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3  
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  
Governor of the State of Oregon, HARDY  
20 MYERS, in his official capacity as Attorney  
General of the State of Oregon; GARY  
21 WEEKS, in his official capacity as Director of  
the Department of Human Services of the  
State of Oregon; and JENNIFER  
22 WOODWARD, in her official capacity as  
State Registrar of the State of Oregon,  
23

24 Defendants,

25 and  
26

Case No. 0403-03057

DEFENDANTS' RESPONSE TO CROSS-  
MOTIONS FOR PARTIAL SUMMARY  
JUDGMENT



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

4 Intervenor-Defendants.  
5

## 6 INTRODUCTION

7 Plaintiffs, intervenor-plaintiff Multnomah County, and intervenor-defendants Defense of  
8 Marriage Coalition, *et al.* (DOMC) have filed motions for partial summary judgment, seeking a  
9 resolution of only some of the claims for relief. The State has filed a motion for summary  
10 judgment on all claims. The State believes that all claims should be resolved, and a final,  
11 appealable judgment should be entered. A piecemeal resolution of the claims presented in this  
12 case could unnecessarily prolong resolution of the core legal issue that is presented in all  
13 claims—whether Oregon’s marriage statutes violate Article I, section 20 in any respect.

14 This court should decide that core legal issue first. That will effectively resolve all  
15 claims for relief.<sup>1</sup> If the court finds no Article I, section 20 violation, all claims should be  
16 dismissed. If the court holds that Oregon’s marriage statutes violate Article I, section 20 in any  
17 respect, the court must then address the issue of remedy in order to fully resolve any of the  
18 claims. In fashioning a remedy, the court should follow the lead of the Vermont Supreme Court.  
19 The Vermont court recognized that extending the legal incidents of marriage to same-sex couples  
20 presents important public policy issues that are properly resolved by the state legislature in the  
21 first instance. It ordered the continued enforcement of Vermont’s existing marriage laws until  
22 the Vermont legislature could enact remedial legislation. If Oregon’s marriage statutes are found  
23 to violate the Oregon Constitution, this court should adopt a similar approach, and require  
24 Multnomah County to comply with current statutory requirements until the legislature has an  
25 opportunity to enact remedial legislation.

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<sup>1</sup> The only possible exceptions are certain counterclaims asserted by DOMC, as discussed below.







1 not “declare the rights of the parties,” and it may not terminate the controversy or remove the  
2 uncertainty that gave rise to this case.

3 Whether the controversy is terminated will depend in part on how the court rules on the  
4 constitutional issue. If the court holds that Oregon’s marriage statutes do not violate Article I,  
5 section 20, that should terminate the entire controversy.<sup>6</sup> But if the court holds that the statutes  
6 violate Article I, section 20 in any respect, the court must address the question of remedy,  
7 declaring the rights of the parties sufficient to terminate this controversy. Failing to address the  
8 question of remedy would continue the confusion and uncertainty that presently exists. Plaintiffs  
9 would not know whether they are immediately entitled to receive a marriage license, and if so,  
10 from whom. State agencies would not know whether they are obligated to recognize the validity  
11 of same-sex marriage licenses issued by Multnomah County pending resolution of the appeal.  
12 Multnomah County would not know whether the remedy it has selected—extending ORS  
13 106.010 to apply to same-sex couples—is legally appropriate, or whether a different remedy  
14 applies. Other counties will be uncertain as to how to proceed. And the expected appeal from  
15 such a ruling might be subject to dismissal on jurisdictional grounds, as explained below.

16 **C. A resolution of fewer than all claims could create jurisdictional obstacles on**  
17 **appeal.**

18 If the court decides only the motions for partial summary judgment on the constitutional  
19 issue as presented in the declaratory judgment claim, and enters a limited judgment pursuant to  
20 ORCP 67B on that claim, an appellate court could dismiss the resulting appeal on jurisdictional  
21 grounds. There are several potential jurisdictional obstacles that could be presented on appeal if  
22 that course of action is followed.

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24  
25 <sup>6</sup> Presumably, Multnomah County would enforce ORS 106.010 and cease issuing marriage  
26 licenses to same-sex couples if the court holds that the marriage statutes do not violate Article I,  
section 20. *See Alto v. State Fire Marshal*, 319 Or. 382, 395, 876 P.2d 774 (1994) (court  
assumed “that the defendant state agency will, in the absence of an injunction, follow the law as  
a court decides it”).



Under Oregon law, “an ORCP 67B judgment cannot be entered unless it fully adjudicates at least one claim or the interests of at least one party.”<sup>7</sup> An appellate court could find that a limited ORCP 67B judgment that does not fully declare the rights and duties of the parties is insufficient to fully adjudicate the declaratory judgment claim.<sup>8</sup> Moreover, some of the plaintiff couples asserting that claim reside in counties other than Multnomah County. They apparently seek a declaration that they are entitled to receive marriage licenses from counties that are not parties to this proceeding. Thus, an appellate court could find that declaratory relief was inappropriate because it affects the “rights of persons not parties to the proceeding.”<sup>9</sup> Finally, an appellate court could find that the court lacked subject matter jurisdiction to decide only the declaratory relief claim because the APA provides the exclusive remedy for at least some of the plaintiff couples.<sup>10</sup>

**D. Entering final judgment on all claims would serve the public interest.**

The public interest would not be served by a limited judgment that raises the possibility of jurisdictional obstacles that could prevent an appellate court from resolving this case on the merits. A prompt resolution of the core constitutional issue is in the public interest. Such a resolution effectively decides all claims asserted by plaintiffs and by intervenor-plaintiff Multnomah County. There is no reason to postpone resolution of those claims.

DOMC has asserted three counterclaims that appear to challenge the legal validity of same-sex marriage licenses previously issued by Multnomah County, the County’s constitutional and charter authority to issue those licenses, and the procedures used by the County in reaching its decision. Depending on the nature of the court’s ruling, those claims could be effectively

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<sup>7</sup> *Lesch v. DeWitt*, 317 Or. 585, 589, 858 P.2d 872 (1993).

<sup>8</sup> ORCP 67B; ORS 28.060.

<sup>9</sup> ORS 28.110.

<sup>10</sup> *See Lucas v. ODOT*, 168 Or. App. 593, 597, 4 P.3d 745 (2000) (“If plaintiffs can obtain a decision \* \* \* through the administrative process, subject to judicial review under the Administrative Procedures Act, that is their exclusive remedy; they would be precluded from seeking a declaratory judgment”).



1 resolved and dismissed as moot. Alternatively, if DOMC's counterclaims are not effectively  
2 resolved by the court's ruling, a limited judgment on all claims alleged by plaintiffs and by  
3 intervenor-plaintiff Multnomah County should be entered, with DOMC's remaining  
4 counterclaims to be resolved at a later date.

5 **II. The court should carefully analyze whether plaintiffs have been denied any**  
6 **privileges or immunities within the meaning of Article I, section 20, and then define**  
7 **the scope of the privilege.**

8 The constitutional issue has been fully analyzed in the opening briefs on summary  
9 judgment. Resolving that issue will require the court to carefully analyze whether Oregon's  
10 marriage statutes deny any constitutionally-protected "privileges or immunities," and then to  
11 define the privileges or immunities that are at issue in this case. The parties have suggested a  
12 variety of approaches.

13 Plaintiffs describe the privilege as "marriage," excluding "religious marriage."<sup>11</sup>

14 Plaintiffs generally include within the privilege of marriage the "social recognition" that comes  
15 with marriage, along with "hundreds of rights, responsibilities, benefits, and obligations" that are  
16 legally tied to marriage.<sup>12</sup> According to plaintiffs, certain plaintiff couples have suffered social  
17 harms resulting from the denial of the privilege of marriage, including the absence of any "social  
18 recognition of their relationship"; the "stigmatization" and "likely harassment" that their children  
19 may have to endure; and the "stigma of inferiority" that some same-sex couples feel.<sup>13</sup> The  
20 specific legal harms asserted include (1) denial of employer-sponsored health benefits (plaintiffs  
21 Burke, Farrera, and Sheklow);<sup>14</sup> (2) denial of retirement fund beneficiary rights (plaintiff  
22 Kiefer);<sup>15</sup> (3) inability to assert the privilege not to testify against a spouse (plaintiffs Potter and  
23 Moen);<sup>16</sup> and (4) the potential ineligibility for surviving spouse death benefits (plaintiffs Potter

24 <sup>11</sup> Plaintiffs' Memorandum, p. 21 ("marriage is a privilege for purposes of Article I, section 20").

25 <sup>12</sup> *Id.* at 21.

26 <sup>13</sup> *Id.* at 11.

<sup>14</sup> *Id.* at 12.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 12-13.



1 and Moen).<sup>17</sup> In addition, the State Registrar has declined to file and register the marriage  
2 licenses that Multnomah County issued to four of the plaintiff couples.<sup>18</sup>

3 DOMC analyzes the issue differently. According to DOMC, marriage itself is *not* a  
4 privilege or immunity protected by Article I, section 20. DOMC suggests that plaintiffs are  
5 attempting to use the marriage license statutes set forth in ORS chapter 106 as “legal shorthand”  
6 for “tangible” rights, responsibilities, benefits and obligations that are defined elsewhere in the  
7 law.<sup>19</sup> In DOMC’s view, if plaintiffs’ claim is that they are being unconstitutionally denied the  
8 benefits granted to married couples under specific statutes outside ORS chapter 106, “they  
9 should be attacking those benefit-granting statutes in particular, not ORS chapter 106.”<sup>20</sup>

10 The State’s opening brief noted that appellate decisions in other states “have usually  
11 defined the ‘privilege’ as not just the marriage license itself, but also the ‘secular benefits and  
12 protections’ provided under state law to persons who are married.”<sup>21</sup> The State noted, however,  
13 that in one case, the Arizona Court of Appeals focused on the marriage license itself without  
14 analyzing the other legal benefits provided by law to married persons.<sup>22</sup> The Massachusetts  
15 Supreme Court appears to be the only court to address the social “stigma of exclusion” issue.<sup>23</sup>  
16 However, that issue arose in the context of deciding whether a “civil union” statute being  
17 considered by the Massachusetts legislature would violate the Massachusetts constitution.

18 Here, the court should carefully analyze whether there is a constitutionally-protected  
19 “privilege” at issue in this case, and if so, define the scope of that privilege in determining  
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21 <sup>17</sup> *Id.* at 13. Plaintiffs Potter and Moen also “had to go out of their way” to ensure that they are  
22 eligible for other federal benefits; they do not assert that they have been *denied* those benefits.

23 <sup>18</sup> *Id.* at 15-16.

24 <sup>19</sup> DOMC’s memorandum, p. 30.

25 <sup>20</sup> *Id.* at 31.

26 <sup>21</sup> State’s Memorandum, p. 13, citing *Baker v. State*, 744 A.2d 864, 870 (Vt. 1999); *Goodridge v.*  
*Department of Public Health*, 798 N.E.2d 941, 955-56 (Mass. 2003).

<sup>22</sup> *Id.* at 13-14, citing *Standhardt v. Superior Court*, 77 P.3d 451, 460 (Ariz. App. 2003).

<sup>23</sup> See State’s Memorandum, p. 14, n. 75, citing *Opinions of the Justices to the Senate*, 802  
N.E.2d 565, 570 (Mass. 2004).



1 whether Oregon's marriage laws violate Article I, section 20. Defining the privilege at issue  
2 should also help the court craft an appropriate remedy if the court finds a constitutional violation.

3 **III. If the court finds an Article I, section 20 violation, the court should give the**  
4 **legislature an opportunity to enact remedial legislation.**

5 Plaintiffs contend that, under the Oregon Supreme Court's decision in *Hewitt v. SAIF*,<sup>24</sup>  
6 "[t]he only permissible and appropriate remedy \* \* \* is to allow same-sex couples and different  
7 sex couples to marry on equal terms[.]"<sup>25</sup> *Hewitt* does not mandate that remedy in this case. As  
8 discussed in the State's opening brief, the remedy in *Hewitt* involved an "either/or" choice:  
9 either males received the same workers' compensation benefits that the State afforded to  
10 females, or neither gender receive those benefits. The court ordered that the benefits should be  
11 extended to males based on evidence from the legislative record indicating that the legislature  
12 would have extended the benefits to males if it had known that it could not offer those benefits to  
13 females only.

14 The *Hewitt* court emphasized that it had "never addressed the issue of remedy in a case  
15 like the present."<sup>26</sup> It determined only that courts "are empowered to extend underinclusive  
16 statutes,"<sup>27</sup> not that extension was required in every case. The court concluded, based on the  
17 legislative record in that case, that "[e]xtension of benefits *in this case* advances the purpose of  
18 the legislation and comports with the overall statutory scheme."<sup>28</sup>

19 That conclusion does not mean that extending the privilege at issue is the required  
20 remedy in *every* Article I, section 20 case, or that extending the "privilege" of marriage is  
21 required in this case. Unlike *Hewitt*, there is no evidence from the legislative record that such an  
22 extension advances the purpose of the marriage laws and comports with the overall statutory

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24 <sup>24</sup> *Hewitt v. SAIF*, 294 Or. 33, 653 P.2d 970 (1982).

25 <sup>25</sup> Plaintiffs' Memorandum, p. 36.

26 <sup>26</sup> *Id.* at 53.

27 <sup>27</sup> *Id.* at 52.

28 <sup>28</sup> *Id.* at 53 (emphasis added; footnote omitted).



1 scheme. Nor is the choice of remedy a simple “either/or” choice, comparable to the remedy at  
2 issue in *Hewitt*.

3 Instead, as the Vermont Supreme Court noted in declining to extend Vermont’s marriage  
4 statutes to include same-sex couples, there may be “a number of potentially constitutional  
5 statutory schemes[.]”<sup>29</sup> The options mentioned by the Vermont court

6 “include what are typically referred to as ‘domestic partnership’ or  
7 ‘registered partnership’ acts, which generally establish an  
8 alternative legal status to marriage for same-sex couples, impose  
9 similar formal requirements and limitations, create a parallel  
licensing or registration scheme, and extend all or most of the same  
rights and obligations provided by the law to married partners.”<sup>30</sup>

10 The Vermont court declined to “endorse any one or all” of those options.<sup>31</sup> The majority opinion  
11 also rejected the dissent’s assertion “that granting the relief requested by plaintiffs—an  
12 injunction prohibiting defendants from withholding a marriage license—is our ‘constitutional  
13 duty.’”<sup>32</sup> The majority explained that such an assertion

14 “appears to assume that we hold plaintiffs are entitled to a  
15 marriage license. We do not. We hold that the state is  
16 constitutionally required to extend to same-sex couples the  
17 common benefits and protections that flow from marriage under  
Vermont law. That the state could do so through a marriage  
license is obvious. But it is not required to do so[.]”<sup>33</sup>

18 Instead of ordering the immediate extension of Vermont’s marriage license laws to same-  
19 sex couples, the Vermont Supreme Court held “that the current statutory scheme shall remain in  
20 effect for a reasonable period of time to enable the Legislature to consider and enact  
21 implementing legislation in an orderly and expeditious fashion.”<sup>34</sup> The court explained that such

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23 <sup>29</sup> *Baker*, 744 A.2d at 886.

24 <sup>30</sup> *Id.*

25 <sup>31</sup> *Id.* at 887.

26 <sup>32</sup> *Id.*

27 <sup>33</sup> *Id.*

28 <sup>34</sup> *Id.*



1 a remedy was “prudent” in order to “avoid the uncertainty that might result during the period  
2 when the Legislature is considering potential constitutional remedies[.]”<sup>35</sup>

3 If this court holds that Oregon’s marriage statutes violate Article I, section 20, the same  
4 considerations apply with equal force. *Hewitt* does not mandate the remedy that plaintiffs seek.  
5 As in *Baker*, the “prudent” course of action would be to give the legislature a reasonable  
6 opportunity to consider potential constitutional remedies during its next regular session.

7 **IV. If the court holds that Oregon’s marriage statutes violate Article I, section 20, the**  
8 **court should not issue an advisory opinion on the constitutionality of “civil unions”**  
9 **or other statutory remedies that might be considered by the legislature.**

10 Plaintiffs suggest that extending the “privilege” of marriage is the only constitutionally-  
11 permissible remedy. In their view, a “civil union” statute or other statutory remedies will  
12 amount to a “separate but equal” system that is not really equal.<sup>36</sup> If the court finds an Article I,  
13 section 20 violation, the State urges the court to adopt a more cautious approach to remedy,  
14 comparable to the “prudent” course of action ordered by the Vermont Supreme Court in *Baker*.  
15 There, the court declined to decide whether any of the specific remedies adopted in other states  
16 would be constitutional, noting that, “significant benefits [were] omitted” from some of the laws  
17 enacted in other states.<sup>37</sup>

18 At this juncture, it would be premature for this court to rule in advance on the  
19 constitutionality of any particular remedy that might be enacted by the legislature. An Oregon  
20 court “cannot render advisory opinions.”<sup>38</sup> Until the legislature acts, it is impossible to know  
21 whether remedial legislation might be unconstitutionally “stigmatizing,” whether the legislature  
22 would craft a “civil union” system for same-sex couples that is completely “separate” from the  
23

24 <sup>35</sup> *Id.* at 887, n. 15.

25 <sup>36</sup> See Plaintiffs’ Memorandum, p. 38.

26 <sup>37</sup> *Id.* at 887.

<sup>38</sup> *Brown v. Oregon State Bar*, 293 Or. 446, 449, 648 P.2d 1289 (1982).



1 current marriage laws,<sup>39</sup> or whether any “separate” system would not be sufficiently “equal” to  
2 satisfy the Oregon Constitution.

3 **CONCLUSION**

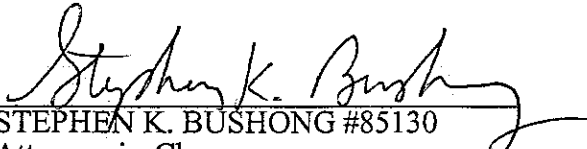
4 This case presents an important constitutional question. The State has attempted to assist  
5 the court’s resolution of that question by describing the governing analytical and procedural  
6 framework, summarizing the pertinent authorities, and addressing the legal arguments that have  
7 been presented by plaintiffs, DOMC and the County. A prompt resolution of the core  
8 constitutional issue, resulting in a final, appealable judgment, is in the public interest. If the  
9 court finds an Article I, section 20 violation, it is also in the public interest to give the elected  
10 policymaking body—the Oregon legislature—an opportunity to consider in the first instance any  
11 necessary remedial legislation at its next regular session. The Vermont Supreme Court’s  
12 approach in fashioning a remedy strikes the proper balance, maintaining the existing marriage  
13 statutes for a reasonable period of time in order to give policymakers an opportunity to act.

14 This court should adopt a similar approach if it finds that Oregon’s current marriage  
15 statutes violate Article I, section 20 in any respect. Accordingly, for all the foregoing reasons,  
16 the State’s motion for summary judgment should be granted.

17 DATED this 12~~th~~ day of April, 2004.

18 Respectfully submitted,

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20 Attorney General

21   
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26 <sup>39</sup> For example, the legislature might choose to make a “civil union” license available to both  
same-sex couples and opposite-sex couples.



CERTIFICATE OF SERVICE

I certify that on April 12, 2004, I served the foregoing DEFENDANTS' RESPONSE TO CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT upon the parties hereto by the method indicated below, and addressed to the following:

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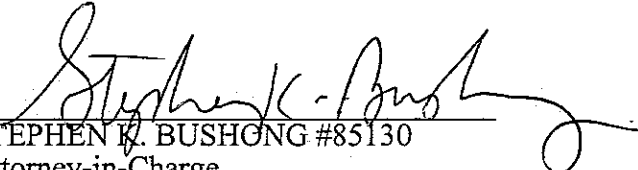
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