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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' REPLY IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

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

Intervenor-Defendants.

5 INTRODUCTION

6 This case presents an important constitutional issue, one that is in the public spotlight locally
7 and across the nation. All parties agree that prompt resolution of this issue is in the public interest.
8 The merits of the constitutional issue have been fully briefed by the parties. The State has urged the
9 court to decide the constitutional issue in a way that leads to entry of a final judgment that may be
10 appealed to a higher court without raising jurisdictional obstacles that could prevent a final
11 resolution of the issue on appeal. If the court finds a constitutional violation, it must address the
12 question of remedy in order to enter a final, appealable judgment.

13 Plaintiffs contend that there is only one permissible remedy: extending Oregon's marriage
14 statutes to include marriage licenses for same-sex couples. Plaintiffs suggest that the remedy
15 proposed by the State—patterned after the remedy ordered by the Vermont Supreme Court in
16 comparable circumstances—is not permissible under Oregon law and may not even be *considered*
17 by this court. It is true that the remedy suggested by the State has not been adopted in any prior
18 Article I, section 20 case in Oregon. But it is also true that the constitutionality of Oregon's
19 marriage statutes—and determining whether those statutes should extend to same-sex couples—has
20 never been addressed in any previous case. And the Oregon legislature has never had an
21 opportunity to confront the important public policy questions presented by same-sex marriage.

22 The legislature should have that opportunity if Oregon's marriage statutes are found to
23 violate Article I, section 20 in any respect. The court should consider the remedy proposed by the
24 State as one of the available options if it finds a constitutional violation. Plaintiffs' arguments to the
25 contrary should be rejected.

ARGUMENT

I. Resolving the constitutional issue may require the court to address the issue of remedy.

The parties agreed at the outset of this case that the constitutional issue would be addressed first.¹ The court indicated earlier this week that it intended to focus its ruling on the constitutional issue only.² The State fully supports that approach. Resolving “the constitutional issue” could require the court to address the question of remedy. If the court holds that Oregon’s marriage statutes do not violate Article I, section 20, there would be no need to address the remedy issue.

But if the court finds a violation of Article I, section 20, it should promptly address the question of remedy. In *Hewitt v. SAIF*, the Oregon Supreme Court decided on a remedy as part of its ruling that the statute at issue violated Article I, section 20³. In *Tanner v. OHSU*, the Court of Appeals explained that the trial court found a constitutional violation “and entered an order enjoining the state from denying group insurance benefits to unmarried domestic partners of its homosexual employees.”⁴ Every court addressing the constitutionality of a state’s marriage laws decided on the remedy as part of its resolution of the constitutional issue if a violation was found.⁵ Deciding the constitutionality of Oregon’s marriage statutes *without* addressing remedy if a violation is found unnecessarily prolongs the proceedings and raises jurisdictional obstacles to a final resolution on appeal, as explained in the State’s response to cross-motions for partial summary judgment filed earlier this week.

¹ See Affidavit of Charles E. Fletcher.

² See April 13, 2004 letter from the court.

³ *Hewitt v. SAIF*, 294 Or. 33, 50, 653 P.2d 970 (1982) (stating, after finding the statute unconstitutional: “We turn now to the issue of the appropriate remedy”).

⁴ *Tanner v. OHSU*, 157 Or. App. 502, 505, 971 P.2d 435 (1998). The Court of Appeals held that “the trial court correctly entered judgment in favor of plaintiffs” on the constitutional issue. *Id.* at 525.

⁵ See *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 968 (Mass. 2003) (after deciding constitutional issue: “We consider next the plaintiffs’ request for relief”); *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999) (“It remains only to determine the appropriate means and scope of relief compelled by this constitutional mandate”).

Moreover, if the court finds a constitutional violation without also addressing the question of remedy, the parties to this litigation—and local governments and public officials throughout Oregon—will be uncertain as to how to proceed. If the statute is unconstitutional but no remedy is specified, is the State Registrar required to file and register the marriage licenses issued to same-sex couples in Multnomah County? Are other counties free to fashion their own remedies? Or should other counties and public officials continue to abide by statutory requirements pending further proceedings in this court or on appeal? These uncertainties can be avoided by a prompt resolution of the question of remedy if the court finds a constitutional violation. If a violation is found, the court should either address the remedy issue as part of its ruling on the constitutional question, or schedule a hearing to resolve the issue of remedy in the very near future.⁶

II. If the court finds an Article I, section 20 violation, it should follow the lead of the Vermont Supreme Court in fashioning a remedy.

Plaintiffs argue that a remedy patterned after the remedy ordered by the Vermont Supreme Court in *Baker* is not permissible under Oregon remedies law. They point out that the Oregon Supreme Court in *Hewitt* described “two remedial alternatives”: “either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or * * * extend the coverage of the statute to include those who are aggrieved by the exclusion.”⁷ But the “either/or” choice described in *Hewitt* does not define the entire range of permissible constitutional remedies.

The *Hewitt* court decided that extending the statute beyond the “favored” class was a permissible remedy; it did not hold that it was the *only* permissible remedy. This case presents unique circumstances that make it appropriate for the court to consider other ways to remedy any constitutional violation. The traditional concept of civil marriage as a contract between couples of

⁶ It is unclear whether further briefing on the remedy issue is necessary. The State and the plaintiffs have already briefed the issue; if further briefing and argument is necessary, the court should set a schedule for prompt resolution of the issue.

⁷ Plaintiffs’ Opposition, p. 8, citing *Hewitt*, 294 Or. at 52.

1 the opposite sex is currently the law in every state, and it has been the law in Oregon since
2 statehood. Unlike the policy choice addressed in *Hewitt*, the Oregon legislature has *never* addressed
3 the policy implications of extending the marriage statutes to same-sex couples. The current
4 statutory limitation of civil marriage to opposite-sex couples has existed essentially unchanged
5 since 1854.⁸ There is no evidence that the 1854 Territorial Assembly considered same-sex marriage
6 as another option. No Legislative Assembly after 1854 considered the policy implications of same-
7 sex marriage. If such a fundamental change in public policy is to be made in Oregon, the legislature
8 should have the first opportunity to address the policy issues.

9 Plaintiffs argue that “the State offers no support for its assertion that Oregon remedies law
10 permits the Court to abdicate its responsibility to the legislature.”⁹ But the State is not suggesting
11 that the court “abdicate its responsibility”; the State is suggesting that the court follow the lead of
12 the Vermont Supreme Court in crafting a remedy. And the State *did* offer support for this assertion:
13 the Vermont Supreme Court’s decision in *Baker*. There, the court rejected the “abdication”
14 argument presented by Justice Johnson in her concurring opinion. Instead, the court found that the
15 “prudent” course would be to adopt a remedy that relies on elected policymakers to craft remedial
16 legislation in the first instance. The same considerations apply here. Oregon courts may not have
17 considered other remedial options in other Article I, section 20 cases, but they have not addressed
18 the subject of same-sex marriage, either. If a change in public policy toward marriage and same-sex
19 couples is required by Article I, section 20, the legislature should be given an opportunity to
20 confront the policy implications in the first instance.

21 **III. Remedy is not beyond the agreed-upon scope of this case, as plaintiffs acknowledge.**

22 The parties’ case management agreement to seek a resolution of the constitutional issue *first*
23 does not mean that they agreed to postpone resolution of the question of remedy if a constitutional
24 violation is found. The parties’ agreement is evidenced by a transcript of the statements made “on

25 ⁸ See “An Act Relating to Marriage and Divorce,” adopted by the Oregon Territorial Assembly in
26 1854.

⁹ Plaintiffs’ Opposition, p. 9.

1 the record” before Judge Kantor;¹⁰ an email summarizing the essence of the parties’ agreement;¹¹
2 and an agreed press release announcing the terms of the agreement.¹² Nowhere in the documents
3 evidencing the parties’ agreement is there any mention of an “agreement” to (1) resolve the
4 constitutional issue through motions for *partial* summary judgment; (2) defer consideration of
5 remedy until a later date; or (3) seek entry of a limited ORCP 67B judgment on fewer than all of the
6 claims. Indeed, the fact that plaintiffs devoted a substantial portion of their opening brief to the
7 issue of remedy demonstrates plaintiffs’ acknowledgment that the issue of remedy is ripe for
8 resolution at this stage of the proceedings if the court finds a constitutional violation.

9 In deciding on a remedy, the court should consider *all* of the possibilities addressed by the
10 parties, not just the remedy proposed by plaintiffs. The remedy suggested by the State—patterned
11 after the remedy ordered by the Vermont Supreme Court in *Baker*—maintains the current marriage
12 statutes pending consideration of remedial legislation by the Oregon legislature at its next regular
13 session.¹³ If adopted, that remedy would require Multnomah County to comply with the current
14 marriage statutes. The county acknowledges that those statutes do not permit it to issue marriage
15 licenses to same-sex couples. Plaintiffs do not dispute that point. Thus, if the court holds that the
16 marriage statutes violate Article I, section 20 in any respect, and if it adopts the “Vermont” remedy
17 as suggested by the State, it should order Multnomah County to comply with the current statutes in
18 order to implement that remedy. The question of the county’s “authority” to decide the
19 constitutional issue for itself was presented in the State’s opening brief to demonstrate that there is
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22 ¹⁰ Fletcher Aff., Ex. 1.

23 ¹¹ Fletcher Aff., Ex. 2.

24 ¹² Fletcher Aff., Ex. 3.

25 ¹³ Plaintiffs moved to strike the State’s proposed “legislative remedy” defense from the pleadings.
26 The State asserted this as an affirmative defense to put the parties and the court “on notice” that the
State intended to request a “Vermont” remedy if the court finds a constitutional violation. If the
court agrees with plaintiffs that this remedy is not available under Oregon law or is not otherwise
worthy of consideration, the court can simply decline to order that remedy. There is no reason to
strike the defense from the State’s pleadings.

1 no constitutional obstacle to adopting a remedy patterned after the remedy ordered by the Vermont
2 Supreme Court in *Baker*.

3 If the court believes that further briefing and argument is needed to resolve the issue of
4 remedy (including the "authority" issue as it arises in that context), the State requests a hearing on
5 or about April 30, 2004, so that "the constitutional issue" can be fully resolved and appealed to the
6 Oregon appellate courts.¹⁴

7 CONCLUSION


8 The constitutional issue presented by Multnomah County's decision to issue marriage
9 licenses to same-sex couples has been thoroughly briefed by the parties. There is no reason to
10 further delay resolving that issue. If the court finds that Oregon's marriage statutes violate Article I,
11 section 20 in any respect, the court should promptly address the question of remedy as part of its
12 resolution of "the constitutional issue."

13 The State urges the court to follow the lead of the Vermont Supreme Court in fashioning a
14 remedy if a constitutional violation is found. Accordingly, the State's motion for summary
15 judgment should be granted.

16 DATED this 14th day of April, 2004.

17 Respectfully submitted,

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26 ¹⁴ The State also reserves the right, consistent with the parties' agreement, to seek immediate
resolution of the "authority" issue after April 23 if any county decides to begin or continue issuing
marriage licenses to same-sex couples.

CERTIFICATE OF SERVICE

I certify that on April 14, 2004, I served the foregoing DEFENDANTS' REPLY 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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