

**STATE’S REPLY BRIEF IN RESPONSE TO THE ANSWERING BRIEFS  
OF PLAINTIFFS-RESPONDENTS MARY LI *ET AL.*, INTERVENOR-  
PLAINTIFF-RESPONDENT MULTNOMAH COUNTY, AND  
INTERVENORS-DEFENDANTS-APPELLANTS DOMC, *ET AL.***

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**I. THE QUESTION WHETHER THE STATUS OF CIVIL MARRIAGE *PER SE* IS A “PRIVILEGE” UNDER ARTICLE I, SECTION 20 IS NOT JUSTICIABLE IN THIS CASE**

Under Oregon law, marital status *per se* does not exist in a legal vacuum and cannot be considered separate and apart from its attendant legal benefits and obligations. (*See State Resp Br 5-9*). Plaintiffs and the County continue to ignore that fact and its consequences. (*See Plaintiffs Resp Br 5, 12-14; County Resp Br (to DOMC) 7-8*). Neither the trial court, nor this court, is authorized to issue an advisory opinion on the abstract question whether the status of civil marriage *per se* is a privilege under Article I, section 20. *See Yancy v. Shatzer*, 337 Or 345, 347, 97 P3d 1161 (2004) (construing Article VII (Amended), section 1, and concluding that this court’s “judicial power does not include the authority to adjudicate cases in which there is no existing controversy”).

**II. THE TRIAL COURT’S REMEDY FOR THE ARTICLE I, SECTION 20 VIOLATION IT FOUND IN THIS CASE IS CONSISTENT WITH THE PRINCIPLES ESTABLISHED BY THIS COURT IN *HEWITT***

This court concluded in *Hewitt v. SAIF*, 294 Or 33, 50-54, 653 P2d 970 (1982), that, when a statute is found to violate Article I, section 20, the court determines the appropriate remedy by examining “the legislative purpose” of the law and then “resolv[ing] what the legislature would have done” if the legislature were faced with the law’s invalidity. As the state explained in its answering brief, the remedy ordered by the trial court in this case is consistent with the principles established in *Hewitt* and is appropriate in light of the numerous statutes at issue here. (*See State Resp Br 10-16*). In their answering brief, plaintiffs contend that “deferring to the legislature is not a third

remedial option” under *Hewitt* and that, in footnote 18 of the majority opinion in that case, this court “considered and rejected this very suggestion.” (See Plaintiffs Resp Br 53). Their reliance on that footnote is misplaced.

The *Hewitt* majority’s footnote 18 is a response to the dissent, which “criticize[d] the majority for ‘legislating’ by extending the statute.” In that footnote, the court simply observes that the legislature could adopt “alternate remedies” without regard to whether the court invalidated the statute or extended its coverage to the disfavored class and “pointed out that the dissent’s remedy would repeal the entire statute, a result no less ‘legislating’ in effect” than extending the statute. *Hewitt*, 294 Or at 53 n 18. Nothing in the text of the *Hewitt* majority’s opinion, or footnote 18, says what plaintiffs claim for it – *i.e.*, that *Hewitt* requires that marital status and its attendant legal benefits either be extended to same-sex couples or be denied to all.<sup>1</sup> As explained in the state’s answering brief, no such either/or choice is presented in this case. (See State Resp Br 12-16). Given the number and nature of the statutory benefits and obligations at issue here, the trial court’s remedy—which gives the legislature the first opportunity to craft remedial legislation — is not precluded by *Hewitt* and is consistent with the principles established

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<sup>1</sup> That kind of either/or choice might be presented in this case if this court concludes—contrary to the trial court—that same-sex couples are “improperly excluded” from obtaining a marriage license, and it then fashions a remedy that focuses only on ORS chapter 106. But plaintiffs have not demonstrated that the trial court erred in deciding the constitutional issue on the basis of the legal rights and benefits that attend the status of civil marriage. Unlike the workers’ compensation statute at issue in *Hewitt*, ORS chapter 106 does not give rise to a single “benefit” that exists completely independent of other statutory rights and benefits. Rather, a marriage license issued pursuant to ORS chapter 106 automatically carries with it a panoply of legal rights and benefits, as plaintiffs acknowledge.

in that decision for determining the appropriate remedy for an Article I, section 20 violation.<sup>2</sup>

**III. THIS COURT CANNOT DETERMINE THE CONSTITUTIONALITY OF REMEDIAL LEGISLATION THAT HAS NOT BEEN, AND MAY NOT BE, ADOPTED**

In answer to plaintiffs’ contention that a “civil union” statute enacted by the legislature would violate Article I, section 20, the state has explained that the constitutionality of a “civil union” statute that does not exist is not presently a justiciable issue.<sup>3</sup> (*See* Plaintiffs App Br 43-49; State Resp Br 17). Notwithstanding that this court does not and can not issue advisory opinions, *see Yancy*, 337 Or at 347, plaintiffs and several of the *amici*, challenge the constitutionality of civil unions on the ground that such laws stigmatize groups of citizens, like the “separate-but-equal” statutes found to violate the Equal Protection Clause in *Brown v. Board of Education*, 347 US 483, 74 S Ct 686, 98 L Ed 873 (1954), and subsequent United States Supreme Court decisions. Again, the sole remedy question presented *in this appeal* is whether the trial court had authority

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<sup>2</sup> On November 2, 2004, the people approved Ballot Measure 36. That measure amends the Oregon Constitution by adding the following provision:

It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage.

The amendment is scheduled to take effect as part of the Oregon Constitution 30 days after the November 2 election. *See* Or Const Art IV, section 1(4)(d); Or Const Art XVII, section 1. The legal effect of Measure 36 is not entirely clear, and its constitutional validity might be challenged. Rather than attempting to sort out the precise effect the amendment will have on the determination of the appropriate remedy in this case, the court should give the legislature a reasonable opportunity to enact remedial legislation. If the court wishes to address the effects of Measure 36 on this case, the court may, of course, request additional briefing from the parties.

<sup>3</sup> The outcome of any challenge to a “civil union” statute under the Oregon Constitution is further clouded by the people’s recent approval of Measure 36.

to permit the legislature a reasonable opportunity to cure the Article I, section 20 violation that the trial court found. The constitutionality of statutes that are not, and may never be, enacted by the legislature is not before this court.<sup>4</sup>

**IV. DOMC’S “HISTORICAL EXCEPTION DOCTRINE” IS NOT PART OF THE METHODOLOGY THIS COURT APPLIES TO CONSTRUE ORIGINAL PROVISIONS OF THE OREGON CONSTITUTION**

**A. The applicable methodology**

When construing an original provision of the Oregon Constitution, this court determines and gives effect to the intent of the framers expressed in the provision. *See State v. Cavan*, 337 Or 433, 98 P3d 381 (2004). That does *not* mean that the court identifies and then applies the framers’ subjective beliefs and biases. Nor does it mean that the court decides the case as the framers would have done. Instead, the court seeks to “understand *the wording* in the light of the way [*the*] *wording* would have been understood and used by [the framers].” *State v. Rogers*, 330 Or 282, 297, 4 P3d 1261 (2000) (quoting *Vannatta v. Keisling*, 324 Or 514, 530, 931 P2d 770 (1997) (emphasis added)). The court determines what the words of original constitutional provisions mean by:

- (1) analyzing the text and context of the provisions, giving words the same meaning the framers would have ascribed to them; (2) considering the case law interpreting the provisions; [and] (3) \* \* \* reviewing the historical circumstances that led to their creation.

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<sup>4</sup> In any event, this court should not assume that, if given the opportunity, the legislature would enact a “civil union” statute that would not be constitutional. Nor should the court assume – as plaintiffs apparently do – that every conceivable “civil union” statute will be unconstitutional.

*Cavan*, 337 Or at 441. Having determined what the words mean, the court then seeks “to apply faithfully the principles embodied [therein] to modern circumstances as those circumstances arise.” *Rogers*, 330 Or at 297.

As discussed below, DOMC continues to cite and then misapply the foregoing methodology in its arguments in this case.<sup>5</sup>

**B. “Historical circumstances” vs. DOMC’s “historical exception doctrine”**

In its answering brief, DOMC straightforwardly asserts that what it characterizes as an “historical exceptions doctrine” is a *fourth* element of this court’s well-established three-level methodology for construing original provisions of the Oregon Constitution.<sup>6</sup>

DOMC’s proposed analysis is wrong for at least two reasons.

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<sup>5</sup> In its answering brief, DOMC’s casts its historical analysis as responses to two *amici*, rather than to the state’s analysis of the construction and application of Article I, section 20. The state assumes that DOMC would have expressed the same or similar objections to the state’s analysis set out in the state’s answering brief, had not the state’s and DOMC’s answering briefs been filed simultaneously. Accordingly, in this reply brief, the state addresses DOMC’s responses to *amici* Paula Abrams, *et al.* and Civil Rights and Historians as if those responses were directed instead to the state’s answering brief.

<sup>6</sup> According to DOMC:

The Civil Rights and Historians *Amici* Brief falters because it consistently conflates this Court’s devotion to “historical meaning” of words and phrases in the Oregon Constitution with historical context and the “historical exceptions” doctrine, discussed by DOMC/Intervenors in their opening brief. *The historical exception doctrine, in contrast to historical meaning, looks for clear areas of private life and public interaction – historical legal or social institutions – to which particular provisions of the Constitution or perhaps all parts of the Constitution were not intended to apply (because otherwise they would have undone the established societal construct). See State v. Robertson, 293 Or 402, 412 (laws in existence at the time of the framing of the Oregon Constitution represent “historical exceptions” to a literal reading of constitutional provisions that would render such laws – or their modern equivalents – unconstitutional).*

First, under DOMC’s “historical exception doctrine”: (1) the “legal or social institutions” of Oregon, as they existed in 1857 – *not* the words the framers used, *or* this court’s case law, *or* the historical circumstances that led to the adoption of Article I, section 20 – would define and limit the principles embodied that provision; and (2) Article I, section 20 *never* could apply to “modern circumstances,” because, if frozen in what DOMC calls the “established societal construct” of 1857, section 20 would (by definition) conflict with the framers’ conception of it. DOMC’s proposed methodology does not aid the search for the framers’ intent. Rather, it *assumes* that intent. Therefore, DOMC’s distinction between its “historical exceptions doctrine” and this court’s “devotion to ‘historical meaning’” is without any utility to this court in construing and applying Article I, section 20.<sup>7</sup>

Second, neither in *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982), nor in any other decision, has this court applied “history” for the two separate purposes DOMC purports to have found in the court’s case law – *i.e.*, (1) the invocation of history to

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(DOMC Resp Br 37-38) (emphasis added).

<sup>7</sup> DOMC asserts that “[t]here does not appear to exist even a single case in which this Court has found relevant historical meaning and context for a constitutional text or provision, *but then determined to reject that history in favor of some more modern or popular or evolving interpretation.*” (DOMC Resp Br 34-35). The state does not contend that history must be rejected in order to conclude that Article I, section 20 is applicable to modern circumstances. To the contrary, the state’s analysis of Article I, section 20 is tethered to the relevant historical circumstances. As explained in detail in the state’s answering brief, the most logical conclusion to be drawn from the historical circumstances that led to the adoption of Article I, section 20 is that the framers did not intend to limit the protections guaranteed by Article I, section 20 only to those who qualified as “citizens” in 1857, nor did they intend to limit the protection of Article I, section 20 only to what were explicitly recognized as privileges and immunities in 1857. (State Resp Br 31-45). And, as demonstrated by its decision in *Hewitt*, this court consciously has applied the open-ended text of Article I, section 20 to modern circumstances. Thus, history need not be “rejected” – as DOMC claims -- if Article I, section 20 is to be applied to the privileges and immunities at issue in this case.

understand the meaning of text, and (2) the use of history as the foundation for an independent analysis through which *exceptions* to the text of the constitution – “no matter how bold or ringing in its assertion” — are to be identified. (DOMC App Br 20).

Indeed, DOMC’s approach is *contradicted* by *Robertson*, in which this court emphasized that “constitutional interpretation of broad clauses locks neither the powers of lawmakers nor the guarantees of civil liberties into their exact historic forms in the 18<sup>th</sup> and 19<sup>th</sup> centuries, as long as the extension remains true to the initial principle.” *Robertson*, 293 Or at 434. Moreover, as explained in the state’s answering brief, this court never has adopted or applied DOMC’s proposed fourth element as part of the *Priest v. Pearce* methodology for determining the framers’ intent.<sup>8</sup> (State Resp Br 29).

C. **Article XV, section 5 does not inform, much less resolve, the construction of Article I, section 20**

DOMC’s claim that “the traditional structure of marriage is enshrined in the Oregon Constitution” is beside the point of this case. Nor does Article XV, section 5 carry the historical significance that DOMC claims for it.

As explained in the state’s opening and answering briefs, the “privilege” or “immunity” at issue in this case is *not* the status of being married. Instead, the “privileges” or “immunities” at issue here are civil marriage *together with* its legal incidents. The fact that Article XV, section 5 refers to “marriage” does not aid in applying Article I, section 20 to laws that grant “privileges” or “immunities” on different terms to “citizens” based on gender or sexual orientation. Moreover, the important historical lesson to be drawn from the adoption of Article XV, section 5, supports the

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<sup>8</sup> DOMC’s extended discussions of *Kessler*, *Reynolds*, and *Vannatta* amount to little more than confirmation that this court turns to history to aid in divining the meaning of original provisions of Oregon’s constitution. (See DOMC Resp Br 29-33).

state's position that the framers understood that their constitution contained what were, in effect, open-ended terms like those in Article I, section 20. Article XV, section 5 reflected a national movement that, over time, would eliminate gender-based distinctions in the law between married men and married women. At the beginning of the 19<sup>th</sup> century, in most jurisdictions:

\* \* \* a married woman's property was disposed of at death either by the operation of intestate succession laws or by the constraints contained in the equitable instrument establishing her title to the property. These inheritance rules followed the more general structure of coverture law under which a married woman's real estate was subject to the management and control of her husband, and her personal property, once in the possession of her spouse, was permanently lost by the wife. While a number of exceptions to these rules arose in various areas of the United States, especially in jurisdictions with strong equity traditions supporting the creation of separate estates for married women, wives were treated as civilly dead persons in many situations.

R. Chused, *Married Women's Property Law: 1800-1850*, 71 Geo LJ 1359, 1367-68 (1983).

As DOMC points out in its opening brief, some delegates sought unsuccessfully to strike Article XV, section 5 from the draft constitution. (DOMC App Br 22). The motion to strike failed. Only nine years after delegate Williams criticized proposed Article XV, section 5 as being representative of "women's rights and insane theories," this court confirmed the change worked by that section:

The great change in the relations of husband and wife to the property of the wife was wrought by the Constitution of this State. (Article 15, section 5.) Under that instrument no woman loses any pecuniary rights by marriage. Whatever property a woman has at the time of marriage, or afterwards acquired by gift, devise, or inheritance, remains hers, until she, by her own consent, express or implied, parts with it. Without that consent she cannot be divested of her title to it, whether registered or not. No one having notice of her claim can acquire any

title to her property by any contract of her husband to which she does not expressly or by implication assent.

*Brummet v. Weaver*, 2 Or 168, 173 (1866).

Thus, the “traditional marriage” that the framers “ensconced” in the Oregon Constitution was itself dramatically different from what some delegates thought should be confirmed in the new constitution. By its terms, Article XV, section 5 extended to married women privileges and immunities that previously-prevailing mores had not extended. The lesson to be drawn from this history is not that the existence of Article XV, section 5 precludes the application of Article I, section 20 to the privileges and immunities at issue in this case. Rather, Article XV, section 5 is an example of the evolution of privileges and immunities that the framers had every reason to expect would continue into the future under the new constitution.

**V. THE STATE’S INTEREST IN “PROCREATION” DOES NOT JUSTIFY THE CLASSIFICATION AT ISSUE IN THIS CASE**

DOMC rests much of its argument on the assertion that procreation is the “only historic or continuing justification” for the state’s regulation of marriage, and that without that justification, state regulation of marriage would be unconstitutional. (*See* DOMC Resp Br 1, 14-18).<sup>9</sup> But DOMC does not cite a single constitutional provision, state or

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<sup>9</sup> For example, DOMC asserts:

[T]he only reason that the government has constitutionally been allowed to intrude into the zone of privacy surrounding one’s intimate relationships, and regulate the commencement and ending of those relationships, is the government’s compelling concern for the orderly reproduction of the next generation.

(DOMC Resp Br 14). And they add:

federal, or a single case from any court, that says that only the state's interest in procreation permits it to regulate marriage. This court has long condemned the practice of "generalized constitutional attack without reference to specific textual provisions," and "without setting forth the text of each and analyzing its application to the contention at issue[.]" *Sterling v. Cupp*, 290 Or 611, 614, 625 P2d 123 (1981). The practice is objectionable, if for no other reason, because it denies other parties the opportunity to respond to the "constitutional" argument with any specificity. More recently, the court has stated that the "mere invocation" of specific constitutional provisions "unaccompanied by substantial argument or any reference to authority, is insufficient to provide us a meaningful basis to review any specific constitutional question." *State v. Barone*, 329 Or 210, 233 n 15, 986 P2d 5 (1999). DOMC does not explain which provisions of which constitution it seeks to rely upon. Nor do any of the cases it cites hold that the state may regulate marriage only because of the relationship between marriage and procreation. (*See* DOMC Resp Br 16-17).

Moreover, that argument forces DOMC to ignore a host of legislative choices that are plainly inconsistent with its thesis. As the state explained in its opening brief, (State App Br 49-52), the Oregon Legislature has granted married persons "automatic" access to a wide variety of benefits that are unrelated to procreation and child-rearing, and has removed any barrier to unmarried persons' and same-sex couples' having and raising children. And, as the state also pointed out, the constitution appears to prevent the state

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In crux, this intrusion and regulation by the state of intimate sexual or private relations is *inexplicable and unjustifiable* absent the ancient and venerated concern over the procreative function.

*Id.* at 18 (emphasis in original).

from imposing any disability on children whose parents are not married. (State App Br 50-51). Moreover, the legislature permits persons who lack the will or capability to have children to marry and requires that they marry if they wish to obtain the benefits that flow to married persons.<sup>10</sup> Thus, DOMC's argument supports the state's conclusion that there exists no rational relationship between marriage and many of the benefits that attend the marital status. Stated differently, if only procreation justifies the regulation of marriage, and the legislature "could easily" regulate the property and other economic interests of domestic partnerships without regulating marriage, (*see* DOMC Resp Br 14), it would appear to follow that attaching benefits unrelated to procreation to the marital relationship is almost by definition arbitrary.

In sum, the central thesis of the procreation-is-the-only-basis-for-marriage-regulation argument remains unproven.

**VI. THE TRIAL COURT ERRED IN GRANTING PLAINTIFFS' REQUEST FOR A WRIT OF MANDAMUS REQUIRING THE STATE REGISTRAR TO REGISTER THE MARRIAGE LICENSE DOCUMENTS ISSUED BY THE COUNTY TO SAME-SEX COUPLES BEFORE APRIL 20, 2004**

In their answering briefs, plaintiffs and the County suggest that the trial court's granting plaintiffs' fourth claim for mandamus relief was appropriate, because "[t]he trial court apparently recognized that the parties had effectively agreed to defer the litigation of the second and third claims for relief to a subsequent round of cross-motions for partial summary judgment[.]" (Plaintiffs Resp Br at 65; County Resp Br at 9 n 6). Plaintiffs and the County are wrong. The actual terms of the parties' agreement are set out in the

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<sup>10</sup> Nor is it sufficient merely to assert that the state cannot constitutionally require proof of fertility or intent to have children as a prerequisite to marriage. (DOMC Resp Br 23-24). If procreation is the sole justification for state regulation of marriage, it must be unconstitutional for the state to require marriage licenses for persons who cannot have children.

Affidavit of Charles E. Fletcher, and show that the state never agreed to “defer” resolution of the second and third claims.<sup>11</sup> (*See* Affidavit of Charles Fletcher – Tr Ct Rec).<sup>12</sup> And the trial court recognized that the only agreement was that the “constitutional issue” should be resolved first. (*See* State Resp Br at 52-53).

In any event, for the reasons discussed in the state’s opening and answering briefs, the trial court erred in granting plaintiffs claim for mandamus relief. (*See* State App Br 18-34; State Resp Br 51-54).

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<sup>11</sup> Indeed, on April 5, 2004, the state had moved for summary judgment on *all* claims for relief. (*See* ER 49 through ER-51).

<sup>12</sup> A copy of the Fletcher affidavit is attached hereto Appendices App-1. In its Reply in Support of Summary Judgment, filed the same day as the Fletcher affidavit, the state explained, in relevant part:

The merits of the constitutional issue have been fully briefed by the parties. The State has urged that the court decide the constitutional issue in a way that leads to entry of a final judgment that may be appealed to a higher court without raising jurisdictional obstacles that would prevent a final resolution of the issue on appeal. If the court finds a constitutional violation, it must address the question of remedy in order to enter a final, appealable judgment.

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The parties agreed at the outset of this case that the constitutional issue would be addressed first. The court indicated earlier this week that it intended to focus its ruling on the constitutional issue only. The State fully supports that approach. Resolving the “constitutional issue” could require the court to address the question of remedy. If the court holds that Oregon’s marriage statutes do not violate Article I, section 20, there would be no need to address the remedy issue.

(Defendants’ Reply in Support of Motion for Summary Judgment, at 2-3 – Tr Ct Rec).

**VII. WHETHER OREGON’S MARRIAGE LAWS DENY EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IS NOT AN ISSUE BEFORE THIS COURT**

In their answering brief, plaintiffs confirm that they have raised no claim under the Fourteenth Amendment, “because they believe that this case can and should be resolved on independent state grounds.” (Plaintiffs Resp Br 44). The state agrees. Indeed, inasmuch as no party has raised any claim under the Fourteenth Amendment and the trial court did not base its decision in any way upon the Fourteenth Amendment, this court should decide this case solely on the state constitutional grounds that are properly before this court.

## CONCLUSION

For the reasons discussed above, and in the state's opening brief, (*see* State App Br 9 n 4, and 64 n 48), this court should: (1) *affirm* the portion of the Revised Limited Judgment adjudicating plaintiffs' First Claim for Relief and give the legislature a reasonable opportunity to craft any necessary remedial legislation during the 2005 regular session; and (2) *reverse* the portion of the Revised Limited Judgment granting plaintiffs' request for a writ of mandamus requiring the State Registrar to register the marriage license documents issued by the County to same-sex couples before April 20, 2004.

Respectfully submitted,

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