IN THE SUPREME COURT OF THE
STATE OF OREGON

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, an Oregon not-for-profit corporation; and AMERICAN CIVIL LIBERTIES UNION OF OREGON, an Oregon not-for-profit corporation, Plaintiffs-Respondents, Cross-Appellants, and MULTNOMAH COUNTY, a political subdivision of the state of Oregon, Intervenor-Plaintiff-Respondent, Cross-Appellant, v. STATE OF OREGON; THEODORE KULONGOSKI, in his official capacity as Governor of the State of Oregon, HARDY MYERS, in his official capacity as Attorney General of the State of Oregon; GARY WEEKS, in his official capacity as Director of the Department of Human Services of the State of Oregon; and JENNIFER WOODWARD, in her official capacity as State Registrar of the State of Oregon, Defendants-Appellants, Cross-Respondents, and DEFENSE OF MARRIAGE COALITION, an assumed business name of OREGON FAMILY COUNCIL, an Oregon not-for-profit corporation; CECIL MICHAEL THOMAS; NANCY JO THOMAS; DAN MATES; and DICK JORDAN OSBORNE, Intervenor-Defendants-Appellants, Cross-Respondents.	)	Multnomah County Circuit Court No. 0108 07915 Supreme Court No. S51612

INTERVENOR-DEFENDANTS-APPELLANTS, CROSS-RESPONDENTS DEFENSE OF MARRIAGE COALITION, et al.'s

~~REPLY BRIEF~~

Appeal from the Judgment of the Circuit Court of the State of Oregon for the County of Multnomah entered June 24, 2002.

Honorable Frank L. Bearden, Circuit Court Judge

NOVEMBER 4, 2004

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I. INTRODUCTION

A. THIS COURT'S HISTORICAL EXCEPTION ANALYSIS.

This Court has unambiguously declared itself a history-respecting court. One way in which this Court has shown this respect is by recognizing that the Oregon Constitution is not untethered to drift in the political winds. BRO Plaintiffs, the County and numerous *amici* do not like that fact—at least as it applies to this case—and cry that, if really history matters, then Oregon constitutional law is an enemy of human and social progress. DOMC Intervenors have never insinuated that the framers' subjective understanding of constitutional terms wholly confines their application today. Instead, DOMC Intervenors argue—consistent with this Court's precedent —that certain historical laws sometimes fall outside the reach of a constitutional provision; they predate it, they are excepted from it; they are "grandfathered." But this does not mean the constitutional provision ***itself*** is frozen in time—as BRO Plaintiffs suggest—only that certain ideas, institutions, or laws that fit the specific and narrowly tailored "grandfathering" criteria are ***exempted***.

The plainest example of such an historic exception is perjury in relation to Oregon's free speech provision: perjury is an exception from protected ***speech***. *See State v. Robertson*, 293 Or 402, 412, 649 P2d 569 (1982) (free speech under Article I, Section 8 does not include "perjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud and their contemporary variants"). So too, marriage is an historical exception that is grandfathered as to Article I, Section 20, because even if putatively unequal as applied to same sex couples, youngsters, or those already married, the legal institution of civil marriage itself was well-recognized in 1857 and has remained substantially unchanged since.[1] Thus, traditional one-man-one-woman

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[1] The structure of marriage is unchanged at its core: a civil contract between one man and one woman, each of capacity. Variations in the defined age of capacity are inapposite to BRO

marriage is, by legal circumstance and historical definition, not properly considered as ***inequality*** under Article I, Section 20.[2]

BRO Plaintiffs (hereinafter inclusive of Multnomah County unless specifically noted), *amici*, and even putative defendant the State all fail to comprehend this remarkably simple legal construct: the historic exceptions doctrine—to the extent that is a "doctrine" at all—is a subset of this Court's historical analysis that only operates where a historical legal fact both predated the Oregon Constitution and has remained in force and intact since 1857. In this way, ***the historic exceptions concept is self-limiting and highly restricted in scope***. DOMC Intervenors do not advocate the resurrection of antiquated and long-dead laws, and the repeated equation of DOMC Intervenors and traditional marriage supporters with history's bigots and racists is disingenuous, ill-advised, and unhelpful to a reasoned resolution of this case.

Contrary to the emotional arguments made by BRO Plaintiffs and *amici*, racial and gender inequality under the law have been repudiated both constitutionally and by statute, and therefore can no longer operate as "historic exceptions"—if they ever could have. The Legislature simply could not bring back an historic exception that has lapsed or been constitutionally repudiated. In this regard, BRO Plaintiffs, *amici*, and regrettably even the State engage in nonsensical *reductio ad absurdum* arguments. Compounding this error, BRO Plaintiffs, *amici*, and again the State choose to deliberately ignore the role of intervening changes in the Constitutions of Oregon and the United

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Plaintiffs' claims, as are the effects of constitutional amendments on race, allowing interracial marriage. *See* Part II.A.1.c, *infra*, at 20.

[2] *See State v. Slowikowski*, 307 Or 19, 27, 761 P 2d 1315 (1988) (explaining in *dicta* in the Article I, Section 9 (search and seizure) context that the under the historic exception doctrine "there is an historical exception for such use of [contraband sniffing] dogs, *i.e.*, ***such a use would not be a search***") (emphasis added).

States as well as changes in Oregon statutes. Recognizing marriage as the kind of historical legal fact that has, up to now, defined this Court's historical exception analysis does not "turn back the clock" on rights. Rather, it affirms the basic concept that the words of the Oregon Constitution have meaning beyond the fancies of the moment, the obvious discipline that the Oregon Constitution cannot be read in an historical vacuum, and ultimately the first principle that legitimate government limits itself. This is the crux of constitutionalism.

BRO Plaintiffs appear to misapprehend the historic exceptions concept as stated by this Court and argued by DOMC Intervenors to mean that constitutional ***provisions*** are frozen in time. This is simply not what DOMC Intervenors have argued and not what this Court has said. Rather, following this Court's precedent, DOMC Intervenors argue that the historic exceptions doctrine is a self-limiting doctrine, rigorously requiring a legal institution not only to be in existence at the time of the founding, but also to have existed in substantially similar form up to the present. Marriage is one such unchanged historical legal fact,[3] as is perjury in the case of free speech and certain kinds of actions giving rise to trial by jury. *See* Part II.A.1 *infra* at 7–17. The historic exceptions lens is not a blind and retrograde imposition of 1857 values, but a recognition of the worth and propriety of long-established and unbroken legal norms that predate Oregon's founding.

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[3] The State would define marriage exactly backwards as the benefits which have accrued to it. *State's Response Brief* at 36–37, 52–53. As stated in DOMC Intervenors' opening brief, the ivy on an old stone wall is not the wall itself. Marriage is a civil contract, it is not coequal to the benefits that flow from obtaining that contract. As Judge Bearden described marriage, "Prior to the 1930's and certainly prior to our rural and agrarian society becoming more urban and over-legislated, there were few rights and privileges bestowed by any level of government that would be worth mentioning, much less fighting for. Everyone was equally deprived." E-R 441. Take away every financial and civil benefit from marriage, and a husband and wife are still joined in union—still ***married***. The accretion of benefits to the married state over time has done nothing to change the institution itself, or take it out of the "historical legal fact" category. The State is wrong to conflate marriage with modern benefits that are in no way tied exclusively or necessarily to marriage.

The State makes the same fundamental error as BRO Plaintiffs, forgetting the self-limiting boundaries of the historical legal fact framework. The State objects to an unfounded and strictly originalist view of Oregon constitutional jurisprudence, but in doing so, the State savages a helpless strawman. DOMC Intervenors are not arguing that the framers' original intent governs all constitutional provisions, but rather that the "historical legal fact" analysis exempts ***laws that have existed and been in effect largely unchanged since the framing in 1857***. *See Robertson*, 293 Or at 412 (free speech does not include "perjury [*etc.*] . . . and their ***contemporary variants***") (emphasis added); *State v. Henry*, 302 Or 510, 732 P2d 9 (1987) ("obscenity" not an historical exception because it has not meant the same thing over time). The "historical legal fact" concept does not freeze equality at its meaning in 1857; it simply says that some—few, limited, specific—laws are ***exempted*** from the reach of Article I, Section 20. The marriage statutes represent one example of those laws.

B. LEGISLATIVE PREROGATIVE OVER MATTERS OF POLICY

BRO Plaintiffs also do not appreciate the legislative prerogative in matters of social policy and the legislative goal of encouraging ideal procreative relationships. Making the perfect the enemy of the good, BRO Plaintiffs argue that Oregon's administrative and legislative policy of not discriminating against gays and lesbians in child custody and adoption undercuts any state interest in the procreative or child rearing aspects of traditional marriage. But simply because substitute arrangements exist for child rearing, or even procreation, this does nothing to weaken the legitimate legislative ***basis*** for recognizing opposite sex couples in the marriage statutes. Marriage truly reflects "significant biological differences" between the sets of couples. Nor can BRO Plaintiffs

prove in any way that recognition of these differences is based on prejudicial assumptions about sexual orientation. Indeed, the requirements for marriage are about the natural aspects of heterosexuality, and not "about" homosexuality at all.[4]

C. FACIAL NEUTRALITY OF LAWS

Concerning the final argument in relation to the Article I, Section 20 challenge—the applicability of Article I, Section 20 in the context of a facially neutral law—BRO Plaintiffs can point to no Oregon precedent for applying Article I, Section 20 to a law that, on its face excludes no Plaintiff. They further ignore the fact that where discriminatory impact analysis applies—the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution—it only creates a cause of action where there is a clear showing of deliberate animus toward the excluded class.[5] This subject will not be addressed further in this Reply. *See DOMC Intervenors' Opening Br.* at 37–44.

D. THE FOURTEENTH AMENDMENT

The Fourteenth Amendment itself is not properly at issue for this Court's review, not in the

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[4] It bears repeating that there is a presumption of constitutionality of statutes, and BRO Plaintiffs must show that ***no constitutional reason could exist*** for the exclusion of same sex pairs from marriage. See *State v. Smyth*, 286 Or 293, 296, 593 P2d 1166 (1979) ("statutes will not be construed to violate constitutional prohibitions unless no other construction is possible").

[5] In the Fourteenth Amendment context, disparate impact alone is insufficient to state a claim for relief. The challenged policy or act must be motivated at least in part by an intent to harm a suspect class. The U.S. Supreme Court has held that "'[p]roof of racially discriminatory intent or purpose is required' to show a violation of the Equal Protection Clause." *City of Cuyahoga Falls, Oh. v. Buckeye Community Hope Found.*, 538 U.S. 188, 194 (2003), citing *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977), and *Washington v. Davis*, 426 U.S. 229, 242 (1976).

least because it was not raised below and BRO Plaintiffs failed to brief the issue in its opening brief. Additionally, the responses of BRO Plaintiffs, the County, and the State boil down to one thought: this Court should ignore clear and binding precedent from the United States Supreme Court because it might change. DOMC Intervenors will simply point out that no court is entitled to ignore Supreme Court precedent on federal issues until the United States Supreme Court itself says so. Whether or not the denial of a substantial federal question in *Baker v. Nelson*, 409 U.S. 810 (1972), would be upheld if before the Supreme Court today, *Baker v. Nelson* is the law, and it precludes a contrary holding by this Court. This subject will not be addressed further in this Reply. *See DOMC Intervenors' Opening Br.* at 49–59; *DOMC Intervenors Response Br.* at 18–27.

E. REMEDY AND MANDAMUS

As for the issue of remedy, BRO Plaintiffs continue to ignore the core of *Hewitt v. SAIF*, 294 Or 33, 653 P2d 970 (1982)—that known legislative policy as reflected in statute and in legislative history, not conjecture and inapposite tangential legislative enactments— limit the Oregon Supreme Court's ability to craft what amounts to new legislation in response to a constitutional problem. This Court simply cannot know with any certainty what the Legislature would do, or even how the "legislative policy" underlying marriage would apply, if faced with a constitutional defect in marriage, and the admission of the Attorney General (an Executive Branch member) does nothing to alter that uncertainty. The subject of remedy will not be addressed further in this Reply.

All parties seem in agreement that the trial court's issuing of mandamus relief proceeded from a procedurally flawed beginning. Naturally, BRO Plaintiffs discount this initial failing and assert the legality of the same sex marriage licenses, but BRO Plaintiffs' explanation of the licenses'

continued validity based on the "good faith" of the parties is not proven on the record below and is irrelevant in any event. Good faith only matters if the official solemnizing the marriage lacks actual authority; good faith does not cure or validate a statutorily impermissible marriage.

II. REPLY

A. REPLY TO BRO PLAINTIFFS' RESPONSES TO FIRST ASSIGNMENT OF ERROR: THE ALLEGED UNCONSTITUTIONALITY OF MARRIAGE.

The trial court's ruling that ORS Chapter 106 was unconstitutional is flawed for two reasons. First, even if the terms of the marriage statute might theoretically pose an Article I, Section 20 issue, the fact that the laws of civil marriage predated the Oregon Constitution and have remained in effect substantially unchanged since that time would render these laws an historic exception to the broad equality protections of Article I, Section 20. Second, the intrinsic, specific biological differences between same sex couples and opposite sex couples justify whatever disparate impact the marriage statutes might have on BRO Plaintiffs. BRO Plaintiffs' responses to these fall short of rebuttal or miss the mark entirely.

1. THE HISTORIC EXCEPTION DOCTRINE IS LIMITED IN SCOPE AND ANALYTICALLY FITS IN THIS SITUATION.

The historic exception framework should apply to Article I, Section 20, just as it should to any original provision of the Oregon Constitution. It applies in this case, and it exempts marriage from any attempts to redefine this historically hallowed institution through constitutional jurisprudence. This Court's historic exception framework is neither regressive nor radical, and this Court's precedent does not permit ignoring the clear history behind marriage in an Article I, Section

20 challenge.

a. Applying the Historic Exception Doctrine to Article I, Section 20 Is Appropriate Under This Court's Precedent.

Part of the difficulty arising from this case is the two subtly divergent analytical approaches to history found in this Court's precedent. One historical method narrowly confines the scope of a constitutional provision to the specific rights recognized at the time of the framing of the Oregon Constitution, and only those rights—this can be called an "historic meaning" inquiry. This "historic meaning" analysis has been used only in the Article I, Section 17 context, and it does indeed "freeze" the jury trial right, at least in a sense. *See Lakin v. Senco Products, Inc.*, 329 Or 62, 82, 987 P2d 463 (1999) (Article I, Section 17 right to jury trial, and concurrent right to have jury assess all facts of case including damages, limited strictly to cases "of like nature" to those existing in 1857).

The second, more widely applied and more fully articulated mode of historical analysis looks at a current law that arguably implicates a constitutional provision and asks whether it was well-established at the time of the framing and whether it was intended to be covered by the constitutional provision at issue; if so, it is exempt from any reading of that constitutional provision that would declare this "historical exception" unconstitutional. *See, e.g., State v. Robertson*, 293 Or 402 ("illegal coercion" presents an historical exception to the free speech provisions of Article I, Section 8 because it was a well-established legal concept at time of the framing, and the framers did not intent free speech extend to it). This can be called the "historical exception" analysis.

BRO Plaintiffs, *amici*, the State, and Judge Schuman's concurrence in *Cox ex rel. Cox v. State*, 191 Or App 1, 5–16, 80 P3d 514 (2003) (Schuman, J., *concurring*)—which BRO

Plaintiffs and several *amici* cite—criticize the "historic meaning" inquiry as it has been used in Article I, Section 17 cases, but do not differentiate it from the "historical exception" framework under *Robertson*. Yet it is this far more limited *Robertson* historical exception methodology—and not the "historic meaning" framework of the Article I, Section 17 cases— that DOMC Intervenors invoke in this case. The historical exception analysis would in no way "codify the prejudices" of the framers or ***limit*** Article I, Section 20's guarantee of equality; indeed, the analysis helps define what exactly the guarantee is.

i. The Historical Meaning Analysis under Article I, Section 17.

Although it did not expressly articulate a specific framework, this Court first applied an "historical meaning" concept to Article I, Section 17 in *Tribou v. Strowbridge*, 7 Or 156 (1879). *Tribou* held that the language of Article I, Section 17—"In all civil cases the right of Trial by Jury shall remain inviolate"—"indicates that the right of trial by jury shall continue to all suitors in courts in all cases in which it was secured to them by the laws and practice of the courts at the time of the adoption of the constitution." *Tribou v. Strowbridge*, 7 Or at 158. In current times, *Molodyh v. Truck Insurance Exchange*, 304 Or 290, 744 P2d 992 (1987), reaffirmed this longstanding holding that the jury trial right under Article I, Section 17 was confined to cases "of like nature" to those that had jury trials in 1857. *Molodyh*, 304 Or at 295–96, *citing Cornelison v. Seabold*, 254 Or 401, 404-405, 460 P2d 1009 (1969), *State v. 1920 Studebaker Touring Car*, 120 Or 254, 259, 251 P. 701 (1927), *and Tribou v. Strowbridge*, 7 Or at 158. *See also Lakin v. Senco Products, Inc.*, 329 Or 62, 82, 987 P2d 463 (1999) (same); *Jensen v. Whitlow*, 334 Or 412, 417, 51 P.3d 599 (2002) (same).

It is true that the specific legal contours of the historical meaning concept is not fleshed out in the Article I, Section 17 cases. BRO Plaintiffs, *amici*, and the State object to the application of the Article I, Section 17-type historical meaning framework to Article I, Section 20. DOMC Intervenors agree that the specific historical construct under Article I, Section 17 might pose difficulty in other contexts—but that is because Article I, Section 17's historically limiting language is *sui generis*: it ***specifically implies*** that its reach is governed by the cases in which there was a right to a jury trial in 1857—*e.g.* "the right . . . shall remain inviolate." The "right" means now what it meant then—because of the language ***within*** Article I, Section 17. No such problem is triggered by the language of Article I, Section 20, and application of the historical exception analysis.

ii. The "Historical Exception" Framework.

In *State v. Robertson*, 293 Or 402, this Court articulated the historical exception analysis simply and without much elaboration as to its limitations:

> "Article I, section 8 . . . forbids lawmakers to pass any law 'restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever,' beyond providing a remedy for any person injured by the 'abuse' of this right. This forecloses the enactment of any law written in terms directed to the substance of any 'opinion' or any 'subject' of communication, unless ***the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach***."

Robertson, 293 Or at 412 (emphasis added). Even though this Court did not then note it, the doctrine itself, requiring an "exception that was well established . . . and that the guarantees then or in 1859 demonstrably were not intended to reach" is ***inherently self-limiting***.

In fact, it was not very long until this Court would articulate an instance—a limit—in which

the historical exception concept did not work. This Court in *State v. Henry*, 302 Or 510, 732 P2d 9 (1987), analyzed illegal "obscenity" on the grounds laid out in *Robertson*, and held that "obscenity" was not an historical exception to the guarantee of free speech. *Henry* significantly condensed and refined the historical exception methodology:

> "The first part of the *Robertson* test for determining whether a restriction on expression comes within an historical exception focuses on whether the restriction was well established when the early American guarantees of freedom of expression were adopted, *i.e.*, by the late eighteenth and mid-nineteenth centuries.
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> * * * * *
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> "We [then] turn to Oregon history to determine if there is any indication that legislation existing at or near the time of the adoption of Article I, section 8, of the Oregon Constitution demonstrates that 'obscene' expressions should be included as an historical exception under the *Robertson* test. . . . The party opposing a claim of constitutional privilege must demonstrate that the guarantees of freedom of expression were not intended to replace the earlier restrictions."

Henry, 302 Or at 515, 521. In *Henry*, this Court held that "restrictions on sexually explicit or obscene expressions were not well-established at the time the early freedoms of expression were adopted . . . . The pejorative label of 'obscenity' has not described any single type of impropriety through the years." 302 Or at 520. Because the meaning of "obscenity" was not fixed at the framing and was not the same thing then as now, the obscenity statutes failed the first *Robertson* prong.

The obscenity statutes also failed the second prong of the *Robertson* test because Oregon's "territorial statute, which contained no definition of 'obscene' and which was directed primarily to the protection of youth, certainly does not constitute any well-established historical exception to freedom of expression[.]" 302 Or at 522. *See also State v. Stoneman*, 323 Or 536, 545, 920 P2d 535 (1996) (child pornography was not "wholly" within historical exception because

"obscenity" was not "well-established" by territorial statute; upholding the prohibition on child pornography on other grounds). *Henry* and *Stoneman* were in no way a repudiation of the *Robertson* methodology; on the contrary, they reinforced the limited scope and rigorous standards for the historical exception analysis.

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iii. *Applying the* Robertson *Historical Exception Framework to Article I, Section 20.*

BRO Plaintiffs complain that the historical exception doctrine has never been applied to Article I, Section 20. But, of course, it had never before been applied to Article I, Section 8, or in any other context, until an appropriate example came along. And BRO Plaintiffs point to no case in which this Court has explicitly disclaimed the use of the historical exception analysis, or give any suggestion why the concept is fitting for certain constitutional provisions and not for others.[6] While admittedly the historic exception framework has both evolved in clarity and not yet been applied specifically to any Article I, Section 20 case, yet DOMC Intervenors can find no previous Article I, Section 20 case that even arguably considered a claim that would implicate it.

There is nothing in this Court's cases to suggest that the application of the historical exception concept to Article I, Section 20 would be in any way contrary to the ways in which this Court has applied it to other constitutional provisions in the past. Indeed, the historical exception lens seems most notably a sound rule of constitutional construction, not tied to any specific

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[6] It remains puzzling that a group of civil libertarians apparently hold equal privileges and immunities to be a more important and sacrosanct constitutional right, or deserving of a different analysis, or a different constitutional exegesis or hermeneutic, than free speech protections or the right to a criminal jury trial.

provision.

The first case to apply the historical exception framework outside of Article I, Section 8 was a criminal jury trial right case under Article I, Section 11. In *Dwyer v. Dwyer*, 299 Or 108, 698 P2d 957 (1985),[7] the lack of a jury trial for a criminal contempt proceeding was deemed an historical exception to the jury trial right of Article I, Section 11. *Dwyer*, 299 Or at 114–15. In extending the historical exception framework to Article I, Section 11, this Court's straightforward reasoning for the extension of the analysis to a provision outside of Article I, Section 8, in its entirety, was as follows:

> We are satisfied that ***the framers of our constitution contemplated this well-established principle of common law when they drafted Article I, section 11.*** Thus, ORS 33.100, which provides that the court or judicial officer determines a defendant's guilt on a contempt charge, is wholly confined within an historical exception that was well-established when the Oregon constitutional guarantee of a jury trial in all criminal prosecutions was adopted, and ***the jury trial guarantee in Article I, section 11, demonstrably was not intended to reach punishment for indirect criminal contempt*** for violation of court orders to pay child support. *See State v. Robertson*, 293 Or 402, 412, 649 P2d 569 (1982).

Dwyer, 299 Or at 114–15 (emphasis added). *Dwyer* seems to assume that some type of historical inquiry is a necessary part of the overall analysis that this Court undertakes when evaluating a provision of the Oregon Constitution, and that "historical exceptions" are a fair and obvious factor in the historical inquiry.

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[7] Justice Roberts' dissent in *Emery v. State*, 297 Or 755, 688 P2d 72 (1984) discussed other states' use of historical exceptions in relation to the takings provisions of their respective state constitutions. *See id.* at 779 (Roberts, J., *dissenting*). Neither the majority opinion nor the dissents in *Emery* discussed any historic exceptions to Article I, Section 18. It is arguable that the *Emery* majority found the government's use of private property as evidence in criminal prosecutions to be an historic exception to Article I, Section 18, though the majority did not use those words. *See Emery*, 297 Or at 766-76 (agreeing that providing testimony in criminal cases "is a duty not to be grudged or evaded," and holding that the sacrifice of property as evidence is equivalent to the sacrifice of time to appear as a witness in a criminal trial, and therefore not a taking under Article I, Section 18).

Dwyer's language about "well established principle[s]" that a constitutional provision "demonstrably was not intended to reach," repeated from *Robertson*, forms the kernel of the historical exception analysis. As seen in *Dwyer*, this Court has not hesitated to apply the exceptions doctrine in appropriate situations. Prior to *Robertson*, it might have been reasonable for a party to suggest that there was no such thing as an historical exception to the original provisions of the Oregon Constitution outside of Article I, Section 17, and that the Article I, Section 17 analysis froze the rights granted in the Constitution at 1857. Similarly, prior to *Dwyer*, it might have been reasonable to argue that the historical exception doctrine was limited to Article I, Section 8. Neither of these absolute statements is reasonable now.

BRO Plaintiffs make the assertion that the use of the term "demonstrably" in *Dwyer* and *Robertson* puts the onus on DOMC Intervenors to prove affirmatively that the framers knowingly and explicitly exempted marriage from Article I, Section 20. *See BRO Plaintiffs Response Br.* at 43 n27. This notion is not only utterly simplistic, but contrary to the way the Court has demonstrated historical exceptions in the past. Rather than DOMC Intervenors showing a negative, all that DOMC Intervenors are required to prove is the framers' knowledge of the historical legal fact, knowledge of the plain meaning of the constitutional provision at issue, and ***implicit*** recognition that the provision would not touch the historical legal fact—shown in fact through an ***absence*** of commentary on the historical legal fact.

The historical exception analysis is a sound interpretive tool. It does not "freeze" the meaning of Article I, Section 20 as of 1857. And historical exceptions are properly considered in any constitutional context—except, apparently, Article I, Section 17 with its *sui generis* language. In any event, BRO Plaintiffs have given no reason why the historical exception concept—as distinct

from the "historic meaning" analysis—does not analytically work in the Article I, Section 20 context.

b. The Marriage Statutes Meet the Criteria For an Historical Exception.

Marriage represents a well established principle of common law that Article I, Section 20 "demonstrably was not intended to reach." *See Dwyer*, 299 Or at 114–15, *citing Robertson*, 293 Or at 412. The traditional structure of marriage—limited to one man and one woman—was historically well-recognized in Oregon, and has remained so ever since. *See also DOMC Intervenors' Opening Br.* at 20–24 (discussing the Oregon constitutional convention and history of the common law). As this Court has noted "we should begin our [historical exception] analysis by determining whether, in 1859, when the Oregon constitutional guarantee . . . was adopted, a person in the [plaintiff's] position would have been entitled to [the right]." *State ex rel. Juvenile Dept. of Klamath County v. Reynolds*, 317 Or 560, 566, 857 P2d 842 (1993). So, too, in this case, the first inquiry here is whether BRO Plaintiffs—***as same sex couples***—would have been entitled to marriage.[8]

The marriage contract itself has remained virtually unchanged since the first European settlers arrived in this continent. *See generally* Howard, George Elliot, 2 A HISTORY OF MATRIMONIAL INSTITUTIONS: CHIEFLY IN ENGLAND AND THE UNITED STATES WITH AN

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[8] Significantly, by their own admission, BRO Plaintiffs ***do*** have access to marriage on equal terms to that of all other citizens. *See BRO Plaintiffs' Opening Br.* at 17 ("[A]ll of the individual plaintiffs qualify to marry in that they do not have another living wife or husband, are not first cousins or nearer of kin, and have the legal age and capacity needed to enter into a marriage."); *Multnomah County's Opening Br.* at 5 (admitting that the BRO Plaintiffs individually "qualify to marry in that they do not have another living wife or husband . . . and have legal age and capacity to enter a marriage."). But that is not what BRO Plaintiffs seek; they seek, essentially, rights as couples.

INTRODUCTORY ANALYSIS OF THE LITERATURE AND THE THEORIES OF PRIMITIVE MARRIAGE AND THE FAMILY at 121–327 (photo. reprint 1994) (1904). By the time of the founding, marriage was significantly established in its modern form. *See id.* at 388–497 (describing the features of opposite sex pairs, solemnization, required ages and degrees of consanguinity, and certification and recording), 452–497 (describing these factors in the Western states), *and especially* 463 (stating "there is relative uniformity [of marriage laws in the Western states] . . . there has been less reason for experimentation . . . [and t]he history of their marriage laws is therefore less eventful"). *See also DOMC Intervenors' Opening Br.* at 20–24 (discussing the Oregon constitutional convention and history of the common law).

Oregon legal history shows that marriage has existed since the days of the Oregon Territory, substantially unchanged in structure, uniting one man and one woman, of capacity, and not related within set degrees. As Attorney General Myers wrote:

> Statutes regulating marriage have been in effect in Oregon since it was a territory. Section 6 of "An Act Relating To Marriage and Divorce," enacted by the Territorial Assembly on January 17, 1854, is the direct precursor to ORS 106.150. It provided that "[i]n the solemnization of marriage, ***the parties shall declare*** that they take each other as husband and wife ***." The 1854 Act was supplanted by "An act to regulate marriages," which took effect on January 15, 1863 by operation of the original state constitution. Section 5 of the 1863 Act replaced section 6 of the 1854 Act, but made only minor changes in its wording and none in its meaning. Section 5 provided that "[i]n the solemnization of marriage, *** the parties thereto shall assent or declare *** that they take each other to be husband and wife." In the same vein, section 12 required from the clerk of the county "in which the female resides" a license authorizing the official performing the ceremony "to join together the persons therein named as husband and wife." According to contemporary dictionaries, "husband" and "wife" had the same "plain, natural and ordinary meaning" at that time as they do today. Section 13 reinforces that the parties to an 1863 marriage could not have been two persons of the same sex, as it required parental consent for a license if "*the* female" was younger than 18 or "*the* male" was younger than 21 (emphasis added). ***Successor statutory provisions, also containing express recognition that the marital relationship is one of "husband and wife," have been carried forward without interruption right up to the present versions of ORS 106.150,***

> ***106.041(1) and ORS 106.020(1).*** *See* 1920 Oregon Laws §§ 9720-9724; 1940 Oregon Compiled Laws Annotated § 63-101 - 63-105.

E-R 76, *Opinion Letter of Hardy Myers* at 3 n2 (bolded emphasis added). *See also* D-E-R-Reply at 1–6 (photocopies of territorial statutes).

Additionally, Article XV, Section 5 of the Oregon Constitution demonstrates that the framers did not intend for the Oregon Constitution to alter the traditional structure of marriage—*i.e.* Article I, Section 20 "demonstrably was not intended to reach" the husband-wife structure of marriage.[9] *See* Or Const Art XV, § 5 ("property . . . of every married woman . . . shall not be subject to the debts, or contracts of the husband . . ."). In this, the framers explicitly recognized that the structure of traditional marriage was in harmony with the guarantees of equality found in Article I, Section 20. Article I, Section 20 was not intended to reach the structure of marriage.

c. The Historical Exception Doctrine Does Not Codify the Prejudices of the Framers.

Quite simply, BRO Plaintiffs do not ***want*** any historical analysis—even the more limited historical exception framework—to apply in this case. In their attempt to distinguish Article I, Section 20 from other provisions to which an historical exception analysis has applied, BRO Plaintiffs make numerous histrionic statements about "turning back the clock," all fatally flawed by their inability to account for the limited scope of the historical exception framework.

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[9] "The party opposing a claim of constitutional privilege must demonstrate that the guarantees of [the Oregon Constitution] ***were not intended to replace*** the earlier restrictions." *Henry*, 302 Or at 521 (emphasis added). Given the recognized historical ubiquity of marriage at the time of the framing and its structural incorporation into the Oregon Constitution in Article XV, Section 5, proof of the framers approval is plain in this case. The equality guarantees of Article I, Section 20 were assuredly ***not*** intended to reach the basic structure of marriage as a union of an opposite sex pair.

BRO Plaintiffs misapply Judge Schuman's critique of the Oregon Supreme Court's use of the historic analysis in *Cox ex rel. Cox v. State*, 191 Or App 1, 6–7, 80 P3d 514 (2003) (Schuman, J., concurring)—upon which BRO Plaintiffs place so much hope and reliance—as a critique of the *Robertson*-type historical exception doctrine specifically. Admittedly, the historic exceptions doctrine has been wedded to this Court's overall historical analysis of the terms of constitutional provisions *See Molodyh v. Truck Ins. Exchange*, 304 Or 290. However, Judge Schuman's concurrence apparently draws its concerns from the Article I, Section 17 "historical meaning" cases—not the limited historical exception analysis.[10]

Likewise, using the Article I, Section 17 historical meaning cases as its compass, the State launches into a discussion of the "historical meaning" of the specific terms of Article I, Section 20. The State provides extensive evidence that modern notions of equality—some of which have recently been advanced by this Court—are unsupported in history. Of course, DOMC Intervenors are not saying that history invariably fixes the meaning of Oregon constitutional provisions—only that some laws are exempted from them. However, the State, ostensibly aligned with DOMC Intervenors, goes so far as to state that "if DOMC's 'historical exceptions doctrine' exists and applies to Article I, Section 20, then *Hewitt* was wrongly decided." *State Response Br.* at 32.

Well, first, the historical exceptions doctrine is not the creation of DOMC Intervenors, but

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[10] Judge Schuman's impassioned denunciation of this Court's historic methodology does not even reach the historical exception construct at all, instead criticizing the use of this Court's historic limitation on the meaning of the terms of constitutional provisions such as that in *Lakin v. Senco Products, Inc.*, 329 Or at 82 (right to jury trial, and concurrent right to have jury assess all facts of case including damages, limited to cases "of like nature" to those that existed in 1857). *See also Molodyh v. Truck Insurance Exchange*, 304 Or 290 (same); *Jensen v. Whitlow*, 334 Or 412, 417, 51 P3d 599 (2002) (right to jury trial does not prohibit substitution of government as defendant in tort claim against government employees). This historical "freezing" of jury trial rights under the *Lankin*-type rationale is what Judge Schuman apparently decries in *Cox*, should it be applied to Article I, Section 20's "equality" guarantee.

of this Court. Second, in the context of *Hewitt*, the State can point to no statute in existence and unchanged since before 1857 that provided state death benefits to the families of deceased unmarried men but not women. It is quite foolish to call attention to the fact that the historical exceptions doctrine did not apply in a case where it ***should not*** apply. But this merely goes to the State's misreading of this Court's historical exceptions jurisprudence.

The State's further discussion of history continues to fall wide of the mark. History shows that the marriage laws—unlike the statute at issue in *Hewitt*—have existed since the days of the Oregon Territory in substantially the same structure, that of one man and one woman. *See* E-R 76, *Opinion Letter of Hardy Meyers* at 3 n2, *supra*; *Hewitt v. SAIF*, 294 Or at 45–47. Discussion of the meaning of "who is a citizen," like the discussion of what constitutes an historic privilege or immunity, may be helpful for an overall historic understanding of Article I, Section 20. But the only historic question in ***this case*** remains: ***assuming*** marriage is a privilege or immunity, and ***assuming*** gays and lesbians are a class of citizens excluded from marriage, is ***marriage*** an historic exception to the "equality" language of Article I, Section 20 because it existed prior to the Oregon Constitution's ratification, and it has continued substantially unchanged until today?

DOMC Intervenors reiterate that marriage meets the exact criteria that this Court has set for exempting a law from the operation of an Oregon constitutional provision. The failure of all parties in opposition to DOMC Intervenors in this case to engage the simple, basic, substantive historic exceptions argument—even to give a ***principled reason*** why it should not apply here—is inexplicable.

DOMC Intervenors are ***not*** arguing that equality under Article I, Section 20 means only what the framers thought it meant; nor are DOMC Intervenors saying that Article I, Section 20

cannot be applied to novel claims of right or to modern statutes. It is only where a statute has existed, in effect and substantially unchanged, since before 1857 that the historical exceptions doctrine applies. Indeed, many of the framers of the Oregon Constitution envisioned an expansion of rights and citizenship. That much is clear. But such changes occur organically, through republican processes (the Legislature) or, as developed later, through democratic means (the initiative). The historical exceptions concept is consistent with this understanding.

There have of course been cases since the framing of the Oregon Constitution recognizing Article I, Section 20 privileges for racial or gender minorities. This does not alter the historic exceptions analysis, but indeed strengthens it. For the following statement is beyond dispute: in no case to which BRO Plaintiffs point did a court decide—without any state or federal constitutional amendment directing or implying that it do so, and without even any direction from the popular branches of government or the people—to create from ***whole cloth*** a new constitutional right against the clear historical intent of the framers of the very constitutional provision being invoked.

All the racial and miscegenation cases to which BRO Plaintiffs can point were predicated either under the Civil War era amendments to the United States Constitution— especially the Equal Protection Clause of the Fourteenth Amendment—or to subsequent conforming Oregon Constitutional or statutory provisions. The People (or their states) passed constitutional amendments: race lost.[11] Concerning gender, both amendments to the Oregon Constitution and the Nineteenth Amendment to the US Constitution, as well as a whole host of legislative

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[11] It is important to note that racial classifications were not included in the marriage statutes until after statehood. *Compare* "Act relating to marriage and divorce," passed January 17, 1854, *with* "An act to regulate marriages," January 15, 1863, Gen. Laws Ch. XXXIV (Deady 1866) at D-E-R-Reply at 3–6. Indeed, despite the fears of BRO Plaintiffs, miscegenation statutes do not fall under the historic exceptions doctrine.

enactments—all making clear that the People considered gender to be irrelevant—were at this Court's disposal in the gender discrimination cases. The same can be said for virtually every other provision of the original Oregon Constitution to which BRO Plaintiffs would like to analogize: questions of alienage were resolved under federal Fourteenth Amendment's naturalization clause; age was addressed through the Fourteenth Amendment, as well as federal statutory law and conforming Oregon law; handicapped status has been addressed federally and in Oregon through disabilities acts.

The fact, hard as it is for BRO Plaintiffs to admit, is that they can point to no constitutional amendment, debate, dialogue, ballot measure, legislative enactment, legislative debate, or initiated or referred ballot measure, state or federal, concerning sexual orientation and marriage, as support for their request of this Court. They simply want this Court to create a same sex marriage right whole cloth. Because there is no support for such a right in Article I, Section 20 or any constitutional or statutory enactment, this Court should decline to do so.

2. SPECIFIC BIOLOGICAL DIFFERENCES BETWEEN OPPOSITE SEX COUPLES AND SAME SEX COUPLES PRESENT A LEGITIMATE AND NON-PREJUDICIAL BASIS FOR THE LEGISLATURE TO LIMIT MARRIAGE TO THE FORMER

BRO Plaintiffs discount the legitimacy of the State's interest in marriage as a vehicle for procreation, largely on the basis that heterosexual marriage is not the exclusive means— physically and legally—by which children are born and raised in society. This response misses the point for at least one significant reason. The social science data show, at least to a degree which a Legislature is entitled to rely, that a family structure composed of a child's natural biological parents is the optimal environment in which to raise a child. *For discussion, see Amicus Br. of Alliance for*

Marriage at 6–17 (showing children raised by biological parents perform best on developmental markers of all groups measured); *Amicus Br. of Stronger Families for Oregon* at 24–25. This is not to say that other relationships cannot produce healthy children, but simply that the nuclear family is the ideal. At least, a Legislature could rationally so believe, without being irrational or prejudicial.

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C. REPLY TO BRO PLAINTIFFS' RESPONSES TO THIRD ASSIGNMENT OF ERROR: MANDAMUS.

1. MULTNOMAH COUNTY HAD NO AUTHORITY TO ISSUE MARRIAGE LICENSES TO SAME SEX COUPLES, AND THE "MARRIAGES" BETWEEN THE COUPLES ARE VOID.

It is undisputed the same sex marriage licenses were issued in violation of the terms of ORS 106.010, and that if this court decides the limitation on marriage in that statute to opposite sex couples is constitutional, the marriages are invalid. DOMC Intervenors argue the marriages are invalid regardless, because Multnomah County lacks authority under the County Home Rule Amendment, Article VI, Section 10 of the Oregon Constitution, to issue marriage licenses to same sex couples without a prior amendment to the statute or a judicial declaration requiring it to do so. DOMC Intervenors also reply to arguments offered in response to that contention by the County and BRO Plaintiffs.[12]

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[12] Consistent with its refusal to act as an advocate on some of the important issues in this case, the state neither supported nor opposed DOMC Intervenors county authority argument. Instead, it carelessly asserted the County's authority to issue same sex marriage licenses is immaterial to whether the state must record the marriage certificates. *State Response Br.* at 55 n.24. If the marriage licenses are *ultra vires* under Article VI, Section 10, the marriages are void. There are, then, literally no marriages to record, so the trial court erred by ordering the state to

The dispute is simply stated. BRO Plaintiffs and the County maintain county executives have the same obligation as state executive and legislative officials to engage in constitutional decision making under the *Cooper* doctrine.[13] DOMC Intervenors assert Article VI, Section 10 denies counties authority to engage in constitutional decision making concerning statutes like Chapter 106 that are statewide in scope, which need uniform application, so the *Cooper* doctrine cannot apply to county executives with respect to such statutes. DOMC Intervenors also believe county executives obey their oaths to uphold the Oregon Constitution ***only*** when they uphold their first constitutional duty—to respect limits on their authority imposed by the Oregon Constitution. By unilaterally changing the definition of marriage, Multnomah County exceeded its limited constitutional authority, thereby violating the very duty it originally posited as its sole reason for taking its challenged action—the duty to obey the Oregon Constitution.[14]

To avoid the constitutional limits of its authority under the Home Rule Amendment, the County argues it was merely exercising authority given it under Chapter 106 when its clerk began issuing licenses to same sex couples. *County Response Br.* at 14–16.[15] The structure of its argument is: (1) under Chapter 106 the County, not the State, administers the marriage licensing process, *County Response Br.* at 14-15; (2) the State's authority is restricted to registering marriage certificates forwarded by counties, *id.* at 15; and (3) thus the County was exercising

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record them. The county's authority here is patently material to the issue raised by this assignment of errOr

[13] *Cooper v. School Dist. 4J*, 301 Or 358, 723 P2d 298 (1986)

[14] One searches the March 2, 2004 opinion of the County's legal counsel in vain for discussion of the County's limited role under the Oregon Constitution. ER 59.

[15] The County inadvertently labeled both its briefs identically. The brief to which DOMC cites herein is the 19 page (longer) brief.

authority granted by the state under Chapter 106 by determining the constitutionality of ORS 106.010. "The County has never claimed authority over the issuance of marriage licenses, other than the authority granted to it by the state."[16] *Id*. Aside from this syllogism's failure to address the limitations imposed by Article VI, Section 10, it is also inconsistent. Relying on Chapter 106 as the source of its authority to act on the subject of marriage requires the conclusion the County must obey that Chapter as written, ***not*** that it can override any part of it.

The power of executive officials to assess the constitutionality of statutes they administer arises under the *Cooper* doctrine, not from any constitutional or statutory provision. DOMC Intervenors explained in both their preceding briefs why the *Cooper* doctrine cannot be extended to county executives. Neither the County nor BRO Plaintiffs offers a persuasive explanation why it can be, and nothing in *Cooper* or the subsequent decisions of this court leads to that conclusion. Multnomah County has coequal authority with 35 other counties, each with limited geographic jurisdiction, to administer a wide variety of statewide statutes. Extending the *Cooper* doctrine to counties would give rise to a multitude of conflicting constitutional opinions on their validity, defeating the important goal that statewide statutes operate uniformly throughout the state. The assumption that *Cooper* applies to county executives has already caused problems, as officials in different counties arrived at different conclusions about their responsibilities under ORS 106.010.

While insisting the County ***must*** follow its own constitutional course, BRO Plaintiffs and the County would deny the State Registrar the same power, notwithstanding the *Cooper* doctrine. They argue the Registrar's responsibility to record marriage certificates is purely ministerial and

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[16] This argument is an exercise in retroactive justification. County Counsel Agnes Sowle's legal opinion, on which the County based its actions, justified the County's authority to act solely by reference to the *Cooper* doctrine. ER 60.

nondiscretionary, not admitting of exercise of independent judgment.[17] *BRO Plaintiffs Response Br*. at 59; *County Response Br*. at 14-15. By their logic, then, if a county clerk forwards for registration the marriage certificate of the dish that ran away with the spoon, the State Registrar is powerless but to bless their culinary union through registration in the normal course. By issuing a marriage certificate for recording, goes the argument, the County has determined once-and-for-all the union is a "marriage" as the term (in the County's judgment) should be defined, and the state is powerless to disagree. Nonsense.

As a state official the Registrar does not have to record "marriages" that, on the face of the certificates, do not qualify as marriages as the term is statutorily defined. If a county clerk and the State Registrar disagree whether a union is a "marriage," only the Registrar is able to apply the definition (including her opinion of its constitutionality) uniformly throughout the state, and she is competent to reject a proffered certificate on that basis. BRO Plaintiffs' and the County's argument would stand *Cooper* on it head. When the state implements its opinion there are uniform results, even if wrong. When counties implement their opinions, there is legal chaos, even if someone's opinion turns out to be correct. Thus, with respect to statewide statutes of general application, the *Cooper* doctrine can extend only to state officials.

The County next argues Article VI, Section 10 contains additional language requiring

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[17] In contrast to the state's allegedly limited role, BRO Plaintiffs contend the County is charged with determining the validity of marriages. *BRO Plaintiffs Response Br*. at 59. In support of this novel conclusion, BRO Plaintiffs cite three statutes: (1) ORS 106.041, which merely sets out the county clerk's requirement to issue licenses and the content of license applications (which are to be issued by the State Department of Human Services—not the county); (2) ORS 106.077, which contains additional requirements for the issuance of licenses; and (3) ORS 106.110, which requires county clerks to strictly follow the statutory requirements for issuing licenses. Far from supporting BRO Plaintiffs' conclusion, these statutes, particularly ORS 106.110, demonstrate county clerks have no discretion to deviate from the terms of the applicable statutes.

counties to perform the duties distributed to them by the constitution or laws of the state. Thus, it argues, it is thereby obliged to engage in constitutional interpretation to avoid implementing an unconstitutional law. *County Response Br.* at 17. This argument also misses the mark. Article VI, Section 10 limits counties' authority to act independently to matters of county (as opposed to statewide) concern, ***as well as*** requiring counties to perform the duties delegated to them by law. There is no tension between these provisions, because the duties delegated to counties do not include engaging in constitutional interpretation. The duty of local officials to obey the Constitution does not imply they can declare statewide statutes unconstitutional, because ***the first constitutional duty of a local government entity is to confine its actions to the limited sphere of responsibility it has been given***. It is that duty the County disobeyed.

BRO Plaintiffs argue the County did not violate Article VI, Section 10, because by issuing marriage licenses to same sex couples, it effected only a ***countywide*** policy. *BRO Plaintiffs Response Br.* at 64-65. Of course, this concedes DOMC Intervenors' main point—that counties lack authority to alter the definition of marriage statewide.[18] This court should utterly reject BRO Plaintiffs' piecemeal approach to constitutional decision making, which is contrary to the court's decisions interpreting Article VI, Section 10's limits on county authority. This court has declared county actions exceeding Article VI, Section 10 power are *void*, not that they are valid but limited to their locality. *See cases cited in DOMC Intervenors' Opening Br.* at 68-69 and 71–72, and *DOMC Intervenors' Response Br.* at 44–45. The State has a compelling interest in ensuring its laws operate uniformly throughout the state, which undergirds the court's decisions in this area.

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[18] How the effect of such marriages could be confined to Multnomah County in view of its insistence they be recorded by the State Registrar is not something BRO Plaintiffs stopped to explain. Nor did the County restrict the licenses to Multnomah County residents.

BRO Plaintiffs also argue the County had no alternative means to implement its counsel's legal opinion but to begin issuing licenses to same sex couples, *BRO Plaintiffs Response Br.* at 63-64, but their recitation of the alternatives available to the County omits the obvious solution DOMC Intervenors mentioned in their response brief at page 47: the County could refuse to issue a license to a same sex couple and wait for the couple to seek judicial resolution. Such a solution posed no financial risk to the County or its employees.[19]

BRO Plaintiffs do make one novel argument—that the same sex marriages should be recognized ***even though*** the licenses are invalid. This, they say, is because of the statutory "good faith" exception in ORS 106.041(1). *BRO Plaintiffs Response Br.* at 60. Although that statute contains a good faith exception, its use here is breathtakingly inapt—a complete *non sequitur*. ORS 106.041(1) validates a marriage entered into in good faith[20] which would otherwise be invalid ***solely because it was solemnized by an individual who lacks statutory authority to***

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[19] The County utterly fails to support its contention it would face potential liability for such a course. *County Response Brief* at 18. BRO Plaintiffs' claims in this case are all based on alleged violations of their rights under the Oregon Constitution, for which there is no right to recover damages. *Hunter v. City of Eugene*, 309 Or 298, 787 P2d 881 (1990). *See also Barcik v. Kubiaczyk*, 321 Or 174, 189-90, 895 P2d 765 (1995) (same). Even under 42 U.S.C. § 1983, which creates a private right of action for violation of certain federally-protected rights, public officials are immune from liability as long as the official's conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 US 800, 818 (1982) (emphasis added). If BRO Plaintiffs alleged violation of a federally-protected right, there is no credible argument that denying them marriage licenses violates a clearly established right. Indeed, the single United States Supreme Court decision on this issue establishes there is no federal constitutional right to same sex marriage. *Baker v. Nelson*, 191 NW2d 185 (Minn 1971), *appeal dismissed* 49 US 810 (1972). BRO Plaintiffs' attempt to distinguish *Locker v. City and County of San Francisco*, 33 Cal 4th 1055 (Cal 2004) on this basis fall flat.

[20] The "good faith" part of the statute requires at least one of the participants believes the officiant was legally authorized to conduct the ceremony. BRO Plaintiffs' contention at page 61 of their response that they believed "in good faith" they had the right to marry is completely beside the point, as well as being unsupported in the record.

officiate. The exception has absolutely nothing to do with this case. No one has attacked the credentials of any of the officiants; indeed, the record is silent on that point. No, the "marriages" are void because the County had no authority to issue the licenses.[21] There is no "good faith" exception for unions of couples who, ***by definition known to all***, cannot marry each other.

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III. CONCLUSION

For the foregoing reasons, the ruling of the trial court should be reversed.

RESPECTFULLY SUBMITTED this 4th day of November, 2004.

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[21] Completing their series of legal non sequiturs in this section, BRO Plaintiffs cite ORS 106.990(2) as authority for the proposition that good faith makes a valid marriage. *BRO Plaintiffs Response Br.* at 60. That statute simply establishes the ***criminal penalties*** the Multnomah County Clerk and each officiant risked by having issued marriage licenses contrary to statute and by officiating in marriage ceremonies between unqualified couples, respectively.

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