



**CIRCUIT COURT OF THE STATE OF OREGON**

**FOURTH JUDICIAL DISTRICT**

**MULTNOMAH COUNTY COURTHOUSE**

**1021 S.W. FOURTH AVENUE**

**PORTLAND, OR 97204-1123**

**FRANK L. BEARDEN**  
**JUDGE**

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April 20, 2004

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RE: Mary Li, et al v. State of Oregon, et al, 0403-03057

Counsel:

The procedure followed by the parties and the court in this case was extraordinary, but not unprecedented. There were very compelling reasons for stipulating to a shortened time frame for filing briefs and responses and replies and a rather narrow issue was selected in order to expedite appeal for a final determination.

The issue to be resolved was whether or not ORS 106. et seq which governs marriage between opposite sex couples effectively operates to deny same sex domestic partners certain rights and privileges granted by Article I, section 20 of the Oregon


Constitution.

This is an issue that has been developing for a long time; it has been addressed by a few other states and it cannot be fully resolved without the legislative process working along the guidelines set by the courts. There is a rich and sacred history of marriage running up against the more recent recognition and awareness of diversity issues that so far have been addressed piecemeal in the courts and legislatures in the states and by the federal courts and Congress.

My interpretation of compliance with Article I, sec. 20 of the Oregon Constitution would allow either a civil union or extension of ORS Chapter 106 privileges to same sex couples. An appellate court may disagree, but a Supreme Court ruling is needed for legal finality and public debate and legislative action may be required to carry out the court's mandate. This is the reason I have ordered Multnomah County, intervenor party to the action, to cease issuing marriage licenses to same sex couples to allow the appellate court to affirm the proper course of action to take.

While circumstances have combined to cause an expedited hearing on the initial constitutional issue, there also needs to be time for reflection and debate so that the laws or initiatives that are passed coincide rather than conflict with each other and are clear and unambiguous in their meaning and effect. It is hoped this opinion will contribute to the dialog that must occur openly and with reasoned minds.

Very truly yours,

  
FRANK L. BEARDEN  
Circuit Judge

FLB:cc

c: File

IN THE STATE OF OREGON  
FOR THE COUNTY OF MULTNOMAH

MARY LI and REBECCA KENNEDY; )  
STEPHEN KNOX, M.D., and ERIC )  
WARSHAW, M.D.; KELLY BURKE and )  
DOLORES DOYLE; DONNA POTTER )  
and PAMELA MOEN; DOMINICK VERTI )  
and 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, )

Plaintiffs,)

and )

MULTNOMAH COUNTY, )

Intervenor-Plaintiff,)

vs. )

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

Defendants,)

No. 0403-03057

**OPINION AND ORDER**

)  
 vs. )  
 )  
 DEFENSE OF MARRIAGE COALITION, )  
 CECIL MICHAEL THOMAS, NANCY JO )  
 THOMAS, DAN MATES, and DICK )  
 OSBORNE, )  
 )  
 Intervenor-Defendants.)

Plaintiffs are the American Civil Liberties Union (ACLU), Basic Rights Oregon (BRO) and nine same-sex couples. Four of the couples were married after Multnomah County started issuing licenses to same-sex couples on March 3, 2004: Mary Li and Rebecca Kennedy, Dr. Stephen Knox and Dr. Eric Warshaw, Kelly Burke and Dolores Doyle, and Donna Potter and Pamela Moen. Four other couples applied for marriage licenses either in Lane County or Benton County and were denied: Sally Sheklow and Enid Lefton, Irene Farrera and Nina Korican, Walter Frankel and Curtis Kiefer, and Julie Williams and Coleen Belisle. The remaining couple, Dominick Vetri and Douglas DeWitt, have not applied for a license but wish to have the option to marry in the future. Plaintiffs are represented by Lynn Nakamoto and Kenneth Choe.

Defendants are the State of Oregon and the following public officials: Governor Theodore Kulongoski, Attorney General Hardy Myers, Director of the Department of Human Services of Oregon, Gary Weeks, and State Registrar, Jennifer Woodward. Defendants are represented by Stephen Bushong from the Department of Justice.

Intervenor-plaintiff, Multnomah County, is represented by Agnes Sowle.

Intervenor-defendants, Defense of Marriage Coalition, Cecil Michael Thomas, Nancy Jo Thomas, Dan Mates, and Dick Osborne are represented by Kelly Clark, Kristian Roggendorf, Herbert G. Grey, Kelly E. Ford, Raymond M. Cihak, Pamela S. Hediger, Kevin G. Clarkson, Jordan Lorence, and Benjamin W. Bull.

Amici curiae for the plaintiffs are the Juvenile Rights Project, Inc., the National Association of Social Workers, the Oregon Chapter of the National Association of Social Workers, Open Adoption & Family Services, Inc., the Oregon Psychological Association, and

Portland Parents, Families and Friends of Lesbians and Gays. They are represented by Mark Johnson and Beth A. Allen.

The present case arrives before this court on an expedited basis. Some concerns have been voiced about a “rush to judgment,” but circumstances compel this court to shorten the normal progression of this lawsuit to resolve what has turned out to be a rather unsettling and divisive issue which arose quite suddenly and basically without warning.

At the present time, Multnomah County is issuing marriage licenses to same sex couples and opposite-sex domestic couples, Benton County is refusing to issue marriage licenses to any couples and the State Registrar is refusing to recognize a marriage performed in Multnomah County with appropriate documentation while the State acknowledges marriages performed in foreign countries that have no equivalent documentation.

Plaintiffs’ amended complaint asserts the same constitutional argument for each of their claims: Article I, section 20 of the Oregon Constitution prohibits the unjustified denial of privilege or immunity based on sexual orientation and gender. Plaintiffs allege four claims for relief: 1) Pursuant to the Uniform Declaratory Judgments Act (UDJA), all plaintiffs seek a declaration that ORS Chapter 106 violate Article I, section 20 of the Oregon Constitution; 2) Pursuant to the UDJA, all plaintiffs seek a declaration that the State’s refusal to file and register same-sex marriages that are licensed and solemnized in Oregon violates the Oregon Constitution; 3) In the alternative to their second claim for relief and pursuant to Oregon’s Administrative Procedures Act (APA), plaintiffs Li and Kennedy, Knox and Warshaw, Burke and Doyle, and Potter and Moen seek judicial review for the final agency orders issued by defendants Weeks and Woodward that proscribed the filing and registering of same-sex marriage records; 4) In the alternative to all claims for relief and only if there is no adequate remedy for the first three claims, all plaintiffs seek a petition for a writ of mandamus for relief against Defendant Woodward compelling her to perform her “non-discretionary duty” to file and register same-sex marriage records licensed and solemnized in Oregon. Plaintiffs’ Amended Complaint, ¶ 113-114, 120, 125, 134, 135.

## STANDING

Plaintiffs argue that they have standing in the following ways: 1) ORS Chapter 106 which does not permit same-sex marriage has the practical effect of “directly and substantially harming” all plaintiff couples because “it excludes them from marriage, the social validation that it confers, and hundreds of rights, responsibilities, benefits and obligations that it affords.” 2) Benton County’s refusal to issue marriage licenses to same-sex couples has the practical effect of “directly and substantially harming plaintiffs Frankel and Kiefer, Williams and Belisle, and Vetri and DeWitt.” 3) Lane County’s refusal to issue marriage licenses to same sex couples has the practical effect of “directly and substantially harming plaintiffs Sheklow and Lefton, Farrera and Korican, and Vetri and DeWitt.” 4) As a result of Governor Kulongoski’s directions and Attorney General Myers’ counsel, defendants Weeks and Woodward have issued final agency orders refusing to file and register marriage licenses. These actions have the practical effect of “directly and substantially harming” plaintiff couples by denying them “the benefit of ensuring that their marriage records are publicly available for official confirmation of the existence of their marriages, a benefit that they need to eliminate any doubt about the validity of their marriages.” Plaintiffs’ First Amended Complaint, ¶¶ 107-109.

Plaintiffs must demonstrate that they meet both statutory and constitutional requirements for standing. If they fail to meet the threshold requirement of statutory standing, then the analysis ends there. *Utsey v. Coos County*, 176 Or App 524, 544 (2001). Even if plaintiffs can prove that they fulfill the statutory standing requirement, they must also show constitutional standing to litigate. *Id.* at 544.

Legislation cannot abrogate the constitutional requirement of standing. *Id.* The constitutional requirements of standing follow a two-step inquiry. There must be 1) adverse parties to the case and 2) a showing that the court’s decision has a practical effect on the plaintiff. *Brumnett v. Psychiatric Service Review Board*, 315 Or 402, 405-406 (1993). The practical effect requirement must exist at every phase of the litigation. *Utsey*, 176 Or App at 540. Oregon’s courts have not specifically defined “practical effect.” Rather, they have provided examples of what does and, more commonly, what does not constitute a practical effect. *Id.* at 542.

Mere difference of opinion is insufficient to create a justiciable controversy. *Eacret v. Holmes*, 215 Or 121, 125 (1958). Also, Oregon's courts consistently hold that the simple assertion that a law has been violated does not make a justiciable controversy. *Utsey*, 176 Or App at 542. "Without some demonstration that the challenged agency action will have a practical impact on the person challenging it, such a case amounts to no more than a request for an unconstitutional advisory opinion." *Id.*

The first claim for relief is brought pursuant to ORS 28.010 to 28.160, collectively known as the Uniform Declaratory Judgments Act. Plaintiffs allege that ORS Chapter 106 and the State's refusal to file and register same-sex couples' marriage licenses violate Article I, section 20 of the Oregon Constitution.

With respect to standing, ORS 28.020 provides:

Any person...whose rights, status or other legal relations are affected by a constitution, statute, municipal charter, ordinance...may have determined any question of construction or validity arising under any such instrument, constitution, statute, municipal charter, ordinance...and obtain a declaration of rights, status, or other legal relations thereunder.

Plaintiffs must allege injury on a legally recognizable interest beyond an abstract interest in the proper application of the law. *Poddar v. Clatsop County*, 167 Or App 162, 170 (2000), citing *Budget Rent-A-Car v. Multnomah Co.*, 287 Or 93, 95 (1979). Standing has been denied when there has been no effect or the effect on plaintiff is speculative. *Gruber v. Lincoln Hospital District*, 285 Or 3, 7 (1979). Here, the plaintiffs do not merely disagree with the law but also demonstrate that their exclusion from the legal and economic benefits of marriage will affect them in more than an abstract manner.

Plaintiffs meet the constitutional standing requirements as to all claims for relief. First, plaintiffs and defendants have adverse interests. The unmarried same-sex couples want marriage licenses to be available to them and married same-sex couples want their marriage licenses filed and registered. The State, however, is contending that same-sex marriage is not permitted and is not processing these licenses. Second, the court's decision to either grant or deny plaintiffs' claims for relief will have a practical effect on them. The State's actions have the most impact on

the four couples who received marriage licenses from Multnomah County and subsequently married, and whose marriages appear to be in a legal limbo. The State's refusal to file and register their licenses effectively invalidates their marriages and thus denies them the benefits that they are seeking.

## ANALYSIS

### First Claim for Relief

ORS 106.010 reads, "Marriage is a civil contract entered into in person by males at least 17 years of age and females at least 17 years of age, who are otherwise capable, and solemnized in accordance with ORS 106.150." Admittedly, this provision by itself does not expressly limit marriage to a union *between* a man and a woman. However, other provisions in ORS Chapter 106 demonstrate that this is the intention. For instance, ORS 106.041 provides that pursuant to ORS 106.120, persons or religious organizations can "join together as husband and wife the persons named in the license." Also, ORS 106.150 provides that the couple "take each other to be husband and wife." In addition, Oregon case law has referred to marriage as a union between a man and a woman. *Heisler v. Heisler*, 152 Or 691, 693 (1936). Therefore, an overall reading of the marriage statutes and the case law demonstrates that marriage in this state is intended solely to take place between a man and a woman. Indeed, plaintiffs have conceded to this interpretation from the start.

The crux of plaintiffs' claims is that the marriage statutes' limitation to opposite-sex couples contravenes Article I, section 20, which provides, "No law shall be passed granting to any citizen or class of citizens privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."

The issue that defines this case is the denial of the benefits ("privileges") and legal protections of marriage to same-sex couples. Similarly, when same-sex couples in Vermont initiated a lawsuit seeking a declaration that the refusal to issue marriage licenses violated the marriage statutes and the Vermont Constitution, the Vermont Supreme Court defined the issue as one involving access to benefits:

May the state of Vermont exclude same-sex couples from the benefits and protections that its laws provide to opposite-sex married



couples? That is the fundamental question we address in this appeal, a question that the Court well knows arouses deeply-felt religious, moral, and political beliefs. Our constitutional responsibility to consider the legal merits of issues properly before us provides no exception for the controversial case. The issue before the Court, moreover, does not turn on the religious or moral debate over intimate same-sex relationships but rather on the statutory and constitutional basis for the exclusion of same-sex couples from the secular benefits and protections offered married couples.”

*Baker v. State*, 744 A2d 864, 867 (1999).

First, we must ask whether the challenged state action involves a “privilege or immunity.” The Oregon Supreme Court offered this definition: “Whenever a person is denied some advantage to which he or she would be entitled but for a choice made by a government authority, Article I, section 20 requires that the government decision to offer or deny the advantage be made ‘by permissible criteria and consistently applied.’ ” *City of Salem v. Bruner*, 299 Or 262, 268-69 (1985) (quoting *State v. Freeland*, 295 Or 367, 377 (1983)). Plaintiffs allege that there are at least 500 rights, benefits, and responsibilities that marriage triggers.<sup>1</sup> Moreover, their amended complaint incorporates several pages detailing the legal hurdles and the emotional upheaval that the plaintiff couples have encountered because of their inability to access the benefits and protections that are contingent on marriage. Some examples of these difficulties include the expense of having to resort to legal representation to assert legal rights that married couples

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<sup>1</sup>As an illustration of some of the numerous benefits of marriage, one can look to the statutes governing the Public Employee Retirement System (PERS), which offers benefits that favor married couples. For instance, ORS 238.390, which governs death benefits under PERS, follows intestacy rules. Therefore, if a PERS member fails to designate a beneficiary and dies, his or her spouse is first in line. Another example is found in ORS 238.465 which permits a court order to attach to PERS benefits as a result of a property settlement agreement, to the extent that money is owed to a spouse or former spouse of a PERS member.

Other examples of the statutory benefits of marriage include: 1) Rights in a wrongful death action, ORS 30.020; 2) Testimonial privileges, ORS 40.255; 3) Joint tenancy property rights (including the right to survivorship), ORS 105.920; 4) The surviving spouse’s right to elective share, ORS 114.105; 5) Intestacy rights, ORS 112.025, ORS 112.035; 6) The surviving spouse’s rights to stay in the family home and get financial support from the probate estate, ORS 114.005-114.085.

would automatically have; the necessity of adoption proceedings designed to create legal relationships with children, and the inability to benefit from employer-sponsored health insurance.

As an example, Plaintiff Frankel's declaration describes other advantages:

Married couples enjoy legal protections to which Curtis and I want access on equal terms. Among these are right of a surviving spouse to be the beneficiary of a deceased spouses' pension and Social Security benefits; the right of a well spouse to visit a sick spouse in the hospital; the right of a well spouse to make medical decisions for a sick spouse; and the rights of inheritance and exemption from certain taxation that spouses enjoy. As we age our need for these legal protections have grown.

Declaration of Walter Frankel, ¶6. A primary concern for plaintiffs, therefore, is the access to such benefits.

The State recognizes that there are two levels of benefits to marriage as plaintiffs have consistently argued. At one level lie the tangible benefits such as health insurance, death benefits, testimonial rights, etc. and at the other level are the social benefits which inure to being the spouse or child of a married couple. It is not clear how our appellate courts would analyze and resolve the issue of extension of privileges beyond the more tangible benefits. It does appear that based on prior appellate decisions the courts would likely extend the privileges required by Article I, section 20 to the tangible benefits married couples now enjoy and that same-sex couples cannot access.

As a second inquiry, the court must ask whether plaintiffs are members of a true class. Classes that are created by the challenged law or government action are not true classes, whereas classes whose members share characteristics that are apart from the law are deemed true classes. *Clark*, 291 Or at 240. True classes also share "antecedent personal or social characteristics or societal status." *Hale v. Port of Portland*, 308 Or 508, 516 (1989). Legitimacy, residency, military service, gender, and ethnicity are examples of characteristics that define true classes. *Clark*, 291 Or at 240. A true class can be further categorized as a suspect class and will receive "a more demanding level of scrutiny" compared to other true classes. *Tanner v. OHSU*, 157 Or App 502, 521-22 (1998). A class is "suspect" when it centers on "immutable" social or personal

characteristics and “reflect[s] ‘invidious’ social or political premises,...prejudice or stereotyped prejudgments.” *Hewitt v. SAIF*, 294 Or 33, 45 (1982). Race, alienage, and religion characterize suspect classes. *Id.* However, because religion and alienage can be altered, the Oregon Appellate Court has stated that the focus should be on characteristics that are “historically regarded as defining distinct, socially-recognized groups that have been the subject of adverse social or political stereotyping or prejudice.” *Tanner*, 157 Or App 502 at 523.

Once a true class is deemed a suspect class, then the final inquiry is whether the denial of privileges and immunities is justified by genuine differences between the suspect class and those who are able to access the privileges and immunities. *Id.*

Plaintiffs contend that they are discriminated on the basis of gender. In *Hewitt*, the Oregon Supreme Court held that classifications based on gender were inherently suspect. *Hewitt*, 294 Or 33. The statute in question permitted the female partner of a cohabiting couple to claim compensation if her male partner suffered work-related injuries. *Id.* However, the statute did not permit compensation to the male partner if his female partner was injured. *Id.* The court’s analysis focused on whether the statute violated Article I, section 20 of the Oregon Constitution. *Id.* The court found that the statute “discriminates against men in claimant’s position...and it discriminates against women...by denying them the privilege of providing through their employment for their surviving family unit.” *Id.* at 42-43. The court reasoned that “the suspicion may be overcome if the reason for the classification reflects specific biological differences between men and women. It is not overcome when other personal characteristics or social roles are assigned to men or women because of their gender and for no other reason.” *Id.* at 46.

Here, the individuals within the same-sex relationship are of the same gender and not the opposite gender, which results in their exclusion from the benefits that marriage affords. A woman is denied the benefits because her domestic partner is a woman; had her domestic partner been a man, then benefits would be available to them. A man, likewise, is denied benefits because his domestic partner is a man; had his domestic partner been a woman, then benefits would be available as well. There are no intrinsic differences between the genders that justify disparate treatment. Thus, the effect of ORS Chapter 106 is to impermissibly classify on the basis of gender.

Plaintiffs also assert that they are discriminated on the basis of sexual orientation. The US Supreme Court has held that classifications based on race, national origin, alienage, and sex are subject to greater scrutiny than economic classification. *See City of Cleburne v. Cleburne Living Center, Inc.* 473 US 432, 440-41, 105 S Ct 3249, 87 L Ed 2d 313 (1985). In general, federal and state laws have not deemed sexual orientation a suspect class. However, in an unprecedented ruling in 1998, the Oregon Court of Appeals held that same-sex couples belonged to a suspect class. *Tanner*, 157 Or App 502. In *Tanner*, the plaintiffs were lesbian employees of Oregon Health Sciences University who were seeking insurance benefits for their domestic partners. *Id.* OHSU denied their applications because unmarried domestic partners of employees were not considered “family members,” and thus, were ineligible for insurance coverage. *Id.* at 506. Because plaintiffs were deemed members of a suspect class and because the court did not find any genuine differences between them and those who were able to access the insurance benefits, i.e. married couples, OHSU’s denial of insurance benefits to lesbian employees’ domestic partners violated Article I, section 20. *Id.* at 524.

Analyzing Article I, section 20 is no straightforward task. The *Tanner* court admitted that “[i]n addressing [plaintiffs’ constitutional arguments], we do not pretend that the cases construing Article, section 20, describe a completed coherent jurisprudence” and that cases involving Article I, section 20 are “a work in progress.”<sup>2</sup> *Id.* at 520.

The *Tanner* court’s holding that sexual orientation is a suspect classification does not automatically lead to the conclusion that ORS Chapter 106 should be construed to permit same-

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<sup>2</sup>The Vermont Supreme Court’s opinion considered both *Hewitt* and *Tanner* among other court decisions. The majority did not find the reasoning of these two cases applicable to their situation, stating that:

The “adverse stereotyping” analysis...may provide one intermediate appellate court’s answer to the question of whether homosexuals are a suspect class, but it is far from an “exacting standard” by which to measure the prudence of a court’s exercise of its powers. It is difficult to imagine a legal framework that could provide less predictability in the outcome of future cases than one which gives a court free reign to decide which groups have been the subject of “adverse social or political stereotyping.” *Baker*, 744 A2d 864 (1999).

sex marriage. Indeed, they declined to consider the issue of same-sex marriage, stating that “[n]o party raises, and we do not address, the constitutionality of prohibiting homosexual couples from marrying.” *Id.* at 516. Further, the Oregon Supreme Court has yet to rule on the validity of the *Tanner* holding. The *Tanner* decision is not all-encompassing and is but one step towards the recognition of a class of people precluded from certain rights and benefits that another class of people is able to access.

On its face, ORS Chapter 106 is neutral and does not discriminate on the basis of sexual orientation. No provision in the statutes requires a determination of one’s sexual orientation before marriage nor does the marriage license probe into one’s sexual identity. However, Article I, section 20 does not sanction only discriminatory conduct but also discriminatory effect. *Tanner*, 157 Or App at 524-525. *See Zockert v. Fanning*, 310 Or 514 (1990). It is evident that the effect of ORS Chapter 106 is to impermissibly classify on the basis of sexual orientation, the repercussions of which deny same-sex couples certain substantive benefits.

Nevertheless, the court here is limiting its holding. Importantly, the court is not extending ORS Chapter 106 to same-sex couples’ right to marriage but to their right to benefits, and thus finding that alternative means should be provided to address this disparity.

Intervenors-defendants argue that “traditional marriage - marriage between one man and one woman - would clearly be a historical exception to any reading of Article I, Section 20 that would invalidate the marriage statutes, then or now.”<sup>3</sup> Intervenors-defendants’ Memorandum in Support of Motion for Partial Summary Judgment, ¶1. Assuming without deciding that this argument is valid, this decision does not require a historical analysis. As mentioned earlier, the court has found that the central issue in this case is one involving access to the benefits of marriage without the necessity of changing the nature of what constitutes a “traditional marriage.”

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<sup>3</sup>The historical exception framework originated from an analysis of Article I, section 8 of the Oregon Constitution which governs freedom of expression. *State v. Robertson*, 293 Or 402 (1982). Intervenors-defendants cite cases in which the Oregon Supreme Court used the historical exception analysis but none of these are in the context of the guarantees of Article I, section 20. Therefore, it is unclear how the Oregon Supreme Court would rule on this issue.

## Remedy

There are two precedent-setting approaches that the court could follow in fashioning a remedy: the Massachusetts approach resulting from *Goodridge v. Department of Public Health*, 798 NE 2d 941 (2003) or the Vermont approach resulting from *Baker v. State*, 744 A2d 864 (1999).

The State of Oregon clearly and succinctly summarizes *Goodridge*:

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

Defendants’ Memorandum in Support of Motion for Summary Judgment, ¶ 23 (quoting *Goodridge*, 798 NE 2d 941 at 968-70) (footnotes omitted). In February 2004, pursuant to the Massachusetts Senate’s request for an advisory opinion, the Massachusetts Supreme Court answered that a statute allowing civil unions would be unconstitutional. Beginning in May of this year, Massachusetts will be the first state to permit same-sex marriages.

On, the other hand, Vermont followed a different path. As the State of Oregon’s brief summarizes:

In *Baker v. State*, the Vermont Supreme Court held—unanimously—that excluding same-sex couples from the secular benefits and protections incident to marriage violated the “common benefits” clause of the Vermont constitution. The court declined to decide whether “the denial of a marriage license operates per se to deny constitutionally-protected rights[.]” Instead, the court issued a more limited ruling, holding that “plaintiffs are entitled under Chapter I,

Article 7, of the Vermont Constitution to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples.”

....[T]he court’s mandate was that “the current statutory scheme shall remain in effect for a reasonable period of time to enable the Legislature to consider and enact implementing legislation in an orderly and expeditious fashion.”...In response to this decision, the Vermont legislature promptly enacted a “civil union” statute that is codified at Vt. Stat. Ann. Tit. 18. §§ 5160- 5169 (2003).

Defendants’ Memorandum in Support of Motion for Summary Judgment, ¶ 25 (footnotes and citations omitted).

In light of the court’s conclusion that the effect of the marriage statutes acts to deny benefits granted by Article I, section 20 as to a certain class of people, the court finds that Vermont’s approach represents a sound remedy to this issue of first impression. Also, the Vermont Constitution is closer to our Constitution than the Massachusetts’ Constitution so it is easier to draw a parallel in analysis. *See Baker*, 744 A2d at 891-92 (Dooley, J., concurring) (“[Article I, section 20] is similar in purpose and effect to our Common Benefits Clause.”). The Vermont method of making a legal decision regarding the present issue and then, in effect, staying the decision until the Oregon Legislative Assembly (hereinafter the legislature) and the public have time for dialog and debate is the approach favored and therefore adopted by this court. The State characterized the Vermont decision as either “genius” or “folly,” but it is the only realistic way to get the public at large squarely into the process. It is incumbent upon the legislature to evaluate the substantive rights afforded to married couples and to provide similar access to same-sex domestic partners. The court will allow the legislature to come up with a remedy consistent with this judicial holding within ninety days of the commencement of the next legislative session or special session, whichever occurs first.

#### **Fourth Claim for Relief**

The writ of mandamus may be issued “to compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station.” ORS 34.110. Mandamus

is an “extraordinary remedial process which is awarded not as a matter of right, but in the exercise of a sound judicial discretion and upon equitable principles.” *Buell v. County Court of Jefferson County*, 175 Or 402, 408 (1944). A mandamus shall not issue where there is a plain, speedy and adequate remedy at law in the ordinary course. *State ex rel Anderson v. Miller*, 320 Or 316, 322 (1994). An adequate remedy is one that provides “ ‘any and all relief to which the relator is entitled.’ ” *Id.* (quoting *State ex rel Hupp etc. Corp. v. Kanzler*, 129 Or 85, 97 (1929)). All parties have agreed in advance that there is a need for a quick determination of the constitutional issue and the refusal of the State to accept the issued licenses for filing with the State Registrar. Ordinary time lines under the ORCP have been shortened and an expedited briefing schedule was also agreed upon. Hundreds of licenses have been issued to same-sex couples and most have completed the process by having the marriage solemnized by a person authorized to do so under the law and those licenses are now in a legal limbo. Under these circumstances, there is no adequate, much less speedy, remedy that is available under the ordinary legal processes.

The Department of Human Services is an executive agency, and as such, it answers to the Governor. Under this department, the Health Service’s Center for Health Statistics is the subdivision that handles the marriage records. The State Registrar’s responsibilities include supervising the Health Service’s Center for Health Statistics, which serves as the depository for vital statistics records, including marriage and divorce records. The staff record these events and process certified copies of records when requested by individuals. ORS 432.010, 432.030. *See also Health Services Appoints New State Registrar*, Press Release Archive, October 11, 2000, [www.dhs.state.or.us/publichealth/archive/2000/1011chs.cfm](http://www.dhs.state.or.us/publichealth/archive/2000/1011chs.cfm).

Even though same-sex couples have paid marriage license fees, their licenses are not recognized by the State. On the other hand, opposite-sex couples who have paid the same fees will have their marriage records filed and registered. ORS 432.405 states, in mandatory language, that a record of “each marriage performed in this state” *shall* be filed with the Center for Health Statistics and *shall* be registered by the State Registrar. It may be that in this day and age the registering of marriage licenses is strictly a statistical function with little or no attendant rights. But, it is a required function. Failing to register same-sex marriage licenses and solemnization certificates is a direct violation of the law. To the extent that the State Registrar’s inaction affects



property rights, health and survivorship benefits, etc., then Article I, section 20 requires acceptance and registering of the license and solemnization certificate. To the extent that rights and benefits are not dependent on registering the license and accompanying documents, the law nevertheless requires the State Registrar accept the record of a marriage performed in this state.

The State Registrar (Jennifer Woodward) is ordered to accept and register marriages that have been performed pursuant to ORS 432.405 thirty days after entry of judgment. A decision on this issue resolves the second and third claims for relief which also sought to require the State Registrar to comply with ORS 432.405.

### **CONCLUSION**

ORS Chapter 106 and Article I, section 20 of the Oregon Constitution have co-existed peacefully for decades. Prior to the 1930's and certainly prior to our rural and agrarian society becoming more urban and over-legislated, there were few rights and privileges bestowed by any levels of government that would be worth mentioning, much less worth fighting for. Everyone was equally deprived.

Today there are numerous laws that govern marriage, divorce and separation, child and spousal support, health and death benefits and rights of survivorship among others. The state of Oregon views a marriage as a secular, civil contract or agreement, and as such can and does set the parameters of the procedure and cost of obtaining the documentation necessary in order to gain the state's stamp of approval. Because the rights and privileges of those who make it all the way to the State Registrar are so extensive, stories abound of people who married "for convenience sake" strictly and unabashedly to gain some of those rights and privileges.

ORS Chapter 106 presently acts as a barrier to certain domestic partners and not to others. This barrier deprives those who cannot obtain a license which will be acknowledged by the State Registrar from some very basic and fundamental rights for which the legislature has not seen fit to provide any other alternatives. To the extent that ORS Chapter 106 acts as a bar to the rights and privileges guaranteed by Article I, section 20 of the Oregon Constitution, then that portion of Chapter 106 is unconstitutional.

Neither the decision of this court nor of the Supreme Court will quell the controversy and

debate, nor should it. It is for the legislature to address the issue of compliance with the Oregon Constitution. This court can only review, usually in piecemeal fashion, the validity and permissible application of existing laws.

As has been pointed out in the opinion, the court follows the Vermont Supreme Court's suggested remedy since it comes closest to blending the need of a specific decision with the need for giving the legislature time to respond. The unique factor in this case is that Multnomah County has already issued licenses to same-sex couples and many of those couples have been married by a person given statutory authority to do so. ORS 432.405 does not refer to ORS Chapter 106 but instead says all marriages that *have been performed* must be recorded. The State is ordered to record those marriages within thirty days of the judgment entered in this case (which can be stayed by an appellate court).

This court will allow the legislature until ninety days after the commencement of the next regular or special session, whichever comes first, to produce legislation that would balance the substantive rights of same-sex domestic partners with those of opposite-sex married couples or Multnomah County will be required to issue marriage licenses to same-sex couples to avoid further violating Article I, section 20. Until that time, Multnomah County is enjoined from further issuing marriage licenses to same-sex couples. This ruling is made in order to allow both the Supreme Court and the legislature time to make reasoned decisions without being presented with a fait accompli more than already exists.

Since the State, through Mr. Bushong, has emphasized the need to craft a general judgment that is immediately appealable, I am requesting the State to prepare the judgment, circulate it to all parties, and present it to the court no later than April 26. The general judgment is to contain language which will make it appealable under ORCP 67. By requiring the State to prepare the judgment I am not declaring that the State is the "prevailing" party.

So ordered this 20<sup>th</sup> day of April, 2004.

  
FRANK L. BEARDEN  
Circuit Judge  
Multnomah County, Oregon