

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 KEIFER; JULIE WILLIAMS
and COLEEN BELISLE; BASIC RIGHTS
OREGON; and AMERICAN CIVIL
LIBERTIES UNION OF OREGON,

Plaintiffs-Respondents,
Cross-Appellants,

and

MULTNOMAH COUNTY,

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,
CECIL MICHAEL THOMAS, NANCY JO
THOMAS, DAN MATES, and DICK
JORDAN OSBORNE,

Intervenors-Defendants-Appellants,
Cross-Respondents.

Multnomah County Circuit Court
No. 0403-03057

Appellate Court No. A124877

Supreme Court No. S51612

Continued.....

STATE DEFENDANTS' -APPELLANTS', CROSS-RESPONDENTS'
ANSWERING BRIEF ON THE MERITS

Certified Appeal from the Judgment
of the Circuit Court for Multnomah County
Honorable FRANK L. BEARDEN, Judge

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Under current Oregon law, the civil marriage contract (or “marital status”) is legally inseparable from the statutory benefits that extend automatically to married couples based solely on that status. Therefore, the trial court did not err in considering civil marriage *together with* its attendant statutory benefits to determine whether the statutory scheme violates Article I, section 20, of the Oregon Constitution..... **Error! Bookmark not defined.**

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Cases Cited

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J.A. Hussey, <i>Champoege –Place of Transition</i> 115 (1967)	35
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