follow the Arizona Court of Appeals’ analysis in *Standhardt*. The Arizona court emphasized the
14 “history of the law’s treatment of marriage as an institution involving one man and one
15 woman,”⁷⁷ and what it found to be the state’s “legitimate interest in encouraging procreation and
16 child rearing within the marital relationship.”⁷⁸

17 The dissenting justices in the Massachusetts case reached similar conclusions. Justice
18 Cordy—joined by two other justices—explained that the Massachusetts legislature could
19 rationally decide that limiting marriage to opposite sex couples serves “the state’s interest in
20 promoting and supporting heterosexual marriage as the social institution that it has determined
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22 ⁷⁵ The Massachusetts Supreme Court held that denying a marriage license by itself results in an
23 unconstitutional “stigma of exclusion.” *Opinions of the Justices*, 802 N.E.2d at 570. Whether
24 denying a marriage license *per se* imposes a “stigma of exclusion” in Oregon, or that such a
“stigma” amounts to a denial of a constitutionally-protected “privilege” or “immunity” under
Oregon law, are issues that have not been presented in any case.

25 ⁷⁶ *Tanner*, 157 Or. App. at 524.

26 ⁷⁷ *Standhardt*, 77 P.3d at 460.

⁷⁸ *Id.* at 463-64.

1 best normalizes, stabilizes, and links the acts of procreation and child rearing.”⁷⁹ Although the
2 majority opinion in that case—and other courts—disagree with that approach, an Oregon court
3 could reach a similar conclusion.

4 Because the Oregon Supreme Court is not obliged to follow *Tanner*, it could choose to
5 revisit some of the basic premises of the *Tanner* decision. For example, it could find that ORS
6 106.010 does not disparately affect a “true class” at all for purposes of Article I, section 20, or
7 that the class itself is not a “suspect” class. The “originalist” approach that the court has applied
8 in recent cases could lead the court to reconsider its entire method of analysis. The court might
9 disagree with the Court of Appeals in *Tanner* and find that a suspect class can be based only on
10 “immutable” characteristics.⁸⁰ The court might then find—perhaps depending on the nature of
11 the evidence presented—that sexual orientation is not an “immutable” characteristic.⁸¹ And
12 applying rational basis review, the court could agree with the views expressed by Justice Cordy
13 in his *Goodridge* dissent.

14 Justice Cordy noted the “significant” advancement in the “rights, privileges and
15 protections afforded to homosexual members of our community in the last three decades.”⁸² He
16 concluded that further “incremental responses to rapidly evolving scientific and social
17 understanding” should proceed through the legislative process; they were not constitutionally-
18 required under the rational basis test.⁸³ The Oregon Supreme Court could reach a similar

19 ⁷⁹ *Goodridge*, 798 N.E.2d at 1001-02 (Cordy, J., dissenting).

20 ⁸⁰ See *Hewitt*, 294 Or. at 45 (“a classification is ‘suspect’ when it focuses on ‘immutable’
21 personal characteristics”).

22 ⁸¹ This, of course, is a controversial issue that has been the subject of substantial debate in
23 sociological and scientific literature. See Simon LeVay, *The Sexual Brain* (MIT Press 1991);
24 Dean Hamer & Peter Copeland, *The Science of Desire: The Search for the Gay Gene and the*
25 *Biology of Behavior* (Simon & Schuster 1993); Scott L. Hershberger, “A Twin Registry Study of
26 *Male and Female Sexual Orientation*,” 2 *Journal of Sex Research* 212 (1997); J.G. Benedict,
Gary R. VandenBos, Mary Beth Kenkel & Warren Throckmorton, “*Special Section: Responding*
to Sexual Orientation Issues—Initial Empirical and Clinical Findings Concerning the Change
Process for Ex-Gays,” 33 *Professional Psychology: Research & Practice* 242 (2002).

⁸² *Goodridge*, 798 N.E.2d at 1004 (Cordy, J., dissenting).

⁸³ *Id.*

1 conclusion. Ultimately, as the Attorney General's opinion emphasized, how the Oregon
2 Supreme Court will resolve these issues "is hardly free from doubt[.]"⁸⁴

3 In light of *Tanner*, a reasonable approach would be to follow the lead of the Vermont
4 Supreme Court in *Baker v. State* if the court holds that Oregon's current marriage statutes violate
5 Article I, section 20. As described above, the Vermont court entered a limited ruling, holding
6 that (1) the plaintiff same-sex couples are entitled to receive the same benefits and protections
7 afforded to married opposite-sex couples; (2) the legislature should have an opportunity to craft
8 remedial legislation; and (3) pending further legislative action, it was not necessary to decide
9 whether the marriage license statute itself operates to deny constitutionally-protected rights.
10 This court should issue a similar ruling in this case if it finds an Article I, section 20 violation.

11 **II. Extending the marriage license law to same-sex couples is not the only remedy if the**
12 **court holds that Oregon's marriage statutes violate Article I, section 20.**

13 Attributing the legal incidents of marriage to same-sex couples raises significant
14 questions of public policy, issues that should be addressed by elected policymakers in the first
15 instance. Various options may be available, such as a "civil union" statute comparable to the
16 Vermont system, or other forms of legislation.⁸⁵ Any remedy will have fiscal, social, and
17 administrative consequences that should be considered by elected policymakers in the first
18 instance.

19 The court's role should be to provide the legal framework for a remedy that is crafted by
20 the legislature in the first instance. If the court determines that Article I, section 20 requires
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22 ⁸⁴ For the sake of brevity—and because this court is bound by *Tanner*—defendants will not
23 provide further elaboration on other arguments that might be presented to the Supreme Court in
24 support of the current statutory scheme. Defendants reserve the right to pursue on appeal the
arguments presented by intervenors and/or the analysis in *Standhardt* and the Massachusetts
dissenting opinions.

25 ⁸⁵ Governor Kulongoski has publicly stated his intent to "lead a fight in the next legislative
26 session for an anti-discrimination statute." (3/19/04 press release). The Governor has expressed
support for a "civil union" system, based on his belief that same-sex couples "should have all of
the state-sanctioned rights and responsibilities that extend to heterosexual couples." (*Id.*).

1 Oregon to attribute the legal incidents of marriage to same-sex couples in any respect, it will
2 need to fashion a remedy that is consistent with the legislature's constitutional authority to
3 legislate on matters of public policy. In *Hale v. Port of Portland*,⁸⁶ the Oregon Supreme Court
4 acknowledged that the remedy for an Article I, section 20 violation may not always be an
5 extension of the "privilege" to the plaintiff class. The court explained that finding an Article I,
6 section 20 violation "leaves an issue whether to strike down the special privilege or to extend it
7 beyond the favored class." In *Hewitt v. SAIF*,⁸⁷ the court addressed whether it has any authority
8 to go beyond invalidating a statute after determining that it violates Article I, section 20. The
9 majority concluded that it could attempt to discern the legislative purpose manifest in the statute
10 to determine whether it was appropriate to extend the coverage of the statute or to extinguish the
11 benefit provided: "we first examine the legislative purpose in providing benefits under the
12 challenged statute; we then resolve what the legislature would have done if faced with the invalid
13 statute."⁸⁸

14 Justice Peterson dissented. In his view, judicial extension of a statute to remedy an
15 Article I, section 20 violation involves "the vexing separation of powers question implicit in the
16 extension-invalidation controversy."⁸⁹ Justice Peterson explained that "[t]he solution enacted by
17 the majority is only one of several actions the legislature might take after this law is nullified.
18 There are other possible solutions to the problem, each solution having significant fiscal and
19 sociological consequences. If we do nothing but discharge our constitutionally-appointed task
20 and nullify the offending statute, the legislature, when it convenes in January, 1983, will
21 undoubtedly consider the problem."⁹⁰

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23 ⁸⁶ *Hale v. Port of Portland*, 308 Or. 508, 525, 783 P.2d 506 (1989).

24 ⁸⁷ *Hewitt v. SAIF*, 294 Or. 33, 653 P.2d 970 (1982).

25 ⁸⁸ *Hewitt*, 294 Or at 51.

26 ⁸⁹ *Hewitt*, 294 Or. at 54-55 (Peterson, J. dissenting; citing Note, *Extension versus Invalidation of Underinclusive Statutes: A Remedial Alternative*, 12 Colum.J.L. & Soc. Probs. 115 (1975)).

⁹⁰ *Hewitt*, 294 Or. at 55 (Peterson, J. dissenting).

1 Whenever a court attempts to “resolve what the legislature would have done” if it had
2 known that its statute was constitutionally defective, the court is effectively engaging in a
3 legislative function.⁹¹ The Oregon Constitution clearly provides that the legislative power
4 resides with the legislature, and that the courts are not empowered to exercise that legislative
5 function.⁹² In light of these limitations on judicial authority, a court should only contemplate
6 “repairing” a constitutionally defective statute when it is abundantly clear what the legislative
7 choice would be.

8 In *Hewitt*, the legislative choice *was* abundantly clear—at least to the majority of the
9 court—because of the nature of the “privilege” at issue. Either both genders were eligible for the
10 workers’ compensation payments at issue in *Hewitt*, or neither was. The court examined
11 evidence from the legislative record to demonstrate that the Legislative Assembly had, in fact,
12 expressed support for extending the “privilege” of receiving workers’ compensation death
13 benefits to men instead of withdrawing it entirely from men and women.⁹³

14 Here, it is not abundantly clear what the legislature would have done. There is no
15 evidence in any legislative record indicating what the legislature would have done if it is known
16 that the policy choice it made in defining “marriage”—a definition that has existed virtually
17 unchanged since statehood—resulted in an unconstitutional denial of privileges to same-sex
18 couples. It seems unlikely that the legislature would have eliminated “marriage” altogether.

21 ⁹¹ See *Foster v. Goss*, 180 Or. 405, 408, 168 P.2d 589, 175 P.2d 794 (1947) (“the court has no
22 legislative powers and is not authorized to supply deficiencies in a statute”); *Union Pac. R.R. Co.*
23 *v. Anderson*, 167 Or. 687, 697, 120 P.2d 578 (1941) (“the court is not authorized to extend the
language of the law beyond its natural meaning to accomplish salutary ends, for that would be to
legislate”).

24 ⁹² Or. Const. Art. III, section 1. See *State v. Rudder/Webb*, 137 Or. App. 43, 48, 903 P.2d 398
25 (1995), *aff’d*, 324 Or. 380 (1996) (“under our constitutional system of government, the
legislative, executive and judicial departments are required to function exclusively within their
respective spheres.”) See also ORS 174.010 (providing that the office of the judge is to declare
what is in the terms of a statute and not to insert what has been omitted).

26 ⁹³ *Hewitt*, 294 Or. at 47-49.

1 Thus, judicial nullification of the marriage license statute is not an acceptable remedy because
2 that would mean that *nobody* could get a marriage license in Oregon until the legislature acts.

3 Extending the marriage license laws to include same-sex couples assumes that the
4 Oregon Legislature would have taken that approach if the legislature knew that ORS 106.010
5 was unconstitutional. That assumption is unwarranted.⁹⁴ This is not an “either/or” choice
6 comparable to the legislative choice at issue in *Hewitt*. The legislature might have taken a
7 variety of approaches. One option would be to amend existing laws to ensure that the legal
8 incidents of “marriage” are made available to same-sex couples. The legislature might opt to
9 eliminate or reduce the legal benefits currently provided to married persons. Or it could choose a
10 combination, extending some benefits to same-sex couples and eliminating other benefits
11 altogether. Other options—like the Vermont “civil union” statute—could be crafted that could
12 satisfy constitutional requirements. Rewriting the statute to authorize county clerks to issue
13 marriage licenses to those who would not be entitled to receive them under the current statutes is
14 not the only option. An examination of remedies adopted by other state legislatures reveals a
15 variety of approaches other than an extension of existing marriage laws to same-sex couples.⁹⁵
16 Oregon’s legislature should have the opportunity to consider policy options in the first instance.

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21 ⁹⁴ Multnomah County Counsel’s opinion concluded: “It is inconceivable that the legislature,
22 given the choice, would refuse to recognize all marriages rather than authorizing counties to
23 issue marriage licenses to heterosexual as well as gay or lesbian couples. Thus, the appropriate
24 remedy is extending marriage licenses to all couples regardless of sexual orientation.” Opinion
25 of Multnomah County Counsel, dated March 2, 2004 at 5. With all due respect, those are not the
26 only choices. It is not inconceivable to the State that the legislature might choose to adopt a
“civil union” statute similar to Vermont or craft another remedy.

⁹⁵ As of May, 2001, thirty-six states had adopted “defense of marriage” statutes patterned after
the federal Defense of Marriage Act. *See Goodridge*, 798 N.E.2d at 990 (Cordy, J., dissenting).
Vermont crafted a “civil union” statute, and Massachusetts is reportedly considering a
constitutional amendment that would ban same-sex marriage but allow civil unions. No state
simply extended its existing marriage statute to include same-sex couples.

1 **III. If the court holds that plaintiffs have been unconstitutionally denied the benefits of a**
2 **civil marriage, it should follow the Vermont approach in fashioning a remedy.**

3 In *Baker*, the Vermont Supreme Court concluded that “the continued exclusion of same-
4 sex couples from the benefits incident to a civil marriage license under Vermont law” violates
5 the Vermont constitution.⁹⁶ The court thus found “a constitutional obligation to extend to
6 plaintiffs the common benefit, protection, and security that Vermont law provides to opposite-
7 sex married couples.”⁹⁷ The court noted that the state “could do so through a marriage license,”
8 but that was not the only option.⁹⁸

9 As a result, the court declined to grant plaintiff’s request for “injunctive and declaratory
10 relief designed to secure a marriage license[.]”⁹⁹ Instead, as noted above, the court kept the
11 current statutory scheme in effect for a reasonable period of time to give the Vermont legislature
12 an opportunity to consider and enact remedial legislation. That approach is consistent with the
13 Oregon Supreme Court’s Article I, section 20 jurisprudence, and avoids the “vexing separation
14 of powers question” noted by Justice Peterson in his *Hewitt* dissent. It also avoids the
15 uncertainty and disruption to state laws and programs that hinge on defining who is “married”
16 and who is not.¹⁰⁰ If this court finds a constitutional violation, it should follow the lead of the
17 Vermont Supreme Court in fashioning a remedy.¹⁰¹

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⁹⁶ *Baker*, 744 A.2d at 886.

21 ⁹⁷ *Id.*

22 ⁹⁸ *Id.* at 887.

23 ⁹⁹ *Id.* at 886.

24 ¹⁰⁰ Some of those programs are described in note 18, above. A search for the word “spouse” or
25 “marriage” in the Oregon Revised Statutes reveals that hundreds of existing laws could be
26 affected.

¹⁰¹ The next regular session of the Legislative Assembly is scheduled to begin January 10, 2005.
ORS 171.010. The court should give the legislature a reasonable opportunity to craft any
necessary remedial legislation during that session, with a deadline of July 1, 2005 for enactment.

1 **IV. County officials are not authorized to declare ORS 106.010 unconstitutional and**
2 **extend its application to same-sex couples pending final resolution of this case.**

3 Multnomah County began issuing marriage licenses to same-sex couples based on a
4 belief that it had a constitutional obligation to ignore the statutory requirements even before a
5 court ruled on the issue. That belief was mistaken. Declaring a statute enacted by the legislature
6 to be “unconstitutional” is a power that is ordinarily conferred on the courts.¹⁰² For that reason,
7 it is generally accepted that public officials, state agencies, and local governments do not have
8 the authority to decide for themselves that a statute is unconstitutional.¹⁰³ That is consistent with
9 the general principle that a statute “is presumed to be constitutional” until declared invalid by a
10 court.¹⁰⁴

11 Oregon courts have recognized a limited exception to this general rule. In *Cooper v.*
12 *Eugene Sch. Dist. No. 4J*,¹⁰⁵ the Superintendent of Public Instruction revoked the teaching
13 certificate of a teacher who violated a state statute that prohibited public school teachers from
14 wearing religious dress at work. The teacher contended that the statute violated her
15 constitutional right to freely exercise her religion. The Superintendent argued on appeal that he
16 had no choice but to revoke the certificate because he lacked the authority to decide the
17 constitutional question. The Oregon Supreme Court disagreed, explaining that the

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19 ¹⁰² See Or. Const., Art. III, § 1 (separation of powers); Art. VII (Amended) (judicial power). See
also, *Wallace v. International Ass’n*, 155 Or. 652, 662, 62 P.2d 1090 (1937) (courts have
20 authority to declare statute invalid “if the act is clearly unconstitutional”).

21 ¹⁰³ See *Johnson v. Robison*, 415 U.S. 361, 368 (1974) (Harlan, J., concurring) (“Adjudication of
the constitutionality of congressional enactments has generally been thought beyond the
22 jurisdiction of administrative agencies”); *Oestereich v. Selective Service Bd.*, 393 U.S. 233, 242
(1968) (same); *Hoh Corp. v. Motor Vehicle Ind. Lic. Bd.*, 736 P.2d 1271, 1275 (Hawaii 1987)
23 (agency “generally lacks power to pass upon constitutionality of a statute. The law has been
clear that agencies may not nullify statutes”); *Bare v. Gorton*, 526 P.2d 379, 381 (Wash. 1974)
24 (en banc) (“An administrative body does not have authority to determine the constitutionality of
the law it administers; only the courts have that power”).

25 ¹⁰⁴ *Tompkins v. District Boundary Board*, 180 Or. 339, 350, 177 P.2d 416 (1947). See also,
Miles v. Veatch, 189 Or. 506, 528, 220 P.2d 511, 221 P.2d 905 (1950) (“There is a presumption
that every legislative act is constitutional”).

26 ¹⁰⁵ *Cooper v. Eugene Sch. Dist. No. 4J*, 301 Or. 358, 723 P.2d 298 (1986).

1 Superintendent's view was based on a "misconception that constitutional law is exclusively a
2 matter for the courts."¹⁰⁶ As the court noted, the Superintendent "himself holds a constitutional
3 office * * * and must satisfy himself that he conducts it in accordance with the Constitution."¹⁰⁷
4 Those statements, however, were made only in the context of addressing three jurisdictional
5 issues that "the Court of Appeals passed over in silence"¹⁰⁸ Those issues were, "first, why the
6 school district is a party to this proceeding; second, what was before the Superintendent for
7 decision in a contested case; and third, whether the case is moot."¹⁰⁹ The court decided those
8 jurisdictional issues before reaching the merits, ultimately finding that the statute, properly
9 interpreted, did not violate either the Oregon or the United States constitutions.

10 In *Employment Div. v. Rogue Valley Youth for Christ*,¹¹⁰ the Employment Division
11 assessed unemployment compensation taxes against Rogue Valley Youth for Christ (Rogue
12 Valley), a religious youth organization. Rogue Valley contended that it was exempt from taxes
13 because it was no different from a church. The Employment Division contended on appeal that
14 the legislature could not constitutionally grant a tax exemption to a "church" but deny it to other
15 religious organizations that did not meet the statutory definition of a "church." The Court of
16 Appeals dismissed on jurisdictional grounds, finding that the Employment Division was seeking
17 "a purely advisory opinion concerning the constitutionality of the statute."¹¹¹

18 The Oregon Supreme Court disagreed, finding that, even though the Employment
19 Division may have believed that the statute was unconstitutional, the agency had nevertheless
20 "attempted to force Rogue Valley to pay taxes which Rogue Valley denies owing. This is an
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¹⁰⁶ 301 Or. at 364.

23 ¹⁰⁷ *Id.* at 364, n. 7.

24 ¹⁰⁸ *Id.* at 360.

25 ¹⁰⁹ *Id.* at 361.

26 ¹¹⁰ 307 Or. 490.

¹¹¹ *Id.* at 495 (citing Court of Appeals' opinion, 87 Or. App. at 576).

1 ‘actual controversy.’”¹¹² The court stated—citing *Cooper*—that the Employment Division “must
2 administer the law in accordance with constitutional principles, and must enforce its statutory
3 obligations. If a statute tells an agency to do something that a constitution forbids, the agency
4 should not do it.”¹¹³ As in *Cooper*, that statement was made in the context of deciding whether
5 the case presented a justiciable controversy.

6 *Cooper* and its progeny do not mean that public officials in Oregon are free to ignore
7 statutes that they believe may subsequently be declared unconstitutional. The issue arose in
8 *Cooper* and *Rogue Valley Youth for Christ* in the context of deciding whether a controversy over
9 the constitutionality of the statute at issue was justiciable in the Supreme Court. Moreover, the
10 issue arose in both cases in the context of adjudicatory proceedings before a state agency. Those
11 cases—properly construed—mean that state agencies acting in a quasi-judicial adjudicatory role
12 have the authority to decide constitutional questions.

13 In other contexts, there is a tension between a public official’s duty to enforce the policy
14 choices made by the legislative branch or the people, and the official’s duty to comply with the
15 state and federal constitutions. In cases where the resolution of that conflict is clear—where a
16 prior court decision has made it indisputably clear that the statute requires the official to “do
17 something that the constitution forbids,” for example—the official’s duty to comply with the
18 constitution is paramount. That does not mean that public officials are free to ignore a statute
19 where, as here, there are multiple uncertainties about the constitutional validity of the statute.
20 With all due respect to county counsel’s opinion, *Tanner* does not make it indisputably clear that
21 Oregon’s marriage license statute is unconstitutional. The Court of Appeals expressly declined
22 to address that issue in *Tanner*, and the Oregon Supreme Court has never addressed that issue.

23
24 ¹¹² *Id.* at 496.

25 ¹¹³ *Id.* at 495. See also, *Nutbrown v. Munn*, 311 Or. 328, 346, 811 P.2d 131 (1991) (“Although it
26 is an authority to be exercised infrequently, and always with care, Oregon administrative
agencies have the power to declare statutes and rules unconstitutional.”); *Outdoor Media
Dimensions, Inc. v. State of Oregon*, 331 Or. 634, 662, 20 P.3d 180 (2001) (same).

1 Nor has the Oregon Supreme Court approved the *Tanner* analysis. The courts in other states that
2 have addressed the issue have arrived at different conclusions. Finally, it is possible that the
3 legislature could remedy any constitutional infirmity without extending ORS 106.010 to include
4 same-sex couples.

5 Thus, a finding that ORS 106.010 is unconstitutional is not a certainty, and the remedy
6 for any constitutional violation is a policy choice reserved to the legislature in the first instance.
7 How the legislature would choose to address this situation is unclear. Given this uncertainty,
8 public officials in Oregon must follow existing statutory requirements under the circumstances
9 presented in this case until there is a definitive court ruling. The final ruling in this case should
10 make it clear that county officials are not free to ignore statutory requirements based on their
11 belief that the statute is unconstitutional.

12 CONCLUSION

13 This litigation and the events that triggered it are in the public spotlight locally and across
14 the nation. Although the issue of same-sex marriage stirs powerful and competing political
15 currents, that issue in the first instance is one of law. Resolving whether Article I, section 20
16 invalidates Oregon's current policy choice as to marriage and, if it does, clarifying what range of
17 new lawmaking choices remain for the Legislative Assembly or the people, is a responsibility of
18 utmost importance for the Oregon judiciary.

19 DOJ has earlier provided its best professional prediction, while by no means asserting
20 certainty, of how the Supreme Court of Oregon would analyze and decide the issue of the
21 constitutionality of Oregon's current marriage statutes. Even if that prediction ultimately proves
22 correct, however, that does not mean that same-sex couples are immediately entitled to receive a
23 marriage license under ORS 106.010, to have the licenses issued to same-sex couples by
24 Multnomah County recognized as legally valid, or that county officials can ignore statutory
25 requirements based on their belief that a statute will ultimately be declared unconstitutional. A
26 proper allocation of responsibility between the judicial and legislative branches, in the

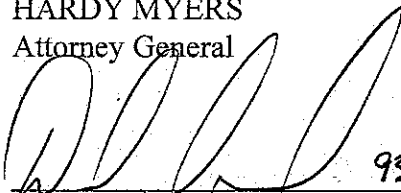

1 application of Article I, section 20, requires in this case a reasonable opportunity for the
2 Legislative Assembly to determine how it wants to revise Oregon's marriage policy if the current
3 policy is invalidated by judicial determination.

4 Accordingly, for all the foregoing reasons, defendants' motion for summary judgment
5 should be granted.

6 DATED this 5 day of April, 2004.

7 Respectfully submitted,

8 HARDY MYERS
9 Attorney General

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CERTIFICATE OF SERVICE

I certify that on April 5, 2004, I served the foregoing DEFENDANTS'

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT upon the parties hereto by the method indicated below, and addressed to the following:

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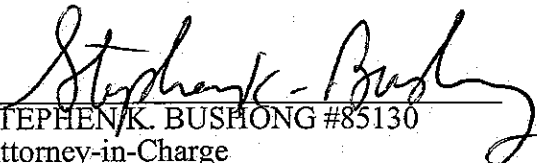
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