

Mary Li, et al v. State of Oregon, etc.

Hearing Held: April 16, 2004

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

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

No. 0403-03057

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;

1 GARY WEEKS, in his official capacity
2 as Director of the Department of Human
3 Services of the State of Oregon; and
4 JENNIFER WOODWARD, in her official
5 capacity as State Registrar of the
6 State of Oregon,

7 Defendants,

8 and

9 DEFENSE OF MARRIAGE COALITION, CECIL
10 MICHAEL THOMAS, NANCY JO THOMAS,
11 DAN MATES, and DICK OSBORNE,

12 Intervenors-Defendants.

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16 ORAL ARGUMENT

17 FRIDAY, APRIL 16, 2004

18 9:00 A.M.

19 THE HONORABLE FRANK BEARDEN, PRESIDING

20 MULTNOMAH COUNTY COURTHOUSE

21 PORTLAND, OREGON

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25

1 APPEARANCES OF COUNSEL:

2 FOR ALL PLAINTIFFS:

3 Kenneth Y. Choe, Esq.

4 American Civil Liberties Union Foundation

5 Lesbian and Gay Rights and AIDS Projects

6 125 Broad Street

7 New York, NY 10004

8 and

9 Lynn R. Nakamoto, Esq.

10 Markowitz, Herbold, Glade & Mehlhaf, P.C.

11 1211 S.W. Fifth Avenue, Suite 3000

12 Portland, OR 97204

13

14 FOR ALL DEFENDANTS:

15 Stephen K. Bushong, Esq.

16 Oregon Department of Justice

17 DOJ Trial Division

18 1162 Court Street, N.E.

19 Salem, OR 97301

20

21 FOR MULTNOMAH COUNTY, INTERVENOR-PLAINTIFF:

22 Agnes Sowle, Esq.

23 Multnomah County Attorney

24 501 S.E. Hawthorne Boulevard, Suite 500

25 Portland, OR 97214

1 FOR DEFENSE OF MARRIAGE COALITION, ET AL.,

2 INTERVENORS-DEFENDANTS:

3 Kelly W. G. Clark, Esq.

4 Kristian Roggendorf, Esq.

5 O'Donnell & Clark, LLP.

6 1706 N.W. Glisan, #6

7 Portland, OR 97209

8 and

9 Herbert G. Grey, Esq.

10 Kelly E. Ford, Esq.

11 4800 S.W. Griffith Drive, #320

12 Beaverton, OR 97005

13 and

14 Kevin Clarkson, Esq.

15 Brena Bell & Clarkson

16 310 K Street, Suite 601

17 Anchorage, AK 99501

18 and

19 Benjamin W. Bull, Esq.

20 Jordan Lorence, Esq.

21 Alliance Defense Fund

22 15333 N. Pima Road, Suite 165

23 Scottsdale, AZ 85260

24 and

25

1 Raymond M. Cihak, Esq.
2 Pamela Hediger, Esq.
3 Evashevski Elliott Cihak & Hediger, P.C.
4 745 N.W. Van Buren Street
5 Corvallis, OR 97339

6
7 FOR AMICI JUVENILE RIGHTS PROJECT, ET AL.
8 (IN SUPPORT OF PLAINTIFFS):

9 Mark A. Johnson, Esq.
10 Johnson Renshaw & Lechman-Su, P.C.
11 420 Weatherly Building
12 516 S.W. Morrison Street
13 Portland, OR 97204

14 and

15 Beth A. Allen, Esq.
16 Lane Powell Spears Lubersky, LLP.
17 601 S.W. Second Avenue, Suite 2100
18 Portland, OR 97204

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1 THE COURT: Good morning, folks. Be seated.
2 I see we have a full house today. A couple of comments
3 before we start -- the recorded proceedings will be both
4 on the FTR system and Ms. Zaro is here, who will be our
5 court stenographer. That will be the official court
6 record.

7 Secondly, I want to thank the attorneys for
8 their briefing in this matter. It has been
9 extraordinarily good writing and very thorough. It
10 obviously makes my job much easier. Also I want to
11 point out that this is a summary judgment hearing
12 process that, in Multnomah County, is conducted almost
13 entirely by briefing. It is rare to have any oral
14 argument on summary judgment motions, and if there is
15 oral argument, it's rare to have it beyond 10 or 15
16 minutes. But this is also a very unique and very
17 important issue, and it's one that needs public
18 awareness every step of the way, and, on that basis, I
19 have decided to give the parties plenty of time to put
20 their points and authorities and thoughts on the record,
21 because I know down the line it's going to be
22 scrutinized.

23 I do want to point out that, while this is
24 an important decision that I take very seriously, I'm
25 also aware that -- in spite of the fact that my decision

1 will be critiqued by the lawyers, by the media, by
2 members of the public -- it is just simply one step on
3 the way toward the Supreme Court and the legislature --
4 probably both -- combining in some form or fashion, to
5 make the ultimate decision in this case. But we have to
6 take a first step, and this is it.

7 Now, I sent out a letter to the attorneys,
8 the parties, on April 5th on the timelines, and I will
9 remind the parties of the timelines today, as I copied
10 them from my letter, hopefully -- it was the first draft
11 of the letter I sent out -- I think another one went
12 out.

13 But Plaintiffs will have an hour to make
14 their presentation, and, if they don't use that hour
15 entirely, they can save part of that for rebuttal
16 argument. Defendants will have 45 minutes, and they can
17 do the same. If they don't use the whole 45 minutes,
18 they can have some time back at the end. Intervenor
19 County, 15 minutes; Intervenor Defense of Marriage
20 Coalition, 15 minutes; amicus, 15 minutes -- and the
21 parties among themselves can decide to give minutes to
22 another party if they want to, because I think maybe
23 that's something that's already been worked out.

24 So I hope that the parties understand that I
25 have thoroughly read the briefs that have come out, and

1 so your comments to me should, of course, take that into
2 consideration.

3 Okay. With that, we will start with
4 Plaintiffs. Mr. -- is it Mr. Choe?

5 MR. CHOE: Yes. May it please the Court, my
6 name is Ken Choe. My co-counsel, Lynn Nakamoto, and
7 I represent nine lesbian and gay couples who seek a
8 declaration that the statutory exclusion of same-sex
9 couples from marriage violates Article I, section 20, of
10 the Oregon Constitution. I'd like to reserve 20 minutes
11 of my time for rebuttal and give 10 minutes to amici,
12 Juvenile Rights Project and others.

13 THE COURT: All right.

14 MR. CHOE: Article I, section 20, guarantees
15 equal privileges and immunities for all Oregonians. The
16 first step of the analysis is a determination of whether
17 there is a privilege at issue. Here marriage is a
18 privilege.

19 In *City of Salem v. Bruner*, the Oregon
20 Supreme Court defined a privilege broadly to mean
21 anything that the government provides that yields at
22 least some advantage. Unquestionably, state recognition
23 of the marital relationship yields not only some
24 advantage, but a significant advantage. No party
25 disputes that marriage is the gateway to hundreds of

1 important rights and benefits, many of which are
2 critical protections for families in their times of
3 need, such as sickness and death. For this significant
4 advantage alone, marriage constitutes a privilege.

5 Above and beyond these hundreds of rights
6 and benefits, marriage provides the most ready means by
7 which a couple and their children are recognized by
8 others as a family unit. Both the State and Intervenor
9 Defendants in their answers admit that when a couple
10 enters into a marriage, they express what is universally
11 recognized as a commitment of the highest order.

12 They also admit in their answers that when a
13 couple enters into a marriage, they and their children
14 are universally recognized as a family unit. For this
15 significant advantage, too, marriage is a privilege.

16 The second step in the analysis is the
17 identification of the class or classes that are excluded
18 from the privilege. Here there are two classes: sexual
19 orientation and gender. The exclusion of same-sex
20 couples from marriage discriminates against individuals
21 based on their sexual orientation. All heterosexual
22 individuals can marry their partners. All lesbian and
23 gay individuals cannot marry their partners.

24 This is a form of sexual-orientation
25 discrimination, as the analysis in Tanner makes clear.

1 Tanner also holds that sexual orientation is both a true
2 class and a suspect class subjected to heightened
3 scrutiny.

4 The exclusion of same-sex couples from
5 marriage also discriminates against individuals based on
6 their gender. Whether an individual can marry his or
7 her partner depends on whether he or she is male or
8 female. A male can marry his female partner, but, if he
9 were female, he could not. Similarly, a female could
10 marry her male partner, but, if she were male, she could
11 not. This is a form of gender discrimination, as the
12 analysis in *Hewitt* makes clear, and *Hewitt* holds, as
13 well, that gender is both a true class and a suspect
14 class subject to heightened scrutiny.

15 The third and final step in the analysis is
16 the determination of whether the exclusion of the class
17 from the privilege is justified. Here, Intervenor
18 Defendants have proffered two reasons for the exclusion
19 of same-sex couples from marriage. The first reason is
20 to encourage traditional procreation, because, they
21 suggest, bringing children into families through means
22 such as artificial insemination, in vitro fertilization,
23 and adoption is inferior to bringing children into
24 families through traditional procreation.

25 The second reason is to promote the welfare

1 of children, because, they suggest, lesbian and gay
2 couples are less fit to be parents than heterosexual
3 couples. Neither of these two proffered reasons
4 withstands scrutiny.

5 And I'd like to take a step back here to
6 talk about what "heightened scrutiny" means under Oregon
7 law. Tanner and Hewitt hold that where a suspect class
8 is excluded from a privilege, the suspicion may be
9 overcome if the reason for the exclusion reflects
10 genuine differences between the classes.

11 There are two items of note to take away
12 from that definition of "heightened scrutiny" under
13 Oregon law. First, the burden lies with Intervenor
14 Defendants, not with Plaintiffs. Intervenor Defendants
15 must overcome the suspicion, by showing that the two
16 proffered reasons for the marriage exclusion reflect
17 genuine differences between heterosexual couples and
18 lesbian and gay couples. This shift in burden is a
19 hallmark of heightened scrutiny.

20 The second item is that the two proffered
21 reasons for the marriage exclusion must reflect actual
22 differences between heterosexual couples and lesbian and
23 gay couples. It isn't enough that they could reflect
24 hypothetical differences between heterosexual couples
25 and lesbian and gay couples. This insistence on the

1 actual instead of the hypothetical is another hallmark
2 of heightened scrutiny. So, with that definition of
3 heightened scrutiny, I will now turn to the two
4 proffered reasons for the marriage exclusion.

5 The first is the proffered interest in
6 encouraging traditional procreation. Excluding same-sex
7 couples from marriage neither encourages nor discourages
8 traditional procreation. Heterosexual couples will
9 continue to engage in traditional procreation regardless
10 of whether lesbian and gay couples are permitted to
11 marry. Thus, Intervenor Defendants can't show that the
12 state could even rationally think that the exclusion of
13 same-sex couples from marriage encourages traditional
14 procreation. There is simply no link between the two.

15 Moreover, the State's laws, policies, and
16 practices prove that, in actuality, the State equally
17 values couples who bring children into their families
18 through means such as artificial insemination, in vitro
19 fertilization, and adoption, and couples who bring
20 children into their families through traditional
21 procreation. All couples who bring children into their
22 families are expressly afforded the same rights and
23 benefits.

24 Because lesbian and gay couples who bring
25 children into their families are just as valued as

1 heterosexual couples who bring children into their
2 families, Intervenor Defendants can't show that the
3 State actually thinks that there is any relevant
4 difference between heterosexual couples and lesbian and
5 gay couples in this regard that justifies the exclusion
6 of one but not the other from marriage.

7 And now the second proffered reason for the
8 marriage exclusion, the proffered interest in promoting
9 the welfare of children. Excluding same-sex couples
10 from marriage does not promote the welfare of children.
11 Children of heterosexual couples will continue to be
12 protected by marriage regardless of whether lesbian and
13 gay couples are permitted to marry. But children of
14 lesbian and gay couples will remain unprotected by
15 marriage so long as lesbian and gay couples are not
16 permitted to marry. Thus, Intervenor Defendants can't
17 show that the State could even rationally think that the
18 exclusion of same-sex couples from marriage promotes the
19 welfare of children. If anything, excluding same-sex
20 couples from marriage is contrary to an interest in
21 promoting the welfare of children.

22 Moreover, the State's laws, policies, and
23 practices prove that, in actuality, the State equally
24 regards parenting by heterosexual couples and parenting
25 by lesbian and gay couples. The State has stipulated

1 that it routinely allows openly lesbian and gay couples
2 to be adoptive and foster parents to the same extent as
3 heterosexual couples. Moreover, State case law
4 concerning custody and visitation disputes has long made
5 clear the sexual orientation of a parent is irrelevant
6 to the determination of the best interests of a child.

7 These are just a few of the ways in which
8 the State's laws, policies, and practices, preclude
9 Intervenor Defendants from showing that the State
10 actually thinks that there is any relevant difference
11 between lesbian and gay couples and heterosexual couples
12 in this regard that justifies the exclusion of one, but
13 not the other, from marriage. For these reasons, there
14 is an Article I, section 20, violation, because there
15 was a statutory exclusion of same-sex couples from
16 marriage.

17 Now, Intervenor Defendants have asked the
18 Court to create for the first time an exception to
19 Article I, section 20, based on antiquated notions of
20 equality. The Court should not ignore the Oregon
21 Supreme Court's implicit rejection of such an exception,
22 an exception that would swallow the rule.

23 In State v. Clark, the Oregon Supreme Court
24 formulated the analytical framework for Article I,
25 section 20, that governs today. Significantly, before

1 doing so, the court carefully examined the text, the
2 historical context, and the interpretation of the case
3 law of Article I, section 20. In other words, the court
4 satisfied the threshold inquiry of *Priest v. Pearce*.
5 This is confirmed in *State v. Reynolds*, a post-*Priest*
6 case.

7 Thus, the Oregon Supreme Court specifically
8 examined the historical context of Article I,
9 section 20, and, in formulating the analytical framework
10 for Article I, section 20, declined to announce any
11 exception to Article I, section 20, based on its
12 historical examination.

13 This is not surprising, because, when one
14 examines the original intent of the Oregon framers --
15 the framers of the Oregon Constitution, one sees that
16 the historical record makes clear that the framers were
17 generally concerned with future oppression of minorities
18 by the majority. As one framer stated: "The history of
19 the world teaches us that the majority may become
20 fractious in their spirit and trample upon the rights of
21 the minority; that through the madness of party spirit
22 they may infringe upon the rights of individual
23 citizens; that if the individual is to be protected at
24 this point in which he is endangered, there must be
25 restrictions put into the Constitution. The people must

1 say, 'We will limit ourselves in certain principles.'"

2 Thus, the framers themselves understood
3 that, to ensure a meaningful guarantee of equal
4 privileges and immunities for disfavored classes, it was
5 necessary to check even their own majoritarian impulses.

6 Moreover, the exception that Intervenor
7 Defendants propose is an exception that would swallow
8 the rule. It would mean that Oregonians are guaranteed
9 notions of equality as they existed in 1857 -- notions
10 of equality that clearly institutionalized bias based on
11 race, gender, alienage, illegitimacy, and a host of
12 other considerations that have since been repudiated.
13 Only a small fraction of this institutionalized bias has
14 been redressed by subsequent amendment to the
15 Oregon Constitution.

16 It's contrary to the concept of a living
17 constitution to suggest that Article I, section 20, is
18 nothing more than a glorified codification of the
19 statutory provisions that were on the books in 1857, and
20 it's inconceivable that the celebrated case law here in
21 Oregon that implicitly rejects the view that notions of
22 equality are limited to those of 1857 must be
23 overturned -- and among these are Tanner and Hewitt,
24 which are binding on this Court. So for these reasons
25 this Court should not announce a new exception to

1 Article I, section 20, based on notions of equality in
2 1857.

3 The final point that I'll make involves the
4 remedy issue. Significantly, the remedy issue is the
5 only issue that the State contests. The State believes
6 that the Court should reach the remedy issue in deciding
7 the claim for relief that's before the Court today.
8 Plaintiffs agree and believe that the Court may do so,
9 based on the briefing to date, such that as a
10 certifiable and appealable interlocutory ruling may
11 issue without need for further briefing.

12 The State in its reply concedes that, under
13 Oregon remedies law, there are only two options --
14 remedy options -- where there is an Article I,
15 section 20, violation: Extending the privilege to the
16 excluded class or nullifying the privilege for all
17 classes. The State in its reply concedes that, allowing
18 a constitutional harm to persist while a remedial
19 legislation is sought has no precedent in Oregon
20 remedies law.

21 The only case to which the State cites is
22 Baker. Baker is a case in which the Vermont Supreme
23 Court expressly disclaimed at the start of its remedies
24 discussion that, in its view, the argument before it in
25 that case concerned only the rights and benefits of

1 marriage, not marriage itself. It itself recognized
2 that that was a distinction between the case before it
3 and the case like the one before Your Honor today, a
4 case where clearly we are talking about marriage itself
5 and not just the rights and benefits of marriage.

6 In deciding between extending the privilege
7 to the excluded class and nullifying the privilege for
8 all classes, the Hewitt analysis ultimately looks to
9 the -- whether extending the privilege would defeat the
10 purpose of the law. Here it's clear that the Court
11 should extend the privilege.

12 As Intervenor Defendants note in their
13 opposition, the purpose of marriage, as articulated by
14 the framers of the Oregon Constitution, is to protect
15 the family unit. So extending marriage to same-sex
16 couples not only does not defeat this purpose, but it
17 actually advances the purpose, and so the privilege
18 should be extended as a remedy here.

19 Moreover, extending marriage to same-sex
20 couples is far less drastic than nullifying marriage for
21 all couples, and it necessitates no complex changes to
22 substantive law, and, significantly, extending marriage
23 to same-sex couples would not preclude the legislature
24 from taking any action it otherwise could have taken.

25 Indeed, this was the reasoning of Hewitt,

1 when it expressly rejected remedial legislation as a
2 third remedy option. The majority opinion noted that
3 all of the possible legislative responses that were
4 listed in the dissenting opinion remained possible
5 legislative responses regardless of whether the
6 privilege was extended or nullified.

7 On a final note, the State seeks remedial
8 legislation based on the presumption that the
9 legislature could create a separate, but purportedly
10 equal, institution for same-sex couples and their
11 children, such as a civil union. This is a false
12 presumption. A civil union is not equal to a marriage
13 as a matter of fact. It does not confer the same social
14 standing for couples and their children as a marriage.

15 Moreover, it almost goes without saying
16 these days that, as a matter of constitutional law -- in
17 Oregon and universally -- that "separate but equal" is
18 never equal, because it stigmatizes the disfavored class
19 with a badge of inferiority that interferes with their
20 ability to participate fully in civic life. This
21 fundamental principle was articulated most famously in
22 *Brown v. Board of Education*, but it's also echoed here
23 in Oregon case law.

24 The Court may not defer to the legislature
25 to create a separate, but purportedly equal,

1 institution, and, therefore, the only permissible and
2 appropriate remedy in this case is permitting same-sex
3 couples to marry.

4 Unless Your Honor has questions, I'd like to
5 reserve the remainder of my time.

6 THE COURT: All right. Thank you.

7 MS. ALLEN: Good morning, Your Honor. May
8 it please the Court, my name is Beth Allen. I'm with
9 the law firm of Lane Powell Spears Lubersky, and I'm
10 here representing amici in favor of the Plaintiffs.

11 Your Honor, there are three things that
12 Defendants and their supporters don't want the Court to
13 know: (1) Same-sex couples have committed, stable
14 relationships similar to those of heterosexual couples;
15 (2) marriage would enhance the stability of same-sex
16 couples' relationships, as it does for heterosexuals,
17 which would benefit them and their children; and (3)
18 children raised by gay or lesbian couples are as well
19 adjusted as children raised by heterosexual couples.

20 They don't want the Court to know this,
21 because these truths crush the stereotypes that led to
22 discrimination against gays and lesbians in the first
23 place. They hope that bias will prevail over the
24 legitimate evidence that refutes the stereotypes.

25 Although we believe that

1 Defendants and their supporters' arguments regarding the
2 stability of gays and lesbians and the well-being of
3 their children is nothing more than a red herring to
4 divert the Court's attention from the fundamental legal
5 issues, we feel compelled to address them because they
6 have been raised.

7 Thus, I turn to the first issue, that
8 same-sex couples have relationships similar to those of
9 heterosexual couples. In our brief we cite to a number
10 of studies that demonstrate that the relationships of
11 same-sex couples are similar in nature, quality, and
12 stability of relationships of heterosexual couples.
13 These studies were performed by respected sociologists
14 and psychologists. The studies were peer reviewed and
15 destroy the myth that gays and lesbians, as a group, are
16 sexually promiscuous.

17 Defendants submitted the affidavits of
18 Walter Throck Morton and Jeffrey Satinover, asserting
19 that gay couples are less monogamous than heterosexual
20 married couples. But, because same-sex couples can't
21 marry we don't know how gay males or lesbian couples who
22 would choose to marry would compare to heterosexual
23 married couples with respect to sexual exclusivity.
24 Studies do show that marital status -- both selects for
25 and fosters a greater level of commitment to sexual

1 monogamy.

2 Moreover, as Judith Stacey explained in her
3 affidavit, and, as statistics offered by Defendants'
4 witnesses show, the primary differences in sexual
5 behavior and attitudes towards monogamy are distributed
6 by gender rather than sexual orientation. Research
7 indicates that men -- regardless of sexual
8 orientation -- are less committed to sexually exclusive
9 relationships than women, and, of course, we don't
10 exclude from marriage other demographic groups that have
11 a greater propensity for infidelity.

12 Throck Morton and Satinover also argue that
13 same-sex relationships are shorter than heterosexual
14 relationships. First, the studies they use compare the
15 range of same-sex relationships from new, dating
16 relationships through long-term relationships. They
17 compare that to married heterosexual relationships,
18 which, of course, are those who have clearly made a
19 commitment to one another.

20 Of course, married relationships last longer
21 than the relationships of couples who have not reached
22 that level of commitment. We don't know what gay and
23 lesbian couples' relationship longevity would be were
24 they able to marry. As I just mentioned, the research
25 cited by Dr. Stacey shows that marriage selects for and

1 fosters commitment.

2 This brings me to my second point. Marriage
3 will add stability to gay and lesbian relationships,
4 just as it does for heterosexual couples, and this will
5 enhance the well-being for the children raised by them.

6 Many gay and lesbian couples want to marry.
7 One need only look at the long line of couples wrapped
8 around the County building for the evidence. Many of
9 the nearly 3,000 couples who married in the past month
10 and a half have been together 10, 20, 30 years or more.
11 Gay and lesbian couples have found a way to make their
12 relationships durable. Marriage -- which, as Defendants
13 and their supporters recognize, adds a stabilizing
14 dimension to romantic relationships -- will only
15 increase the durability of those relationships.

16 Extending marriage to gays and lesbians
17 would in the end provide a more stable and consistent
18 and economically sound environment for the children. To
19 the extent that marriage is an institution whose purpose
20 is to foster the best interests of the children of our
21 state, it's inconceivable that marriage would be
22 foreclosed to same-sex couples.

23 This brings me to my final point. Children
24 raised by gay or lesbian couples are as well adjusted as
25 children raised by heterosexual parents. Both Satinover

1 and Throck Morton have often misled the courts about
2 same-sex parents parenting -- partners parenting. Both
3 rely entirely on studies that consider and compare the
4 well-being of children raised by single mothers to those
5 raised by two parents -- all heterosexual.

6 Furthermore, one cannot logically infer that
7 the absence of a male figure in a household led by a
8 single parent will impact children in the same matter as
9 the absence of a male figure in a lesbian couple
10 household. Single parenthood is different for a myriad
11 of reasons. Also divorce and the stress and strife it
12 causes play a significant role in those studies.

13 The question raised is whether same-sex
14 couples -- parents, as a couple, raise children whose
15 well-being is comparable to that of children raised by
16 opposite-sex couples. Social science evidence is
17 overwhelmingly in accord, yes. I won't repeat them all
18 here, but our brief provides only a sampling of the
19 studies.

20 Defendants don't point to any studies
21 reaching different conclusions. That's because there
22 aren't any. There are dozens of studies by different
23 researchers, studying different children, and not a
24 single one of them found any harm associated with having
25 gay parents. These are studies authored by sociologists

1 and psychologists from universities around the world and
2 published in the scholarly journals of the profession.
3 They are accepted as reliable by the American
4 Psychological Association, the Child Welfare League of
5 America, the National Association of Social Workers, the
6 American Academy of Pediatricians, and more.

7 Unless one can believe that there is a
8 massive conspiracy going on, these research findings are
9 undeniable. But, even if you throw out all the studies
10 of gay parenting, there is still no reason to believe
11 that gay parents would be harmful to children. As
12 Professor Stacey stated in her declaration, research
13 over the last 50 years has firmly established that good
14 quality parenting is the best predictor of good outcomes
15 for children. Good quality parenting requires warmth,
16 consistency, reliability, a good quality relationship
17 between the parents, and sufficient economic resources.
18 There is absolutely no basis to think it would be any
19 different if the parents are of the same sex. Parents
20 who have a good relationship and who provide warmth,
21 consistency, reliability, and sufficient economic
22 resources are more likely to raise well-adjusted
23 children, whether those parents are gay or straight,
24 rural or urban, short or tall.

25 Your Honor, privileges and immunities are

1 not reserved for the few who match the Defendants and
2 their supporters' version of the perfect citizen. Amici
3 and the gay and lesbian citizens of this state urge the
4 Court to rule in favor of Plaintiffs and declare that
5 marriage is a right that must be extended to same-sex
6 couples who are of legal age and otherwise legally
7 capable. Thank you, Your Honor.

8 THE COURT: Thank you, Ms. Allen.

9 Mr. Bushong.

10 MR. BUSHONG: Good morning, Your Honor. May
11 it please the Court, Steve Bushong, appearing on behalf
12 of the State. I have got kind of an unusual situation
13 here, because the State's prelitigation analysis of the
14 constitutional issue that's before Your Honor has been
15 in the public forum. It's been in the newspapers. It's
16 in the court record, as Exhibit 5 to the stipulated
17 facts. That opinion, that analysis, speaks for itself.
18 I don't intend to go over that again here today.

19 What I do hope to do is provide some clarity
20 and focus on some of the legal issues that are presented
21 by this case, and what I'm going to do is start with the
22 first principles, and that's the text of Article I,
23 section 20. It says: "No law shall be passed granting
24 to any citizen or any class of citizens privileges or
25 immunities which, upon the same terms, shall not equally

1 belong to all citizens."

2 Now, the Plaintiffs' position, as I
3 understand it, is that -- three points: Marriage is a
4 privilege; that ORS 106.010, the marriage license
5 statute, grants that privilege to a class of citizens,
6 but not to all citizens; and then, third, that the
7 limitation that's provided by that statute is not
8 justified, and, under the test that's been adopted by
9 the Oregon courts, it's not justified by genuine
10 biological differences.

11 That's the Plaintiffs' position. Defense of
12 Marriage Council Coalition's position is different.
13 They argue first that marriage is not a privilege -- not
14 within the historical exception or the original intent
15 of the framers of Article I, section 20. That's point
16 one.

17 Second, they argue, if it is a privilege,
18 it's equally available to all citizens. That's their
19 argument. And, third, they argue if it's not equally
20 available to all citizens, the limitation that's
21 provided by the statute is justified by genuine
22 biological differences. That's Defense of Marriage
23 Coalition's position.

24 What I'd like to do is focus on kind of the
25 first issue that's in dispute, and that's whether or not

1 marriage is a privilege. And here I'm talking about the
2 legal aspects of marriage. "Marriage" means a lot of
3 things to a lot of people, and I'm not going to address
4 all of that. I'm going to focus my remarks on the legal
5 aspects of marriage, and I think it will be helpful if
6 I hand out an outline of the points I'm going to cover,
7 and I will provide a copy to counsel and to the Court.
8 May I approach, Your Honor?

9 THE COURT: You may.

10 MR. BUSHONG: Thank you. What I have done
11 in this outline -- and this is just a way of thinking
12 through the legal aspects of marriage. We know by
13 statute that marriage is a civil contract, and this was
14 helpful to me, and I hope it's helpful to Your Honor.
15 These issues are difficult, and I think it will be
16 helpful to focus on what is the privilege, if there is a
17 privilege at stake here.

18 So in Category 1 -- I called it "Access to
19 Marriage," because that's what ORS Chapter 106 does --
20 it's the gateway, if you will. The Massachusetts court
21 described the marriage licensing statute as a "gateway
22 into marriage." And there is a number of elements of
23 that. There is the eligibility requirement, which
24 includes some things which are not at issue here. You
25 have to be 17 years old. You can't marry your first

1 cousin or your brother or sister in the statute. Those
2 aren't at issue. It's only one eligibility requirement
3 in Chapter 106 that's at issue.

4 Marriage is an unusual civil contract
5 because there really aren't any terms of the contract
6 other than what I've listed under "B," "Exclusivity,"
7 and, that is, once you enter into a marriage contract,
8 you can't enter into another marriage contract until
9 your first one is either dissolved or your partner dies.
10 It's an exclusive contract. That's the term of it.

11 And then, third, there are entrance
12 requirements specified in the statutes -- again, some of
13 these are not at issue in this case -- consent; you have
14 to have a license; you have to have the ceremony
15 solemnized with someone with authority to provide the
16 solemnization -- those are the requirements of Chapter
17 106.

18 What I have listed under Category 2 is what
19 I call the "Statutory Benefits of Marriage." These are
20 tangible benefits. These are, as the Vermont court
21 described it in Baker, the secular benefits and
22 protections of marriage, provided by law, that are
23 automatically available to those who have a marriage
24 contract.

25 Again , in my mind, I devoted these to three

1 categories. The first one is contract formation,
2 recognition, and dissolution procedures. These are ways
3 in which the State, by statute, helps people either form
4 the contract or break it apart. The first one is a
5 short form -- I use that as kind of a shorthand way --
6 if you go in and apply for a marriage license, the State
7 gives you a marriage license if you meet the criteria.
8 It's a short form. We saw in the affidavits from some
9 of the Plaintiffs -- they don't get that short form;
10 they have to go to a lawyer and create their own civil
11 contracts. So there is that difference.

12 Second, the filing and registration by the
13 State. That's why Defendant Woodward is a defendant in
14 this case. That's her job is to file and register
15 marriage certificates, marriage licenses. And, by
16 filing them, that has a meaning. Those licenses are
17 recognized registered by the State.

18 The third, the State provides formal
19 mechanisms for dissolution. If you have a marriage
20 contract and want to end it and enter into another one,
21 we provide the mechanism, the divorce laws. So that's
22 Category A.

23 The next category is the State also provides
24 through its statutes default terms of the contract.
25 I call them "default terms," because they can be changed

1 by the parties if the parties want to contract
2 differently. But, without any contract, that's the
3 default terms. They deal with property disposition,
4 support rights and obligations, and some of the parental
5 rights are also -- I'm thinking of things like
6 visitation rights upon dissolution. The parties can
7 contract for those rights, or, if they don't specify,
8 the State provides them by default.

9 And then, third, I think is the big
10 category -- it doesn't look so big on my outline, but it
11 is a big category -- "Other Benefits," and I have listed
12 a few that are reflected in the affidavits in the
13 record, Your Honor -- spousal privilege, the right to
14 bring a wrongful death action, surviving spouse benefits
15 -- in a variety of situations -- and other types of
16 spousal benefits. The Tanner case involved one of these
17 categories, the health insurance benefits to public
18 employees.

19 I looked at ORS Chapter 108. There are lots
20 of statutory benefits that are specified in that statute
21 that depend upon the marital status -- a wide variety of
22 legal benefits.

23 The third category that I described here are
24 also reflected in the affidavits before the Court, and
25 I call this "Private and Social Benefits of Marriage."

1 These are good things -- social recognition, respect and
2 acceptance, private employment benefits -- we have seen
3 this in some of the affidavits that the Plaintiffs have
4 submitted. They are unable to get insurance from their
5 own private employer. Hospital visitation and other
6 family benefits -- these are -- these are private social
7 benefits of being married, and there is a wide variety
8 of them.

9 If I could use the board for just a second,
10 there is a way that I visualize these that will help me
11 explain the law. I'm going to use this, if I may,
12 Your Honor.

13 THE COURT: That's fine.

14 MR. BUSHONG: What I described as the
15 Category 2 "Social Benefits" -- I put them there as
16 lines, because these are defined by statute. There is a
17 whole variety of them. This is Category 2, and then
18 just sort of the Category 3, the "Public Benefits" --

19 THE COURT: I can see fine.

20 MR. BUSHONG: Okay. These are -- they are
21 greater. They include all the Category 2, and then what
22 is Category 1 is a gateway into the categories 2 and 3.
23 This is what the Massachusetts Supreme Court described
24 as the "gateway" of the statute, the marriage statutes.

25 I have drawn it this way, because we know

1 under current law that, once you go through that
2 doorway, you get all of Category 2, and you get Category
3 3. It's not the only way you get those benefits. For
4 example, Tanner -- we know, by Tanner, that one of these
5 benefits -- if this was health insurance, for example,
6 for public employees -- they get that without going
7 through the doorway. So it's an open access in some
8 respect. It's limited. And, if I could use that to
9 highlight the differences between the parties, I will.

10 And I'm hoping to take the rest of my time
11 and then defer the rest of it to Mr. Clark to sort of
12 explain how the courts have analyzed this issue, because
13 I think it's important.

14 The difference between, I think, the
15 Plaintiffs and the Defense of Marriage Coalition -- the
16 Plaintiffs say, "We need to go through the doorway,
17 because that's the only way we can access categories 2
18 and 3 -- those benefits -- and you need to look at all
19 of them, because the doorway is what we want," and what
20 Defense of Marriage Coalition says is, "Well, what you
21 really want is the Category 2 benefits -- those are the
22 legal benefits -- and, if you want those, you have to
23 challenge those statutes. You don't necessarily have to
24 go through the doorway. You have to bring an action,
25 like the Tanner case." That's what they say.

1 But what the courts have done is kind of
2 interesting. There are, of course, no cases in Oregon,
3 other than Tanner, as I have described, but the courts
4 in other states have addressed this issue in different
5 ways. The Arizona court in the Standhardt case, which
6 we cited in our briefs -- they looked at -- the court
7 analyzed Category 1 only, the "gateway," and found that
8 there was no fundamental right to enter into that
9 gateway, that doorway, and, applying the rational-basis
10 test -- which was what the court was applying under
11 Arizona law -- that there was a rational basis for
12 denying access to that doorway.

13 The Hawaii court -- the Hawaii Supreme Court
14 in the Baehr case also looked at just Category 1, but
15 found that Category 1 is barred -- the doorway is barred
16 because of the gender of people in a same-sex
17 relationship. And so, because it was barred because of
18 gender, that led to heightened scrutiny, and then the
19 case was remanded back for further findings. But it was
20 looking at Category 1 only.

21 I think both the Defense of Marriage
22 Coalition and the Plaintiffs are looking at Category 1.
23 They are looking at the doorway, and I think that's the
24 difference.

25 Other courts have looked at it a little bit

1 differently. The Massachusetts Supreme Court in the
2 Goodrich case -- the first decision -- looked at,
3 I believe, both categories 1 and 2 in finding under the
4 Massachusetts constitution that there would be a
5 violation. By denying access to the doorway, you have
6 also denied access to Category 2. That's the way the
7 Massachusetts court looked at it. And then in its later
8 opinion, the opinion of the justices issued earlier this
9 year, its advisory opinion, the court also looked at
10 Category 3. So the Massachusetts court was looking at
11 all three of them, saying that, since the gateway is the
12 only way to get immediate access to all of these both
13 legal and social benefits, that that cannot be denied.
14 That was the Massachusetts approach.

15 The Vermont approach was somewhat different,
16 and I'd like to take a moment to describe it, because
17 I think it -- it was somewhat unusual. Some would say
18 the genius of the Vermont approach; some would say the
19 folly. The Vermont approach -- the plaintiffs were
20 making the same argument. They wanted Category 1. They
21 wanted the door opened so that they could get access to
22 the legal benefits that are provided in Category 2.

23 THE COURT: But there were two different
24 constitutional sections of the Vermont and Massachusetts
25 constitutions.

1 MR. BUSHONG: That's true, and both of those
2 are different from Article I, section 20, and that's why
3 we can only look to those cases for some guidance, and
4 that's why I'm suggesting them to Your Honor.

5 The Vermont Supreme Court was analyzing the
6 issue under its common-benefits provision of its
7 constitution. We have -- Article I, section 20, is
8 "Privileges or Immunities" -- "Equal Privileges or
9 Immunities Provision."

10 But what the Vermont court did is because
11 our constitution is concerned with benefits -- the legal
12 benefits -- that's what's important; that's what cannot
13 be denied to people because of either their gender or
14 their sexual orientation -- that we are going to look
15 only at Category 2. And that was a very interesting way
16 of looking at it, because the plaintiffs -- just like
17 these Plaintiffs, they argued, "No, you can't just look
18 at Category 2; you have got to look at the doorway,
19 Category 1, because that's our way into Category 2," and
20 what the Vermont Supreme Court said: "No, because our
21 constitution is concerned with equal benefits, we are
22 going to look at Category 2 only, and we are not going
23 to say that you have to go through this doorway, this
24 Category 1 -- yes, that is one way to access Category 2,
25 but it's not the only way," and so it was interesting --

1 the holding of the court -- if you look at the end of
2 the opinion -- and I cited in our response brief --
3 I quoted it -- one of the few block quotes, which
4 I don't like to use -- the court said: "We are not
5 holding that the plaintiffs are entitled -- have a
6 constitutional right to a marriage license, but what we
7 are holding is to have a constitutional right to the
8 benefits and privileges" -- the Category 2 benefits, if
9 you will, in my analysis. And then because of that
10 holding, that analysis, that framed the court's remedy.

11 I'm going to just briefly touch on remedy
12 here, and then I'm going to turn over the rest of my
13 time to Mr. Clark. The Plaintiffs argue that under
14 Oregon law there is only one remedy, and that is "Open
15 the door. Open the Category 1 benefits to us," and they
16 cite Hewitt, and Hewitt says -- the choice in Hewitt was
17 an either/or choice, and I agree that there is no Oregon
18 case that finds the remedy similar to the remedy we are
19 advocating in this case if the Court finds a violation.
20 But I think Hewitt does not say that that's the only
21 permissible remedy.

22 And if you look at the nature of the
23 benefits -- for example -- let's take an example of a
24 Category 2 benefit -- the right of intestate succession.
25 That's automatically provided to a spouse -- not

1 provided under Oregon law to a same-sex couple. The
2 Oregon Legislature could look at that benefit and say:
3 "There are lots of different ways we can provide that to
4 people," and could craft in any sort of -- it could take
5 that right away; it could split it up; it could provide
6 other types of property disposition rights.

7 And so that's -- my point is that, unlike
8 Hewitt -- in Hewitt, the court was facing a legislative
9 record that made it clear the court predicted that the
10 legislature, if confronted with the choice, would have
11 extended the benefit at issue to the disfavored class.
12 Here we don't have any legislative record. The Oregon
13 Legislature has never confronted the policy choices
14 raised by the issues of same-sex marriage, and that's
15 why we are arguing for a Vermont-style remedy if there
16 is a violation found in this case, because we think the
17 legislature should have that opportunity and that the
18 Court should give that opportunity to the legislature as
19 part of its remedy.

20 I see Mr. Clark is getting a little anxious.
21 So I'm going to give him the rest of my time,
22 Your Honor, unless you have questions for me.

23 THE COURT: No, thank you, Mr. Bushong.
24 I think just about everybody has said what Mr. Clark --
25 or thinks what Mr. Clark is going to say. But,

1 Mr. Clark, would you like to tell us in your own words,
2 instead of their words, your position.

3 MR. CLARK: Good morning, Your Honor.
4 Actually, I was clearing my throat, simply because
5 I needed to clear my throat, not because I was getting
6 impatient.

7 Your Honor, may it please the Court, I'm
8 Kelly Clark. I represent the Defense of Marriage
9 Coalition, as well as a number of individuals who have
10 intervened in this action. They were the original
11 Plaintiffs whom you remember a month or so ago brought
12 suit against the County, and then, for a variety of
13 procedural reasons, we decided to intervene in this case
14 and dismiss that case without prejudice.

15 I would like to say at the outset,
16 Your Honor, I very much appreciate the quality of the
17 professionalism by all the counsel. We have worked very
18 hard to get this case before you in an orderly fashion.
19 All of these folks have been consummate professionals.
20 We have been extended every courtesy every step of the
21 way, and we have tried to extend every courtesy, as
22 well.

23 I also cannot start without acknowledging
24 the very real, human issues and human drama being
25 presented to this Court. It would be callous to do so,

1 and I am not at all ignorant of those realities.

2 Your Honor, we got here because a County
3 Chairperson decided, without the benefit of public
4 meetings; without the benefit of public debate; without
5 the benefit of any input from -- any formal input from
6 other county commissioners; any formal input from the
7 voters of that county; without the benefit of any
8 legislative guidance, debate, bill, discussion; without
9 the benefit any ballot measure, debate, discussion;
10 without the benefit of any constitutional amendment or
11 direction, decided unilaterally to change the meaning of
12 the marriage statutes.

13 Whatever else the decision that you have
14 been given is, it is not simple. You have, I suspect
15 300 pages of briefing in front of you. The reason that
16 it is unwise to do what has been done here is because
17 the situation that it leaves us in -- all of us
18 collectively -- is trying to understand the meaning of a
19 constitutional provision in the midst of alleged social
20 change without any benefit of input from the people who
21 allegedly are the barometers of that social change --
22 the elected representatives of the state of Oregon.

23 But I say all of that simply to come back to
24 this: There is a strong constitutional doctrine, that
25 statutes are presumed valid and constitutional, and that

1 that presumption is to be given real weight --
2 especially in the first instance, especially on novel
3 questions -- and I offer that to the Court for what it
4 is worth, and we believe it is worth a lot in this
5 case -- the presumption of statutory validity.

6 My comments this morning, Your Honor, will
7 be broken into basically three parts. I want to talk
8 about the Historic Exceptions Doctrine, why it fits
9 here, why it applies, and to answer the question as to
10 why it's never been used before in an Article I,
11 section 20, case, and then I want to offer just some
12 observations about the Article I, section 20, analysis
13 in the event that you decide the Historic Exceptions
14 Doctrine does not apply, and then, finally, I would like
15 to reply to some of the comments made by amici and
16 Mr. Choe.

17 Let me -- if I was a trial judge and I had
18 this case, I would wonder first and foremost about this
19 Tanner case, because, by first blush, it appears to have
20 some similarity to the issues being talked about today,
21 primarily because it deals with the same class -- what
22 Tanner called a "suspect class," and so I would like to
23 hit at the outset why Tanner does not apply. I will
24 come back to Historic Exceptions Doctrine in a minute.

25 Tanner does not apply, Your Honor, because

1 Tanner says Tanner does not apply. Footnote 3 of Tanner
2 says: "Nobody has asked our opinion about these issues,
3 as they apply to the marriage statutes, and we offer no
4 opinion about these issues as they apply to the marriage
5 statutes."

6 To that extent it is almost irrelevant --
7 not totally irrelevant, because it does talk about
8 sexual orientation as a suspect class -- but, other than
9 that, the case is not on all fours. It's not even on
10 all threes or all twos. There is one point for which it
11 matters, and that is the Court of Appeals has said
12 sexual orientation, at least in the context of
13 governmental benefits -- governmental employment
14 benefits -- is a suspect class.

15 Finally, Tanner doesn't apply, because
16 Tanner never reached the difficult question that we are
17 grappling with today. Assuming you get to the
18 Article I, section 20 analysis, the second prong of
19 Hewitt asks whether the statutory distinctions are
20 justified by biological differences. Tanner never
21 reached that question, because you couldn't even argue
22 that the statutory -- that the policy choices granting
23 benefits to heterosexual couples but not to gay couples
24 had anything to do with biological differences. You
25 couldn't even argue that. So Tanner never reached where

1 the rubber hits the road here, which is the second level
2 of the Hewitt analysis.

3 So, other than the intermediate finding that
4 Tanner made in that context about sexual orientation as
5 a suspect class, we are starting from a clean slate
6 here.

7 The Historic Exceptions Doctrine -- now,
8 apart from the doctrine itself Your Honor, the Supreme
9 Court has told us for 30 years that in construing
10 constitutional provisions, framer intent matters. We
11 are not a state that says, "We have a living, breathing,
12 evolving constitution, and we, the judges, get to decide
13 whenever it has evolved enough." That's just not our
14 approach. Our approach is framer intent matters,
15 however outdated that may seem; however quaint --
16 according to the words of the Court of Appeals --
17 however quaint that may seem to modern eyes, framer
18 intent matters, that's what Priest said, and that's the
19 entire construct of the Historic Exceptions Doctrine.

20 What the doctrine says -- and it started in
21 Robertson, and it's been reiterated at least a half
22 dozen times since then in a variety of contexts -- this
23 looks like a math equation; it's actually much simpler
24 than that.

25 In reading a constitutional provision -- it

1 doesn't matter what it is -- free speech, Article I,
2 section 8; jury trial, Article I, section 17; equal
3 privileges and immunities, Article 1, Section 20 -- it
4 doesn't matter what it is. The court has never said
5 it's limited to certain kinds of constitutional rights.
6 Never. Never even a hint of that.

7 In reading a constitutional provision, if
8 history clearly shows the framers never intended legal
9 principle or institution, why -- it doesn't matter what
10 it was -- perjury statutes, marriage statutes, right to
11 a jury trial in a certain kind of business contract
12 case -- it doesn't matter. If the framers had ever
13 intended a legal principle -- a well-established legal
14 principle -- to be covered by this new constitutional
15 provision, then that principle institution, why, is
16 excepted from the provision, and the provision doesn't
17 apply at all. You don't even go through the analysis.
18 It is excepted from scrutiny.

19 So in Article I, section 8, starting with
20 Robertson, the Supreme Court said, "Now, wait a minute.
21 We know that they meant a lot of things about free
22 speech. We know they wanted very broad free speech."
23 But they couldn't have meant absolutely pure free
24 speech, no exceptions. Why? Because they had things on
25 the books then like the perjury statutes. Perjury,

1 obviously, is an exception to free speech. I can't get
2 on that stand or this stand and lie. I couldn't then,
3 and I can't now. It looked the same then as it does
4 now. The definition of perjury then and now was
5 essentially the same.

6 In Henry, the court said: "No, Historic
7 Exceptions does not apply," because obscenity -- we
8 don't really know, and they didn't really know what
9 obscenity meant. It didn't mean the same thing then as
10 now, as a legal definition. So, no, Historic Exceptions
11 does not apply.

12 And, then all the other cases we have cited
13 to you -- jury trial cases, both in the criminal and in
14 the civil context. If history clearly shows -- now,
15 I want to talk about that for just a minute, because
16 this is the difference between this case and Tanner,
17 this case and Hewitt, this case and Henry, this case and
18 Molodyh -- this is the reason that Mr. Choe's argument
19 falls when he says, "We are stuck in 1857." All four of
20 those cases did not stick us in 1857, because history
21 did not clearly show anything in those cases. The court
22 said: "We just don't think the historical record is all
23 that clear" or "We don't think the framers intended to
24 except this -- this right to a jury trial or right to
25 free speech.

1 So the key question is, if history clearly
2 shows, then the provision does not apply at all. This
3 is just a systematic way of getting to the question of
4 framer intent.

5 Now, the suggestion that Article I,
6 section 20 has never been applied -- I'm sorry --
7 Historical Exceptions has never been applied -- and
8 Mr. Choe's suggestion that there was an implicit
9 exception to the exceptions doctrine --
10 State v. Clark -- makes no sense, Your Honor, for two
11 reasons. One, State vs. Clark was handed down before
12 the Historic Exceptions Doctrine was ever articulated.
13 State v. Clark was 1981. Robertson was 1982. And the
14 Doctrine of Historic Exceptions has been pronounced --
15 at least discussed probably, I think, a dozen times
16 since then -- at least probably a dozen times. So Clark
17 predated -- and anybody that has followed the Oregon
18 constitutional jurisprudence at all knows how refined it
19 has become in the last 30 years -- particularly in the
20 last 20 years. So the fact that the doctrine was not on
21 the books at the time -- had not been recognized or
22 articulated at the time of Clark is significant.

23 More importantly, Your Honor, no one has
24 ever yet suggested that the historic exceptions analysis
25 be applied to an Article I, section 20, case, because

1 it's never fit before. It has never fit.

2 In Hewitt -- let's just take Hewitt for a
3 minute. Hewitt had to do with Workers' Compensation
4 benefits between men and women. Facial discrimination,
5 women are more dependent upon men -- that's basically
6 what the statute said. We are just going to presume
7 this social stereotype having to do with Workers'
8 Compensation benefits. Well, we can't know historically
9 what the framers would have thought about Workers'
10 Compensation benefits. It didn't exist at the time.

11 The Historical Exceptions Doctrine doesn't
12 fit that case. It doesn't fit Tanner. You can't argue
13 that we could have known what the framers would have
14 intended with legal principal health benefits. It
15 didn't exist at the time. Not only -- it's not just a
16 question of definition; it didn't exist at all, which is
17 why, for example, in one of the jury trial cases -- in
18 the jury trial case having to do with -- oh, the
19 stalking statutes.

20 A person says, "Hey, I'm being prosecuted
21 for violating the stalking statutes. I get a jury
22 trial," and the court said, "No, you don't," and they
23 did the historic exceptions analysis, and what they said
24 was that -- "Well, it's true that the stalking statutes
25 did not exist at the time of the framing, but there are

1 some historic parallels that are close enough for us to
2 do the analysis," you know. There were laws allowing
3 the courts to separate spouses during pending divorce
4 proceedings. There were things that were analogous --
5 I believe it was Judge Landau called it "historically
6 analogous" -- it might not have been Judge Landau, but
7 somebody at the Court of Appeals or the Supreme Court
8 called it "historically analogous."

9 So the question is are we talking about
10 apples and apples? That's why historic exceptions has
11 never been applied in Article I, section 20. It's never
12 fit. Apart from which, nobody has ever raised the
13 issue.

14 Now, again, as I was sitting there worrying
15 the other day about what would I be thinking about if I
16 was a trial judge -- I would be asking myself "What
17 authority do I have to apply this doctrine in the first
18 instance?" The answer is stare decisis. The same
19 authority you have to apply any case -- Supreme Court
20 case, Supreme Court reasoning or doctrine -- to a new
21 set of facts. You try to take the doctrine, as it's
22 been set out or articulated, and you apply it to a new
23 set of facts. The doctrine of stare decisis gives you
24 all the authority you need to say whether analytically
25 the Historic Exceptions Doctrine makes sense.

1 If you decide that it does not make sense,
2 then we go to the Hewitt analysis, Article I,
3 section 20. And, again, Your Honor, as the appellate
4 courts have recognized, Article I, section 20,
5 jurisprudence is not textbook clear. It's very
6 difficult to discern black letter law out of it. We do
7 know things about true classes, and we do know things
8 about suspect classes, but what it is not is the
9 equal-protection clause of the United States
10 Constitution -- analytically.

11 Our courts have said that. They have
12 rejected and then sometimes slightly readopted language
13 and concepts from the 14th Amendment. But, for example,
14 we know in equal-protection law once you get -- once you
15 target a suspect class, there is a very rigorous
16 analysis that the U.S. Supreme Court requires you to go
17 through -- including concepts like least-restrictive
18 means, narrowly tailored statutes. You have got to
19 basically take a surgeon's knife to do what you are
20 going to do with a suspect class, according to the
21 United States Supreme Court.

22 Our courts have never said that. All our
23 courts have said is once you make a distinction
24 involving a suspect class -- once you make that
25 distinction, you have to justify it -- "justify" is the

1 word -- by specific biological differences between class
2 and class. Some cases call it immutability. You just
3 have to justify it, and you have to show us that it is
4 not based on pure prejudice, pure bias, stereotypes --
5 those kinds of things.

6 That's the analysis. That's as far as we
7 have gotten, all we know. And much of the Plaintiffs'
8 argument would ask you to view the marriage statutes
9 through the lens of federal strict scrutiny. Least
10 restrictive alternative. Narrowly tailored. That's all
11 federal concepts. It's never been applied in Oregon.
12 All the statutes have to do is justify themselves in
13 terms of specific biological differences.

14 All right. So our suspect-class analysis --
15 laws involving suspect classes are reviewed under Hewitt
16 for genuine biological differences between one class and
17 the other. If there are genuine biological differences,
18 then the legislature is given deference to craft laws
19 based on those differences so long as the laws are not
20 merely prejudicial or facially biased.

21 The rule is not that a law involving a
22 suspect class is always invalid. That is not the rule.
23 Are there genuine biological differences? And, you
24 know, Your Honor, we make these distinctions all the
25 time in the law. We make these distinctions all the

1 time. I have given you a number of examples.

2 Aged street cops. We draw an artificial
3 line in the sand -- at least I'm told that people who
4 are in charge of such things do -- and, granted, it's
5 not legislation; it's a policy or regulation -- probably
6 of a local government -- but it has the same legal,
7 analytical force.

8 We draw an artificial line in the sand and
9 say at a certain point street officers, people that have
10 to do physical work -- you have got to retire beyond a
11 certain point. At least such a statute or such a rule
12 would be constitutionally valid, because we are entitled
13 to look at the rule versus crafting policy around the
14 exception. That doesn't mean there aren't some very fit
15 70-year-olds that may be able to do the street police
16 job very well. There may well be some physically
17 handicapped firefighters who could overcome their
18 handicaps and do their job. But we have a list of
19 things you have to be able to do to be a firefighter.

20 14-year-old drivers -- I know 14-year-olds
21 who are much more responsible than some 24-year-olds.
22 But we have drawn a bright line in the sand. That's a
23 kind of age discrimination, if you will, which, at least
24 according to dicta, is a suspect class.

25 Uneducated school teachers -- regardless of

1 why I can't get an education, I'm not smart enough to
2 make it through school. I don't have the emotional or
3 the mental stability to make it through school, but
4 I really want to be a schoolteacher. We say, "Sorry.
5 You have to have a ticket. You have to have a certain
6 kind of license, certain kind of educational level."

7 Poor mothers with Sick Children A versus
8 Sick Children B. The Oregon Health Plan is full of
9 these kind of distinctions. If your child has this kind
10 of a disease, your child might be able to get a
11 transplant. If your child has that kind of a disease,
12 you don't get the transplant. Because the legislature
13 is entitled to make some policy choices around those
14 things.

15 Married versus single taxpayers. The
16 government is allowed to recognize distinctions, even if
17 they are involving specific biological differences, as
18 some of those are. So let's turn to the marriage
19 statutes. The marriage statutes make all kinds of
20 distinctions, and they always have, some of which
21 involve suspect classes.

22 Youngsters cannot marry. Close kin cannot
23 marry. Married persons cannot marry. Incapable persons
24 cannot marry. What do all of those things have in
25 common, Your Honor, is the general rule, the general

1 concept that our society has decided over time, as
2 recognized in the statutes, that the public purpose of
3 marriage -- not the private purposes -- the private
4 purposes are as diverse as there are people who get
5 married. I might get married for money; I might get
6 married for love; I might get married for revenge; I
7 might get married for security. The statutes don't care
8 about the private purposes of marriage.

9 What all of those things have in common is a
10 concern for procreation -- natural procreation -- and
11 natural child rearing. That's the public purpose of
12 marriage. Why is the government in the licensing
13 business at all when it comes to private, intimate
14 relationships?

15 Mr. Grey and I have been friends here for 20
16 years. I'm willing to make an argument that society is
17 better off because of our friendship. It's a bona fide
18 friendship, been through thick and thin, all kinds of
19 things. But we don't take it to the government and ask
20 the government to license it. Nor would I want the
21 government to license it. We only license marriage
22 because of this concern about procreation and child
23 rearing. That's why we are in the licensing business to
24 begin with. And the legislature is entitled to make
25 that policy preference, just as in any of those other

1 examples I just gave you.

2 Now, the Plaintiffs say, "Well, wait a
3 minute. The State acts in a way that's inconsistent
4 with that stated policy goal. The state allows gay
5 parents to adopt, allows gay parents to act as foster
6 parents, gives no preference according to sexual
7 orientation in custody; the State is acting
8 inconsistently with its alleged interest." But,
9 Your Honor, the exception is not the goal, and it
10 doesn't have to be the goal.

11 The reason that you don't have to choose on
12 the battle between the experts is because that battle
13 should be happening in the legislative halls. I mean,
14 thank God that there are good, loving people ready to
15 pick up and adopt children and act as foster parents and
16 all of those things, but, Your Honor, the legislature is
17 entitled to look and create a statute based on, if you
18 will, a perfect world -- what they would like to see,
19 what they would like to encourage. They don't have to
20 turn around and persecute the exception and say, "No,
21 you are of no use to us at all. We are not going to
22 allow you to do any of these things. We offer
23 scholarships to bright kids at universities. We also
24 offer scholarships to good athletes, to good dancers, to
25 good artists. We offer certain kinds of scholarships

1 for a lot of reasons. We are entitled to make that
2 policy preference.

3 That does not mean we have to try to go and
4 weed out all the C students and get them out of school
5 or give them no services or pretend like they don't
6 exist. We are entitled to pursue the goal and the
7 preference without regard to what we do with the
8 exceptional circumstance. And I'm not saying that gays
9 are exceptional. I'm talking about the argument that is
10 being made about the legislative choice. We are
11 entitled to create legislative preferences and to pursue
12 those, provided those are based on specific biological
13 differences and not merely reflecting prejudice. The
14 specific biological differences are that heterosexual
15 couples, by definition, are fit -- are designed -- or
16 better yet, the marriage statutes reflect the specific
17 biological differences between heterosexual couples. By
18 definition, every heterosexual marriage -- at least
19 theoretically -- has the biological capability of
20 producing children.

21 Now, the legislature is entitled to choose
22 some forms over others. It is a very odd rule in our
23 society that married persons cannot marry. That is a
24 very strange rule. Many societies have not had that
25 rule. We do. Why? Because the legislature, the

1 congress, the representative branches of government,
2 have said, "We think this is best for society. We think
3 this is the best way to propagate the species." You
4 know what, you can actually raise more children with
5 multiple spouses -- at least if it's ordered the right
6 way -- but the legislature says, "We don't care. We are
7 going to make a policy distinction here. We are going
8 to say that you can only marry one person at a time."
9 The legislature is entitled to make those kinds of
10 choices when it comes to the optimal, the goal, the
11 preference that they want to pursue.

12 I want to end simply with responding to
13 Mr. Choe's arguments about historic exceptions, which is
14 where I started. Our Supreme Court says that framer
15 intent matters, and they mean it. In every other case
16 of discrimination -- this is my response to Mr. Choe's
17 argument about we would be stuck in 1857 -- in every
18 other case of discrimination involving either Article I,
19 section 20, or the federal 14th Amendment -- every
20 single one -- the Plaintiffs are either able to point to
21 a specific constitutional text at issue and make a
22 straight-faced argument -- or even a legal fiction --
23 that the framers would have intended or would have
24 allowed this result consistent with the language that
25 they are citing.

1 Usually the courts also have clear
2 expressions from the people -- the legislative branches
3 -- about the particular issue of equality in that
4 context. The race cases -- we have the federal 14th
5 Amendment, equal-protection clause. We have in Oregon
6 conforming amendments. We ratified the 14th Amendment,
7 by the way, in Oregon -- we tried to rescind it -- but
8 we ratified it. We made conforming constitutional
9 amendments all throughout our constitution to remove
10 race. So whatever historic -- so whatever the historic
11 intent of the framers was when it comes to race, the
12 people took that over and said, "We don't care. We are
13 the new authors. We are rewriting that portion of the
14 constitution. Race no longer matters."

15 We did that with gender, as well. Gender no
16 longer matters. We made specific conforming
17 constitutional amendments. Apart from which, in every
18 case they have been able to cite, the popular branches
19 of government have been heard -- equal rights statutes,
20 all of them, the federal civil rights act -- all of the
21 expressions of the people about how they want their
22 society to operate when it comes to this issue of
23 equality before the courts. The courts had guidance, if
24 you will, in the constitutional text.

25 The reason that the Plaintiffs -- what the

1 Plaintiffs are asking for is unprecedented -- in no
2 other case did a court decide, without any state or
3 federal constitutional text or amendment, without any
4 direction from the popular branches of government or any
5 vote by the people to create, whole cloth, a new
6 constitutional right against the clear historical intent
7 of the framers of that very constitutional provision --
8 in no other case, no state or federal constitutional
9 text or amendment -- even to point to -- that was
10 consistent with framer intent of the right being
11 asserted.

12 The Plaintiffs cannot even say to you that
13 the framers of the Oregon constitutional text at issue
14 here would have intended this result. In fact, we know
15 the opposite. And in no other case is that the
16 situation.

17 Your Honor, you should not be here trying to
18 decide, as a matter of law, which experts are right.
19 The Plaintiffs propose a massive social experiment.
20 They might be right. They might very well be right.
21 But this Court can't decide, as a matter of law, that
22 they are. That's why we have legislatures, to sort all
23 that out, to hear what these folks say, to hear what the
24 other folks say, and to make a policy decision.

25 Maybe it is time to change the marriage

1 statutes, but the legislature has to decide that -- or
2 the people. There has been no constitutional debate, no
3 constitutional amendment, no legislative debate, not
4 even a local discussion before this happened.

5 For all those reasons, Your Honor, what they
6 are asking for is unprecedented. It is a request of
7 this Court to use its broad judicial power to create,
8 whole cloth, a new constitutional right against the
9 clear intent of the framers of that very constitutional
10 right, and you should reject it. Thank you.

11 THE COURT: Thank you very much, Mr. Clark.
12 Ms. Sowle.

13 MS. SOWLE: Thank you, Your Honor. May it
14 please the Court, a couple of weeks ago this Court
15 suggested that it was only a speed bump on the way to
16 the Supreme Court, and, perhaps that's true, but rather
17 than take the caution of taking our foot off the gas, we
18 have all gotten together and agreed to put our foot on
19 the gas.

20 Nonetheless, I agree that the briefing in
21 this case has been extraordinarily good and thorough,
22 and, for that reason, I'm not going to repeat the things
23 that you have already had to read and the things that
24 others have said. I have only a few comments to make
25 with regard to the interest of the County, and then

1 I would like to defer the rest of my time to the
2 Plaintiff.

3 The County's interests in this lawsuit are
4 identical to those that it had on the very first day
5 that it began issuing same-sex marriage licenses, and
6 that is, first, to carry out its administrative
7 functions -- those that are required of it under
8 ORS Chapter 106, in compliance with the Oregon
9 Constitution.

10 And, secondly, when the County decides to do
11 that -- or when it has done so -- that is, when it's
12 issued marriage licenses in compliance with the statute
13 and without regard to sexual orientation or to gender,
14 it's the County's interest that it may assure to those
15 that it has issued licenses that they will be honored by
16 the Oregon administrative agencies and that it will
17 be -- they will be honored in the same way as they are
18 honored -- those to opposite-sex couples.

19 With respect to both of those points, the
20 County's interests and the State's are really not at
21 odds. We should have -- it should be, actually, the
22 interest of all of our government branches to comply
23 with the constitution and to act in compliance with the
24 law.

25 However, based on the briefing that has been

1 presented by the State, it's obvious that the State is
2 not primarily interested in whether or not
3 ORS Chapter 106 is constitutional, but rather is
4 primarily interested in getting the County to stop
5 issuing the marriage licenses, and the State has asked
6 the Court -- even if it finds the constitution -- the
7 marriage laws violate the constitution, to, nonetheless,
8 require Multnomah County to stop issuing the licenses
9 and to require all other counties not to begin issuing
10 them. The State asks, really, for no more than
11 court-ordered discrimination.

12 Specifically, it requests the Court find --
13 if the Court finds that the Oregon law is
14 unconstitutional, that it follow what the Vermont court
15 did in circumstances that were really quite different
16 than they are here and under facts that are different
17 than those that are facing this Court today.

18 This Court should not mimic the Vermont
19 court for a number of reasons. First and foremost, when
20 a statute is held to be unconstitutional because it
21 denies equal treatment in Oregon, the Supreme Court of
22 Oregon favors extension, and it said that in reliance on
23 the Hewitt case, in reliance on two other cases that
24 have been cited in the briefing, and the Zockert case it
25 states: "Where an impermissible classification is

1 utilized by the legislature, we have decided in favor of
2 equalizing privileges." That's our Supreme Court.
3 That's 1990. It follows the Hewitt case.

4 It's clear that it is the court -- the
5 Supreme Court of Oregon's determination that
6 equalization is the way -- the favored remedy.

7 Second, the Vermont remedy is inappropriate
8 in this case because, if the Court holds that the
9 marriage statutes are unconstitutional, the Plaintiffs
10 would have prevailed. If the Plaintiffs prevail, then
11 the remedy should be fashioned in order to help them.

12 And, again, in the Zockert case, the Supreme
13 Court says that what the Plaintiffs request as a remedy
14 is the first item that they will look at -- the first
15 criteria they will look at. In Zockert they say: "In
16 determining whether to strike down the special privilege
17 or to extend it beyond the favored class" -- and, in the
18 Zockert case, that is to other citizens -- "we commonly
19 consider the relief sought by the person who has
20 standing to demand equal treatment."

21 In this case the Plaintiffs are the ones who
22 are demanding equal treatment, and what they want --
23 what their remedy is -- is of primary importance, and,
24 certainly, that's not something that the Vermont case or
25 court was concerned with.

1 There are a number of other distinctions
2 between the Vermont case and the facts here, and
3 Mr. Choe has mentioned a couple of those. But one of
4 those that I would like to state is this. The State
5 here is asking the Court for more than the remedy that
6 was fashioned by the Vermont court. In Vermont, what
7 the court decided was to retain the status quo. Here
8 the State is not asking for status quo. They are asking
9 for status quo as to 35 other counties.

10 But, as to Multnomah County, they are asking
11 to turn back the hands of time to March 2nd. They are
12 asking that the 3,000 or so same-sex marriage licenses
13 that we have issued be held in abeyance. They are
14 really asking for an injunction. And, to do so in this
15 forum, allows them to do so without proving all of the
16 elements that are required in Oregon to prove before an
17 injunction is entitled to be issued.

18 For all of those reasons, the appropriate
19 remedy for the Plaintiffs, who have proven that they
20 have been denied privileges that a favored class has
21 been granted, is not court-ordered discrimination. The
22 remedy has to be one that provides a remedy that is
23 beneficial and of meaning to them.

24 I will reserve -- or defer the rest of my
25 time to Plaintiff. Thank you.

1 THE COURT: Thank you. All right. At this
2 point we have heard -- I guess we would call it the
3 "opening statements" from just about everybody, and
4 I indicated that I would allow both Plaintiffs and
5 Defense, if they had any additional time left, to rebut
6 some of the arguments that have been made, and I will do
7 that now, and we will start with the Plaintiff.
8 Mr. Choe.

9 MR. CHOE: Thank you, Your Honor.
10 Your Honor, I'd like to begin by rebutting Intervenor
11 Defendant's arguments regarding the Historical
12 Exceptions Doctrine. The page that you see there
13 perhaps explains why there is a disconnect between
14 Plaintiffs and Intervenor Defendants. Intervenor
15 Defendants claim that Plaintiffs are trying to create
16 out of whole cloth a new constitutional right that
17 doesn't exist in the Oregon Constitution. That's not
18 true. Plaintiffs simply seek to invoke a pre-existing
19 right, Article I, section 20, that has a long and
20 storied history. We are not seeking to create a new
21 constitutional right.

22 In fact, it's exactly what Mr. Clark talked
23 about in terms of stare decisis. We are simply taking
24 long-established principles that are binding on this
25 Court and applying it to a new context, and that's

1 something that this Court does every day. In that
2 sense, there is nothing novel about what Plaintiffs are
3 doing in their case.

4 Mr. Clark represented that there are many
5 different contexts in which the Historical Exceptions
6 Doctrine has been applied, and there is no limiting
7 principle whatsoever, and, therefore, it should also
8 equally apply to Article I, section 20.

9 This is false. There are only two contexts
10 in which the historical exceptions doctrine has been
11 applied: free speech and jury trials. I'll note that
12 in Intervenor Defendant's reply, they cite in the
13 footnote a third context, which is search and seizure,
14 Article I, section 9. In fact, that's a
15 misrepresentation. In that case, the court expressly
16 declined to hold that there was a Historical Exceptions
17 Doctrine that applied to Article I, section 9. So we
18 are left with only two contexts.

19 In the free-speech context, when one looks
20 at the jurisprudence, there is a limiting principle.
21 There is a theme that runs throughout why there are
22 certain types of speech that are not protected by
23 Article I, section 8. If you look at the case law, it
24 talks about -- as I believe Mr. Clark mentioned --
25 perjury, forgery, fraud. These are types of speech that

1 are antithetical to the whole notion of free speech.
2 They actually interfere with meaningful speech, because
3 they are injurious falsehoods that actually distort the
4 discourse, and so, in that sense, it makes perfect sense
5 that these kinds of speech would not be protected speech
6 under the free-speech provision of the
7 Oregon Constitution, because to protect that kind of
8 speech would defeat the whole purpose of the free-speech
9 clause.

10 The second context is the jury trial
11 context, and this is actually a little bit easier. In
12 Article I, section 11, there is this very sweeping
13 language, as I think Mr. Clark referenced, about a very
14 broad right to a jury trial in a criminal context. But,
15 if one keeps reading to the very end, there is actually
16 a clause at the very end that, in fact, makes clear that
17 one can look backward in time, and that that is
18 something permissible to do when defining the scope of
19 this particular right. So it's actually built into the
20 constitutional provision itself, and I -- I don't have
21 the exact text, but it talks about the constitutional
22 right to a jury trial continuing, in effect, and the
23 constitutional right remaining, and so it clearly is
24 contemplating perpetuating what existed prior to its
25 adoption into the Oregon Constitution.

1 And so in these ways it does make sense
2 that, perhaps in these two contexts, there would be a
3 Historical Exceptions Doctrine, but these are not
4 reasons why it makes sense for there to be a Historical
5 Exceptions Doctrine applied in the Article 1,
6 Section 20, context. There is no textual support for
7 it, as there is in the jury trial context.

8 And, unlike the free-speech context, it is
9 not antithetical to equality to provide full equality.
10 In fact, it's antithetical to equality to accept things
11 out of equality. So, by the very nature of the
12 constitutional right, it's fundamentally different from
13 the right where the Historical Exceptions Doctrine has
14 been applied.

15 And this, is, in fact, something that has
16 been implicitly recognized by Oregon appellate courts
17 throughout time, including recently. Mr. Clark points
18 out that Clark predates Robertson, but there have been
19 Article I, section 20, cases since Clark and since
20 Robertson, and in none of those cases has the Oregon
21 Supreme Court seen fit to create a new context in which
22 the Historical Exceptions Doctrine applies.

23 Now, Mr. Clark has sort of challenged
24 whether there are, in fact, cases where there are sort
25 of -- where the intent of the framers clearly would have

1 been overridden by a case after 1857. There's the case
2 NAMBA v. McCourt, which was a federal equal-protection
3 case, but, in the course of that case, which was about
4 discrimination based on alienage, the court expressly
5 stated that a law that discriminates based on alienage
6 is equally repugnant to Article I, section 20.

7 And there is no doubt that the Oregon
8 framers of the constitution had strong biases against
9 aliens. They would not let certain people emigrate to
10 Oregon from other parts of the country, let alone from
11 other places in the world. These are the kinds of
12 things that are fairly clear in terms of what the Oregon
13 constitutional framers would have intended.

14 The same is actually true for Hewitt. I
15 don't think it really matters analytically, based on the
16 tests that Intervenor Defendants have put forth, whether
17 Workers' Compensation statutes were in existence in 1857
18 or not. It's pretty clear that, although there were
19 certain ways in which the framers of the
20 Oregon Constitution were progressive in terms of gender
21 rights, they certainly did not fully embrace the notion
22 that women are not dependent on men, that they should
23 receive full rights in the workplace, and, under this
24 test, Hewitt would have to go down, as well.

25 Things like illegitimacy -- it's clear --

1 actually, amici's brief talks about English common law
2 that was adopted in Oregon and that existed prior to the
3 adoption of the constitution. There was clear
4 discrimination against children who were born out of
5 wedlock.

6 Now, that has been fixed here in Oregon, but
7 it's clear that -- if the legislature were to go back
8 and discriminate in some way against illegitimate
9 children, that they would have no recourse under
10 Article I, section 20. They would have to go through a
11 constitutional amendment process, and there is nothing
12 in Article I, section 20, jurisprudence that suggests
13 that that is something they should have to do. And, in
14 fact, the Supreme Court in Bradley looks very favorably
15 on the fact that illegitimacy discrimination has been
16 eradicated from the laws of Oregon.

17 And, if, in fact, the challenge is that,
18 well, in some way, shape, or form you can look to
19 something in the intentions of the framers of the
20 Oregon Constitution to say that various things today --
21 like the Hewitt case and the Tanner case and so forth --
22 should remain valid, there is something false about
23 this, because it's clear that for something to be
24 excepted from the constitution, there has to be a very
25 high burden of proof. It would seem -- and that would

1 be the case, I would think, in any of the other cases
2 involving the Historic Exceptions Doctrine -- it's a
3 very big deal to take something out of the protection of
4 the constitution, and there needs to be -- and this is
5 true in the Historic Exceptions Doctrine -- some clear
6 showing that the framers of the Oregon Constitution did
7 not intend for that to become enshrined in the Oregon
8 Constitution.

9 And that doesn't exist here, actually. They
10 are taking a negative inference and assuming that that
11 is evidence of intent. There is no evidence that the
12 framers of the Oregon Constitution contemplated
13 marriages of lesbian and gay couples at all, and I would
14 say it's very unlikely that they did that, and if it's
15 just the evidence of the fact of the statute, again, all
16 that does is it takes all the statutes on the books in
17 1857 and codify them, and that is the bar at which we
18 find ourselves in terms of equality today.

19 There was some talk about the fact that the
20 Oregon Constitution has been amended in various ways
21 over the years, and that's certainly true. But, again,
22 under the theory put forth by Intervenor Defendants,
23 while those subsequent amendments to the
24 Oregon Constitution fixed specific disabilities that
25 were placed on people because of their race or because

1 of their gender, this notion is, "Well, but the
2 intention" -- without sort of an express ERA provision
3 or some express provision that bars discrimination based
4 on race, in general, that original intent of the framers
5 not to give full equality would remain, except for those
6 places where in these discrete circumstances where
7 subsequently there was an amendment to the constitution
8 to fix, for example, the right to vote or the right to
9 be conscripted into the militia.

10 And it's actually clear from the record, the
11 historical record, that the framers of the
12 Oregon Constitution did not want there to be racial
13 equality in public education. They did not want what
14 they called "Negroes" and "Indians" to be equal in
15 education. But they did not put that in the Oregon
16 Constitution at the time, because the record shows they
17 didn't think they needed to do that to accomplish that
18 goal.

19 Well, that intent holds true today, and
20 nothing has been done to the Oregon Constitution to
21 suggest that that intent has been abrogated in any way.
22 So if there were racial discrimination today in the
23 public school systems of Oregon, those children would
24 have no recourse today.

25 I find it kind of ironic that they point to

1 the 14th Amendment of the Federal Constitution as their
2 sort of panacea for all of the other things that have
3 not been fixed in the Oregon Constitution. Like
4 alienage -- if you look at the reply brief -- they talk
5 about, "The reason that we know it's not okay these
6 days" -- maybe it wasn't alienage -- but they point to
7 the 14th Amendment as evidence, and they look at the
8 federal constitution as evidence that certain things
9 have been fixed.

10 Well, the 14th Amendment applies to lesbian
11 and gay people, as well, and that has been made clear in
12 the Oregon Supreme Court jurisprudence -- of course, in
13 1996, *Romer v. Evans*, the Supreme Court made clear that
14 the equal protection of the federal constitution applies
15 equally to lesbian and gay people, just as to every
16 other person.

17 And so if the 14th amendment is, in fact,
18 something to which we can point, then we have that
19 example for Plaintiffs here.

20 I'll move on to talk about some of the other
21 points that were made. There was this attempt to
22 minimize *Tanner*, and, again, while there was this notion
23 that *Tanner* means practically nothing in this case, the
24 discussion about *stare decisis* is actually very
25 instructive, because it says that whatever principles

1 come out of Tanner are applicable to later cases, even
2 if the facts of those case are different. And in Tanner
3 what we get are that sexual orientation is a true class;
4 that sexual orientation is a suspect class, and
5 Mr. Clark conceded those two things.

6 But what we also get out of Tanner is that
7 where there's discrimination between same-sex couples
8 and different sex couples, that's a form of
9 sexual-orientation discrimination, and it's not what the
10 Intervenor Defendants contest, but Tanner stands for
11 that proposition as an analytical matter.

12 It is true that Tanner does not go on to
13 talk about whether this particular discrimination based
14 on sexual orientation is justified, but, for the reasons
15 that we talked about before in this case under our
16 independent analysis, it's not justified.

17 Going to the justifications question, there
18 was some talk that Plaintiffs were relying on federal
19 strict-scrutiny jurisprudence for their arguments.
20 Plaintiffs do not rely on federal strict-scrutiny
21 jurisprudence, as I laid out in our opening remarks. It
22 is actually the definition of "heightened scrutiny"
23 that's in Hewitt and in Tanner on which we rely.

24 It certainly can't be the mere fact that
25 there are differences that justifies discrimination. Of

1 course, men and women are different, by definition, just
2 as same-sex couples and different-sex couples are
3 different, by definition. There are differences that
4 are biological, that are genuine.

5 But that can't end the inquiry, because in
6 every case then discrimination would be justified. That
7 difference has to matter in order for that
8 discrimination to be justified. I mean, just the mere
9 fact alone that there are differences isn't enough.

10 So then we come to the question about what
11 it means to use those differences -- and I'm actually
12 going to use Intervenor Defendant's definition.

13 The definition under No. 2 -- that's
14 "rational basis." And we can -- we know there are two
15 levels of scrutiny in Oregon, and so there has to be a
16 distinction between "rational basis" and "heightened
17 scrutiny." The distinction that they are making is that
18 "rational basis" means that if -- the laws can be
19 prejudicial or facially biased, but -- or based on
20 prejudice of some sort, but we know, that even under
21 rational basis, that the legislature -- or the state --
22 can never act on prejudice alone. That is inherently an
23 illegitimate difference. The State can't discriminate
24 for the sake of discriminating. So that's not a
25 distinction between "rational basis" and "heightened

1 scrutiny," and so what we are left with is -- because
2 that is always true, that laws cannot be based on mere
3 prejudice or mere bias -- that the analysis that
4 Intervenor Defendants put forth is that the legislature
5 is given deference because they can rationally make
6 certain decisions.

7 That's not rational scrutiny in Oregon, and,
8 in fact, Mr. Clark talked about the legislature can
9 posit a perfect world when making these kinds of
10 distinctions, but actually Hewitt said it has to be the
11 actual world; it can't be a perfect world.

12 Mr. Clark also talked about other exclusions
13 from the marriage statute, and he -- of course, those
14 are not before the Court at this time, and they would be
15 subject to their own analysis -- whether they would be
16 subject to heightened scrutiny, whether there would be
17 justifications -- and that would be a very different
18 analysis from the analysis here today.

19 But he used them to talk about the fact that
20 those clearly show that procreation and parenting must
21 be the sole interests in marriage. But, actually, those
22 examples show that that can't be true, because --
23 I mean, it's clear that those who are under age or those
24 who are related in a certain degree of kinship, those
25 who are mentally incapable -- they can procreate, and

1 they can have children. So it's not that that is
2 excluding them from marriage, because they can actually
3 fulfill that interest that Intervenor Defendants posit
4 to be the sole interest of marriage. But that certainly
5 can't be true, and so there is clearly more to marriage
6 and more to these exclusions than just that.

7 I'll actually just conclude by responding
8 very quickly to a few points that Mr. Bushong made. In
9 his helpful diagram, I just want the Court to understand
10 that, even if the focus is on what is there denominated
11 Roman numeral one, that is not the definition of what a
12 "privilege" is. "What one is seeking" is not the
13 definition of a privilege. It's a question of what
14 advantage is conferred by what one is seeking. If it
15 confers some sort of advantage -- in other words, if it
16 confers Roman numerals two and three, then it's a
17 privilege for purposes of Article I, section 20.

18 In terms of remedy, Mr. Bushong talked about
19 sort of ways in which -- at least in Vermont, and he was
20 suggesting here in Oregon -- there could be ways of
21 getting at Roman numeral two -- alternative ways of
22 getting at Roman numeral two -- and the legislature
23 could have various ways of getting at that. But none of
24 those ways, at a minimum, gets you to Roman numeral
25 three, and, in that sense, without Roman numeral one,

1 there will never be full equality between same-sex
2 couples and different sex couples.

3 And the last minor point is Mr. Bushong
4 talked about there is no legislative record at all about
5 what the Oregon Legislature would do if confronted with
6 the choice of either extending the privilege to same-sex
7 couples or abolishing the privilege for all couples,
8 and, again, the analysis in Tanner -- I'm sorry -- in
9 Hewitt, is instructive. Yes, the Hewitt court looked to
10 what had happened in the legislative record, but in its
11 conclusion, its ultimate ending point was to find out
12 what the purpose of the Workers' Comp statutes was, and,
13 in ascertaining that through the legislative history and
14 seeing that they really wanted surviving families to
15 have stability and security when a partner died on the
16 job, it made sense to extend the privileges at issue.

17 Here, while certainly the legislators never
18 actually considered this -- this particular question --
19 we know what the purpose of marriage is. We know
20 that -- you know, even back to the time of the Oregon
21 constitutional framers -- that it was about protecting
22 the family unit, and because that is the fundamental
23 purpose of marriage, we know that extending the
24 privilege here would achieve the same goal, but for more
25 couples here in Oregon. Unless Your Honor has

1 questions --

2 THE COURT: Everybody is doing an excellent
3 job. It's hard to ask questions without probably
4 causing some controversy. So, thank you, Mr. Choe.
5 Mr. Bushong?

6 MR. BUSHONG: Just a couple of quick points.
7 In response to Multnomah County, the County suggests
8 that the State is asking for court-ordered
9 discrimination and that the State is interested in
10 stopping the County from issuing marriage licenses to
11 same-sex couples. The County is partly right. The
12 State is interested in the enforcement -- the consistent
13 enforcement of the rule of law throughout this state,
14 and right now what we have are 35 counties following
15 current statutory requirements and one county that's
16 not. We don't think that is appropriate. So we are
17 asking, as part of the remedy in this case, for the
18 Court to order adherence to the rule of law.

19 We are not interested in court-ordered
20 discrimination, and I think that's implicit in what the
21 County is suggesting is that, if it follows the rule of
22 law, as the other counties are doing right now -- that
23 there will be court-ordered discrimination, and I don't
24 agree with that, and I'm going to use my diagram again,
25 if that's okay, to explain why -- if it's helpful at

1 all.

2 I think with the rule of law -- the
3 Category 1 here is the doorway, and that's what the
4 Plaintiffs want. That's what they have in Multnomah
5 County right now. They have that doorway.

6 THE COURT: I can see fine.

7 MR. BUSHONG: All right. What -- the
8 discrimination that is out there -- the State is not
9 interested in perpetuating discrimination. As a matter
10 of fact, after Tanner was decided, the State -- not only
11 health insurance benefits, but all sorts of state
12 benefits were extended to same-sex couples. As Mr. Choe
13 noted, we have adoption benefits granted to same-sex
14 couples. There is a lot of different ways to access
15 equality and to prevent discrimination besides going
16 through that door.

17 Now, let's take an example that has been
18 mentioned in the affidavits in this case. Let's take
19 the example of the spousal privilege. If Multnomah
20 County -- if this door is closed in Multnomah County, as
21 it's already closed in other counties in Oregon right
22 now, the spousal privilege is not available to same-sex
23 couples as a matter of automatic law, and we have
24 affidavits from Plaintiffs Potter and Moen, who
25 explained that the spousal privilege from testifying is

1 important to them.

2 Does that mean that we are asking for the --
3 for discrimination as to the spousal privilege? No. We
4 don't know if either of those Plaintiffs will be called
5 to testify and would like to assert their spousal
6 immunity. Perhaps by the time the legislature addresses
7 this issue there will -- there will never be an instance
8 in which a same-sex couple will be called upon to assert
9 spousal immunity from testifying against the other.
10 Perhaps there will be, and, if there will, then the
11 court can address it at that time.

12 But, just by closing this door, adhering to
13 current state law, we don't have -- we would not be
14 perpetuating court-ordered discrimination at all. We
15 would be following state law, as other counties are
16 doing right now.

17 I guess -- only a couple of other points in
18 response to the County. The County cites the Zockert
19 case. Zockert involved the rights of fathers --
20 paternal rights of fathers -- and, sure, it made sense
21 to extend those rights as a remedy in that case, just as
22 in Hewitt it made sense to extend those rights as a
23 remedy in that case, because the court could determine
24 that is what the legislature would have wanted. That's
25 the analysis that the court follows in Hewitt and in

1 Zockert.

2 Here we have so many sort of Category 2
3 benefits. There are so -- and each one of them carries
4 with it policy choices that the legislature has grappled
5 with in determining that it's a good thing to have
6 wrongful death actions brought in Oregon, for example,
7 or certain types of spousal benefits -- the whole host
8 of statutory benefits set forth in Chapter 108. Each
9 and every one of them represents a legislative policy
10 choice, dealing with questions of administering the law,
11 fiscal consequences.

12 And all of those policy choices -- if we
13 open up the door, as Multnomah County has done, to all
14 of those benefits immediately and automatically, we have
15 deprived the legislature of an opportunity to address
16 the policy choices of doing so. And there is no
17 evidence in any legislative records that that is what
18 the legislature would have intended. Perhaps the
19 legislature would have intended to open up a different
20 door to those benefits. Perhaps the legislature would
21 have intended to take that benefit away from everybody.
22 Perhaps the legislature would have done something in
23 between. There is a myriad of instances in which the
24 legislature, in addressing the policy, the fiscal, and
25 the administrative consequences of opening that door

1 could have made a different choice.

2 And that's all we are saying. That's why we
3 are asking for the Vermont-type remedy if a violation is
4 found here. The County suggests two things in response
5 to the Vermont remedy. In addition to saying, "That's
6 never been done in Oregon" -- well, that's true. It has
7 not. But this is an unusual case. This case has never
8 been brought in Oregon either. So we are asking for
9 some flexibility and some creativity in the courts in
10 dealing with a difficult issue.

11 But the attempt to distinguish the Vermont
12 case doesn't work here. The County suggests that
13 Vermont presents different circumstances. Well, yes,
14 there were different same-sex couples involved in that
15 case, but they had the whole host of what I described as
16 Category 2 benefits that were at issue.

17 The County suggests that Vermont really
18 wasn't interested in unequal treatment, and I suggest
19 that that's just wrong. I read the Vermont case very
20 carefully, as you can imagine. That's exactly what the
21 Vermont court was most interested in was preventing
22 unequal treatment, and that's why the Vermont court
23 focused on Category 2. Because, for the Vermont court,
24 it wasn't the door that was the most important -- the
25 doorway into Category 2 -- it was Category 2 itself.

1 And what the Vermont Court said was, "We have to have
2 equal treatment in Category 2, and we will let the
3 legislature decide how to get there." That's what we
4 are asking for in this case.

5 The legislative record that was available in
6 Hewitt that gave the Court the ability to predict what
7 the legislature would have done is not present here, and
8 because there are so many different types of benefits
9 that we are talking about, I think the legislature
10 should have the opportunity to address those benefits --
11 the policy implications -- in the first instance, and
12 that's why we are asking for the Court to maintain the
13 current rule of law throughout Oregon and then adopt a
14 Vermont-type remedy if a violation is found in this
15 case. Thank you.

16 MR. CLARK: Your Honor, I only have about
17 three or four points. I don't think I will be very
18 long. I want to start with the question that Mr. Choe
19 raises about what does it mean if we get to heightened
20 scrutiny? What does it mean if we find a statute has
21 made a distinction based upon a suspect class?

22 I stand by my statement that we do not have
23 the whole framework of federal 14th Amendment
24 jurisprudence. Least-restrictive alternative, most
25 narrowly tailored -- that whole very, very rigorous 14th

1 Amendment analysis. If that means, then, that what we
2 are really saying is "rational basis," then maybe that's
3 what it means. We don't really have any clear
4 articulation from the Oregon courts about what happens
5 if you get a suspect class. We don't have a clear
6 articulation. We have a couple that can you sort of
7 overlay and get a sense of, and that's as plainly stated
8 as we know how to state is. That the legislature can
9 base laws on those genuine biological differences. The
10 legislature can base its laws on those genuine
11 biological differences. We are told nothing about the
12 narrowness or the broadness of the microscope through
13 which you are supposed to do that. We are just not told
14 anything.

15 All we know is that the marriage statutes
16 are based on that public purpose of marriage that I
17 talked about. Why we hand out marriage certificates to
18 begin with. That's the basis of it. The legislature
19 didn't sit around now or historically and say, "How can
20 we discriminate against gays and lesbians?" Did not sit
21 around and say, "How can we discriminate against Muslims
22 or some sects of the Mormon Church that still would like
23 to practice polygamy?" The legislature didn't do that.
24 They said, "This is what we want the marriage statutes
25 to look like." It's not based on prejudice or bias.

1 It's based on those genuine biological differences that
2 the legislature recognized, which is the unique
3 procreatability of one man and one woman.

4 All of that only applies -- all of that only
5 applies if the suspect -- if the historic exceptions
6 analysis is not applicable. You don't even get to
7 Article I, section 20, analysis if historic exceptions
8 apply, and I want to start where I ended with historic
9 exceptions.

10 If there are analytical reasons -- Mr. Choe
11 has attempted to give you some analytical reasons why
12 Article I, section 20, should be excepted from the
13 Historical Exceptions Doctrine -- why it should not
14 apply. Those might be good reasons; those might not be
15 good reasons. I don't know that the purpose of free
16 speech and the purpose of equality are analytically
17 different. I think the framers would have had a very
18 interesting debate about that -- the core political
19 speech being what it was at the time. But what we know
20 is if there are analytical distinctions between
21 constitutional rights, triggering the historic
22 exceptions analysis, we have never heard that from the
23 appellate courts. Nothing even suggests that they would
24 not apply historic exceptions to any constitutional
25 right when it makes sense to do so.

1 We have pointed out to you four separate
2 constitutional provisions. In eight, ten -- I don't
3 know how many cases where they have applied it --
4 several free speech cases, several jury trial cases,
5 both under Article I, section 11, and Article I, section
6 17 -- civil and criminal contexts -- two different
7 constitutional rights -- and the search and seizure
8 case.

9 Now, I have been practicing law 20 years,
10 Your Honor. I take phrases like "misrepresented to the
11 Court" very seriously. I went and checked our brief.
12 What our brief said was "even the search and seizure
13 case analyzed" -- we did not say "found a historical
14 exception" -- we said "analyzed search and seizure
15 questions" very briefly in a passing way. We used the
16 word "analyzed." They did not find historic exceptions.
17 But they indicated no reason that Article I, section 9,
18 might not some day fall under the Historic Exceptions
19 Doctrine. They simply said here we don't have to decide
20 it, because we are going to decide it on other
21 questions.

22 So there is absolutely no indication from
23 the appellate courts -- let alone the Supreme Court --
24 that Historic Exceptions Doctrine is limited in any way,
25 shape, or form to some particular kind of constitutional

1 right.

2 That's all I have, Your Honor.

3 THE COURT: All right, folks. Again, I want
4 to thank the attorneys for doing an excellent job, and
5 any of you that are in the audience that are not
6 attorneys -- I think, if you take anything from this,
7 I think you take the fact that there is a need for
8 openness and debate and reasoned debate on these issues.
9 Also these attorneys are not only speaking as advocates
10 for their clients, but from the heart on these issues,
11 because these are the type of issues that are important
12 to them, and you can see how everybody interprets the
13 law a little bit differently.

14 I have been on the bench for over 25 years,
15 and no decision is easy, but this is going to be a very,
16 very difficult decision, just because of the reasons you
17 see. There is not a lot of precedent that can be
18 pointed to that helps us make a decision, such as there
19 is in criminal law and basic contracts law and that sort
20 of thing on the civil side. This is plowing new ground,
21 and I am very thankful that I will simply be an asterisk
22 in some other opinion somewhere along the line that
23 either the Supreme Court and/or the legislature and or
24 an initiative process or whatever comes along that makes
25 some of these decisions that are more final.

1 But, in any event, I think we have got an
2 excellent start, and I will -- because I have had some
3 excellent full-time, very dedicated help from my law
4 clerk, Yumi O'Neil, here, who has checked and
5 double-checked citations, checked and double-checked
6 every reference that you can imagine -- we are well on
7 our way to at least getting that part of it done.

8 I will try to have an opinion out to you
9 before the end of next week. You should be able to
10 count on it by then, because we need some speed in this,
11 and that's what everybody has attempted to do, and
12 that's what I will do. So I want to thank the lawyers
13 again. Excellent work, excellent representation of your
14 constituency, and we are in recess.

15 (PROCEEDINGS CONCLUDED AT 10:56 A.M.)

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25

1 STATE OF OREGON)
2) ss.
3 County of Multnomah)
4

5 CERTIFICATE

6
7 I, JOYCE K. ZARO, hereby certify that I am a Certified
8 Shorthand Reporter in Oregon and Washington, a
9 Registered Professional Reporter, a Certified RealTime
10 Reporter, and a Certified Broadcast Captioner; that, as
11 an Official Court Reporter for the Fourth Judicial
12 District of Oregon, the foregoing proceedings were taken
13 down by me in Stenotype and transcribed through
14 computer-aided transcription; and that the transcript,
15 pages 1 through 89, constitutes a full, true and
16 accurate record of all oral proceedings had and of the
17 whole thereof.

18 Witness my hand at Portland, Oregon, this
19 16th day of April, 2004.

20
21
22
23 _____

24 JOYCE K. ZARO
25 OREGON CSR NO. 90-0099