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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

PAUL RUMMELL and BENJAMIN WEST; LISA CHICKADONZ and CHRISTINE TANNER; BASIC RIGHTS EDUCATION FUND,

Plaintiffs,

v.

JOHN KITZHABER, in his official capacity as Governor of Oregon; ELLEN ROSENBLUM, in her official capacity as Attorney General of Oregon; JENNIFER WOODWARD, in her official capacity as State Registrar, Center for Health Statistics, Oregon Health Authority, and RANDY WALRUFF, in his official capacity as Multnomah County Assessor,

Defendants.

No. 6:13-cv-02256-MC

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

By Plaintiffs Paul Rummell, Benjamin West, Lisa Chickadonz, Christine Tanner, and Basic Rights Education Fund

DEANNA L. GEIGER and JANINE M. NELSON; ROBERT DUEHMIG and WILLIAM GRIESAR,

Plaintiffs,

v.

JOHN KITZHABER, in his official capacity as Governor of Oregon; ELLEN ROSENBLUM, in her official capacity as Attorney General of Oregon; JENNIFER WOODWARD, in her official capacity as State Registrar, Center for Health Statistics, Oregon Health Authority, and RANDY WALRUFF, in his official capacity as Multnomah County Assessor,

Defendants.

No. 6:13-cv-01834-MC

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INTRODUCTION

On November 2, 2004, in a political moment that just ten years later seems distant and hard to comprehend, Oregon etched discrimination into the very document intended to protect the rights of all within this State — the Oregon Constitution. That year, Measure 36 amended the Oregon Constitution to define marriage as between a man and a woman only, thereby slamming shut the door to marriage for thousands of loving, committed same-sex couples. This constitutional amendment has had devastating effects on same-sex couples in Oregon, from stigmatizing their relationships to excluding them from the rights, responsibilities, and benefits that society has otherwise deemed appropriate for devoted couples and families.

The ultimate question for Measure 36, and the one presented in this case, is whether it is consistent with the fundamental rights guaranteed by the United States Constitution. It is not. Under the plain language of the Equal Protection and Due Process Clauses, the Supreme Court's and Ninth Circuit's precedents interpreting those guarantees, and numerous recent court decisions applying them to marriage for same-sex couples, it is clear that the painful chapter of Oregon history written by Measure 36 must come to an end.

BACKGROUND

I. PLAINTIFFS PAUL RUMMELL AND BENJAMIN WEST[1]

Paul Rummell and Benjamin West are a gay couple residing in Portland, Oregon. Rummell, age 43, is a veteran of the United States Air Force who has for the last nine years worked in the renewable energy field. West, age 35, worked in the financial services industry for several years and is now studying to become a nurse. Rummell and West were raised with religious upbringings in Oregon.

Rummell and West have lived together for over seven years, function as one household, and have combined their finances. Yet, several years ago, they were denied a low-interest

[1] These facts are drawn from the Declarations of Paul Rummell and Benjamin West.

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veterans' loan to purchase a home. The reason for denial was that only the veteran's and his or her spouse's income are considered for financing, and because Rummell and West are not legally married, West's income was excluded. Rummell's income, on its own, was not sufficient to qualify. They ultimately purchased a home, but at a less favorable interest rate. Rummell's employer currently provides domestic partner insurance benefits, but Rummell and West are concerned about what might happen to their medical coverage if Rummell has to change jobs sometime in the future. This benefit also comes at a significant cost to them as a couple, because they have to pay income tax on the imputed value of the coverage.

In 2010, Rummell and West wanted to commit to a more formal and permanent relationship with one another. Because same-sex civil marriages are not permitted in Oregon, they could not get married. On August 21, 2010, with family and friends present, they held a wedding-like ceremony to declare their love and commitment to each other. The ceremony was beautiful, but West and Rummell still want the equal rights and recognition of a civil marriage. Rummell was raised to believe in the sanctity of marriage and both men very much want to have a civil marriage.

Rummell and West have also been foster parents for several years. In that role, they help children who have been dealt a particularly difficult hand in life. Rummell and West completed all of the training, home studies, and background checks necessary to begin caring for children in their home. In the course of about a year and a half, they had long-term placements of three children and provided respite care for almost ten additional children.

In June 2012, L.B., a six-year old boy with serious behavioral issues, was placed with Rummell and West. L.B.'s history made the likelihood of finding a long-term placement for him very low. Rummell and West worked extensively and exclusively with L.B. and, in the process, they developed a deep parental love for him. They decided to adopt L.B. and are now waiting for the last step of the adoption to be finalized.

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Rummell and West want to provide a safe, stable, and nurturing home and family for L.B. — one whose dignity is recognized, not degraded, by society. They are concerned both about the legal distinctions imposed on their family by Oregon law and the psychological impact on L.B. of the stigma those distinctions reinforce, including potential teasing or bullying by L.B.'s classmates. When they travel, they are concerned about whether or not their relationship, and especially their relationship to L.B., would be recognized by other people or government officials. They very much want to be legally married in Oregon, not just so that others recognize the love and commitment of their relationship, but so that they will have the important legal protections for each other and their new family.

II. PLAINTIFFS LISA CHICKADONZ AND CHRISTINE TANNER[2]

Lisa Chickadonz and Christine Tanner are a lesbian couple residing in Portland, Oregon. Chickadonz, age 56, is a nurse, midwife, and assistant professor of nursing. Tanner, age 66, is semi-retired following a long nursing career, including clinical, research, teaching, and administrative capacities. Both Chickadonz and Tanner have lived in Oregon for over 30 years.

Chickadonz and Tanner met in 1982. In September 1986, they had a private commitment ceremony and exchanged rings. Shortly thereafter, they decided to raise a family together. Chickadonz gave birth to their two children: Katie, born in 1991, and Jacob, born in 1994. The couple spent thousands of dollars in attorney fees, home studies, and related expenses to perform second-parent adoptions for each child so that Tanner could be a legal parent to both of their children. The couple did everything they could to replicate the legal rights and responsibilities of marriage with respect to the two children.

In addition to having raised children together, the couple shares everything. They jointly own all of their major assets and have, with the help of attorneys, planned for retirement and the possibility of medical emergencies. Again, they have tried the best they can to approximate the

[2] These facts are drawn from the Declarations of Lisa Chickadonz and Christine Tanner.

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same legal rights and responsibilities between each other that married couples possess in Oregon. Doing so has cost them thousands of dollars they otherwise could have saved for their future lives together. These costs are ongoing and most recently involved issues about the couple's respective wills and health care directives.

When the news broke that Multnomah County would begin to issue marriage licenses to same-sex couples on March 3, 2004, Chickadonz and Tanner did not hesitate. They had wanted to be legally married for nearly 20 years and headed down to the county building. Tanner, with a broken leg and a lawn chair, set up camp and stayed out all night so that she and Chickadonz could be first in line. The following morning, Chickadonz brought their children so they could experience their parents' dream as a family. Waiting in line to get into the building, Katie and Jacob, then 13 and 10, were subjected to derogatory comments about homosexuality from opponents of marriage for same-sex couples. Undaunted, and with marriage certificate in hand, Chickadonz and Tanner were married the afternoon of March 3, 2004, by a minister in their church.

Being married was very meaningful to Chickadonz and Tanner and to their community. Their love and commitment was acknowledged, respected, and celebrated by their fellow church members with whom they had shared years of involvement. Upon their arrival home from the wedding ceremony, their neighbors joined in the celebration. With marriage certificate in hand, Chickadonz and Tanner experienced a significant difference in how their extended family interacted with them as a couple.

Bound by a legal and emotional commitment — marriage — whose significance is widely-understood and celebrated by society, Chickadonz's and Tanner's family members could finally understand what the couple's relationship meant and what a central part of their life it represented. When introducing each other as a spouse, there was no question of the level of commitment that relationship entailed. Importantly, the state of Oregon also recognized their love and commitment by granting the same rights and responsibilities to the couple as to any

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other married couple. After almost 20 years of not being able to marry, Chickadonz and Tanner memorialized the recognition of their relationship by hanging their framed marriage license in their home.

Less than a year later, the marriage of Chickadonz and Tanner was invalidated by the Oregon Supreme Court and Measure 36. They were devastated. It was a traumatic experience to be told that, under the laws of Oregon, their marriage no longer existed. Their love and commitment was no longer recognized by the State they called home, and the marriage license that had once been a source of pride became a source of pain. They took it off the wall of their home.

After the Oregon Legislature passed a domestic partnership law in 2007, Chickadonz and Tanner considered whether they should register as domestic partners. But they recognized that being domestic partners was not a substitute for being married, and Chickadonz and Tanner decided to wait until they could get married again; they wanted, and still want, the real thing.

Chickadonz and Tanner have been together for almost 30 years. They have raised a family and plan to spend the rest of their lives together. They want to get legally married in Oregon, amongst friends and family, in their church, and by their minister, and to be afforded the same rights and responsibilities as other committed couples in Oregon who choose the path of marriage.

III. PLAINTIFF BASIC RIGHTS EDUCATION FUND[3]

Basic Rights Education Fund ("Basic Rights") is a statewide civil rights organization dedicated to education about and advocacy for equal rights for lesbian, gay, bisexual, and transgender Oregonians. Basic Rights' mission statement provides that it "will ensure that all lesbian, gay, bisexual and transgender Oregonians experience equality by building a broad and

[3] These facts are drawn from the Declaration of Jeana Frazzini.

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inclusive politically powerful movement, shifting public opinion, and achieving policy victories."

Basic Rights has been deeply involved in advocating for the freedom to marry for same-sex couples in Oregon. In 2004, before the Oregon Constitution was amended to prohibit state recognition of marriage for same-sex couples, Basic Rights worked with the Multnomah County Board of Commissioners and its legal counsel to assess the constitutionality of Oregon's marriage statute. The County's counsel and the State's legislative counsel both concluded that Oregon's marriage statute was unconstitutional, and the County began to issue marriage licenses to same-sex couples. When the State Registrar refused to register the licenses, Basic Rights' affiliate entity Basic Rights Oregon ("BRO"), along with the American Civil Liberties Union of Oregon and nine same-sex couples, filed a declaratory judgment action seeking a declaration that Oregon's exclusion of same-sex couples from marriage violated Article I, section 20, of the Oregon Constitution ("No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."). Later that year, Basic Rights and BRO helped to organize the campaign in opposition to Measure 36. After narrowly losing that campaign, Basic Rights was an organizing force behind a lawsuit that challenged the validity of Measure 36 under the Oregon Constitution (although Basic Rights was not a named party in the suit). Basic Rights continues to work to repeal or overturn Measure 36.

IV. MEASURE 36[4]

Oregon voters passed Measure 36 — amending the Oregon Constitution to exclude same-sex couples from marriage — on November 2, 2004, just eight months after the Multnomah County Board of Commissioners briefly issued marriage licenses to approximately 3,000 same-

[4] Measure 36 is now part of the Oregon Constitution. *See* Or. Const. art. XV, § 5a. Because it is still commonly referred to by its ballot measure number, and because it is discussed herein in the context of its passage, this memorandum refers to it as "Measure 36."

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sex couples. As explained below, prior to the passage of Measure 36, Oregon statutes neither expressly permitted nor prohibited issuing marriage licenses to same-sex couples, but they used gendered terms like "husband" and "wife." *See Li v. State*, 338 Or. 376, 386, 110 P.3d 91 (2005) (holding that Oregon statutes contemplate the marriage of different-sex couples). Oregon was one of 11 states to pass ballot measures excluding same-sex couples from marriage on November 2, 2004, a presidential election day.[5]

The campaign in support of Measure 36 was acerbic and painful for many Oregonians, and especially so for members of the gay, lesbian, bisexual, and transgender community. Proponents of Measure 36 secured its passage by leveraging public fear of and animus against gay and lesbian individuals. For instance, proponents submitted the following statements for publication in the Oregon Voters' Pamphlet of November 2004 (the "voters' pamphlet") regarding Measure 36:

> "Vote YES on [Measure] 36, Because It's the Way Nature Meant it to Be. A Marriage between a man and woman is more than just about a loving relationship, it's also about the laws of nature."
>
> "If we normalize homosexual marriage, the state will be forced to place foster children in same-sex households. … It will cause kids to question their sexual identity, and increase experimentation with a behavior that is neither emotionally nor physically healthy."
>
> "To radically and fundamentally change the definition of marriage to include what God considers an 'abomination' is to reject God's purpose in marriage for men, women, children, and a nation. … Providing equivalent legal standing to unnatural relationships will force devastating and irreversible changes to our society."
>
> "MYTH: Homosexuals suffer serious harm because they're denied the protections of marriage. / REALITY: Many of the 'protections' granted by marriage are already available to same-sex couples through the use of private contractual arrangements …."
>
> "[Same-sex marriage] is a vast, untested social experiment on children. … It is never wise or compassionate to intentionally subject children to social experimentation."

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[5] *See* Scott Titshaw, *The Reactionary Road to Free Love*, 115 W. Va. L. Rev. 205, 255 (2012) (documenting this history).

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> "Defining marriage as between one female and one male does not violate anyone's civil rights. … For example, no one can marry their [sic] sister, brother, mother or father. A parent cannot marry his or her children. And it's not considered discrimination to forbid marrying a child or having two spouses."[6]

Another recurring claim in voters' pamphlet statements was that scientific studies had proven same-sex relationships to be unhealthy and bad for children being raised by same-sex parents.[7] It is undisputed that this and similar claims were then, and are now, untrue. *See infra* note 33.[8]

While inflammatory, these voters' pamphlet statements were typically *less* vitriolic than the public discussion around Measure 36. One direct-mail advertisement produced by proponents of Measure 36 threatened, "If Measure 36 Fails … Gay and Lesbian Sex Will Be Taught in Oregon Schools. Is that what you want?"[9] In keeping with this theme, the campaign promoting Measure 36 implemented a "push poll" that "feature[d] a programmed voice asking respondents if they plan[ned] to vote yes on Measure 36 …. If they sa[id] no, the voice then sa[id]: 'In Massachusetts, where court-ordered same-sex marriage is legal, they are now preparing materials to teach the gay lifestyle to children, beginning in kindergarten.'"[10] The website of the campaign in favor of Measure 36 warned that marriage of same-sex couples is "the first step toward abolishing marriage and the family altogether, thus eliminating the benefits of marriage for anyone."[11]

One opponent of the freedom to marry for same-sex couples, quoted in the *Bend Bulletin*, explained his position way: "Gay marriage is a blatant attempt to legitimize perverted behavior

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[6] Declaration of Misha Isaak ("Isaak Decl.") Ex. 1 at 4, 5, 9-10, 11.

[7] *E.g.*, Isaak Decl. Ex. 1 at 4 (citing unspecified "[r]esearch"); *id.* at 5 (stating that "[a]ll research is conclusive"); *id.* at 8 (stating "the evidence is very strong" and "indisputable"); *id.* at 10 (citing "[o]verwhelming evidence"); *id.* at 11 (citing "[n]umerous studies").

[8] Proponents of Measure 36 cited the research of Yale University child psychologist Kyle Pruett as support for their position. Pruett unequivocally disclaimed this use of his work, calling Measure 36 proponents' characterization of his research "a distortion." Isaak Decl. Ex. 3 at 2. "Despite what measure proponents claim[ed], his research shows that children do better with two parents than with one — even if the parents are of the same gender." Isaak Decl. Ex. 4 at 1.

[9] Isaak Decl. Ex. 4 at 1.

[10] Isaak Decl. Ex. 5 at 1.

[11] Isaak Decl. Ex. 6 at 2.

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as normal. … Doing perverse acts in private does not qualify one for benefits."[12] A letter to the editor printed in the *Statesman Journal* in support of Measure 36 compared gay and lesbian individuals to "[p]olygamists, pedophiles and other perpetrators of abnormal sexual behaviors," arguing, "Throughout human history, societies have fallen apart when sexual deviancies have infiltrated the population at large. This is precisely what the supporters of Measure 36 are trying to avoid."[13] Another letter published the same day took a softer but no less objectionable tack, urging voters to support Measure 36 because, "Men and women with a homosexual orientation need our help…. Affirming the illusion of homosexual marriage will in fact hurt them. Groups such as [redacted], after the model of Alcoholics Anonymous, offer the means of continual recovery and lasting support."[14]

V. PROCEDURAL HISTORY

Plaintiffs Rummell, West, Chickadonz, Tanner, and Basic Rights filed this action pursuant to 42 U.S.C. § 1983, seeking declaratory and injunctive relief for the violation of their rights under the Fourteenth Amendment to the United States Constitution caused by the exclusion of same-sex couples from the freedom to marry under the laws of the state of Oregon. On January 22, 2014, at plaintiffs' request, the Court consolidated this action with a similar suit brought by four other plaintiffs — Deanna L. Geiger, Janine M. Nelson, Robert Duehmig, and William Griesar. All parties to this consolidated action agree that it presents only disputed questions of law that can be resolved through summary adjudication. Accordingly, today, both sets of plaintiffs file motions for summary judgment pursuant to Federal Rule of Civil Procedure 56(a).

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[12] Isaak Decl. Ex. 7 at 2.
[13] Isaak Decl. Ex. 8 at 2-3.
[14] Isaak Decl. Ex. 8 at 1.

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LEGAL STANDARD

Summary judgment should be granted when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). "A fact is material if it could affect the outcome of the suit under the governing substantive law." *Miller v. Glenn Miller Productions, Inc.*, 454 F.3d 975, 987 (9th Cir. 2006). "The moving party bears the initial burden of demonstrating the absence of a 'genuine issue of material fact for trial.'" *Id.* (quoting *Anderson*, 477 U.S. at 256). "The burden then shifts to the nonmoving party to establish, beyond the pleadings, that there is a genuine issue for trial." *Id.*

DISCUSSION

With this motion, plaintiffs ask the Court to hold that Oregon's policy excluding same-sex couples from marriage violates the constitutional guarantees of equal protection and due process. Under the Equal Protection Clause and Ninth Circuit precedent, laws like Oregon's marriage exclusion that discriminate against same-sex couples warrant heightened scrutiny. Applying that standard, the asserted justifications for the policy fall far short. Moreover, the marriage exclusion constitutes a bare exclusion aimed at demeaning same-sex couples with no legitimate justification, and, for that reason, cannot survive even rational basis review. Before proceeding through this analysis, however, plaintiffs address the ways in which Oregon's marriage exclusion treats same-sex couples unequally and burdens their personal dignity and autonomy.

I. OREGON LAW EXCLUDES SAME-SEX COUPLES FROM MARRIAGE.

A. The Oregon Constitution and Statutes, Even As Applied in Light of the Oregon Family Fairness Act and OAR 105-010-0018, Exclude Same-Sex Couples from Marriage.

Oregon statutes define marriage as, "a civil contract entered into in person by males at least 17 years of age and females at least 17 years of age, who are otherwise capable[.]"

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ORS 106.010. This definition was adopted in 1862 — just three years after the Oregon Constitution became effective — at a time when "many citizens had not even considered the possibility that two persons of the same sex might aspire to [marry]." *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013).

The 1862 statute makes repeated reference to "husband and wife," terms that were duplicated in dozens of later-enacted statutes. For instance, the Oregon Evidence Code accords evidentiary privilege to communications that are "between husband and wife," ORS 40.255(1)(b) (OEC 505(1)(b)), the Oregon Securities Law treats a "transaction with a husband and wife" as a transaction with one person, ORS 59.350(1), and the statute governing property rights provides that a tenancy by the entirety is created when real property is conveyed "to a husband and wife," ORS 93.180(1)(b). Though statutes describing the marital relationship use gendered terms, they do not explicitly bar the marriage of two men or two women.

On this basis, in March 2004, the Multnomah County Board of Commissioners determined that the State's marriage laws did not exclude same-sex couples and the County issued approximately 3,000 marriage licenses to gay and lesbian couples. The Oregon Supreme Court later invalidated those marriages on the ground that, "although nothing in [Oregon statute] expressly states that marriage is limited to opposite-sex couples, the context … leaves no doubt that, as a statutory matter, marriage in Oregon is so limited." *Li v. State*, 338 Or. 376, 386, 110 P.3d 91 (2005).

Eight months after Multnomah County took the position that state law permits same-sex couples to wed, voters amended the Oregon Constitution to exclude same-sex couples from marriage. After a bitter campaign, a narrow majority of voters adopted Measure 36, which provides: "**Policy regarding marriage.** 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." Or. Const. art. XV, § 5a. A procedural challenge to this constitutional amendment was unsuccessful. *See Martinez v. Kulongoski*, 220 Or. App. 142, 164, 185 P.3d 498 (2008), *rev.*

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denied, 345 Or. 415, 197 P.3d 1104. Accordingly, since December 2004, the Oregon Constitution has excluded same-sex couples from marriage.

In 2007, the Oregon Legislature adopted the Oregon Family Fairness Act, ORS 106.300 *et seq*., which establishes "a domestic partnership system [to] provide legal recognition to same-sex relationships [and] ensur[e] more equal treatment of gays and lesbians and their families under Oregon law," ORS 106.305(6). Plaintiff Basic Rights and its affiliate BRO were chief proponents of the bill's passage in the Legislature. Under the law, all privileges, immunities, rights, benefits, and responsibilities accorded by state law on account of marital status are "granted on equivalent terms, substantive and procedural, to an individual because the individual is or was in a domestic partnership[.]" ORS 106.340(1)-(2) .

Though the law seeks to make committed same-sex relationships "more equal" to different-sex marriages, ORS 106.305(6), it does not extend equal protection to same-sex couples. The law in fact expressly decrees that it does not "bestow the status of marriage on partners in a domestic partnership" and that, moreover, "numerous distinctions will exist between these two legally recognized relationships." ORS 106.305(7). For instance, the law specifies that Oregon domestic partnerships might not be recognized in other states and might not confer federal benefits. ORS 106.305(7). Although approximately 5,600 same-sex couples have availed themselves of the protections created by the Oregon Family Fairness Act,[15] many couples — including plaintiffs Paul Rummell and Benjamin West, and Lisa Chickadonz and Christine Tanner — have declined to accept the inferior legal status of a domestic partnership.

On October 16, 2013, then Deputy Attorney General Mary H. Williams issued a legal opinion that the State should recognize the marriages of same-sex couples that married in other states, because refusing to do so would likely be unconstitutional after the Supreme Court's decision in *Windsor*, 133 S. Ct. at 2675. The next day, the Chief Operating Officer for the

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[15] Isaak Decl. Ex. 9.

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Oregon Department of Administrative Services, Michael Jordan, directed all state agencies immediately to recognize the marriages of same-sex couples performed outside of Oregon. As of December 23, 2013, this directive is codified in the Oregon Administrative Rules as temporary rule 105-010-0018. The rule applies only to state agencies, not other government entities like courts and local governments. Significantly, the rule does not permit same-sex couples to marry in Oregon.

Accordingly, today in Oregon:

1. Same-sex couples cannot marry;
2. Same-sex couples cannot acquire from the State the status of marriage necessary to receive rights, privileges, immunities, benefits, and obligations conferred by the federal government or the governments of other states;
3. Same-sex couples cannot acquire from the State the status of marriage that is often necessary to access privileges and benefits available to married couples in the private sector;
4. Same-sex couples married in other states, while granted by state agencies some of the rights, privileges, immunities, benefits, and obligations of marriage, are denied the rights, privileges, immunities, benefits, and obligations of marriage by local governments, courts, and other government entities that are not state agencies.
5. Same-sex couples, whether married or unmarried, are beset with confusion and uncertainty about the legal status of their relationships and the rights, privileges, immunities, benefits, and obligations to which they are entitled.

B. Oregon's Marriage Exclusion Harms Same-Sex Couples.

The most important and obvious way that Oregon's marriage exclusion harms same-sex couples is by doing just what it sets out to do: denying to committed, lifelong relationships the societal status conveyed by the designation of "marriage." To paraphrase the Supreme Court's recent decision, Oregon's marriage exclusion "instructs … all persons with whom same-sex

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couples interact, including their own children, that their [relationship] is less worthy than the marriages of others." *Windsor*, 133 S. Ct. at 2696.

But the marriage exclusion inflicts injury in more subtle and unexpected ways as well. Now that the federal government recognizes the marriages of same-sex couples, *id.* at 2675, those who wish to marry in Oregon are denied a host of federal benefits as a result of the State's marriage exclusion. For instance, even if same-sex partners are registered as domestic partners in Oregon, they cannot file a joint federal tax return, although Oregon requires that they file a joint state return.[16] A long list of other federal benefits available to same-sex married couples is documented in *Garden State Equality v. Dow*, 82 A.3d 336, 246-48 (N.J. Super. Ct. 2013). In fact, in the week before this memorandum was filed, Attorney General Eric Holder issued a directive that the Department of Justice would extend equal treatment to same-sex married couples — they can now, for example, avail themselves of spousal privilege in federal courts, file for bankruptcy jointly, and obtain visitation in federal prisons on equal terms.[17] But same-sex couples who wish to marry in Oregon cannot access these federal rights and benefits.[18]

A particularly poignant illustration of the consequences of depriving same-sex couples the freedom to marry in Oregon, and thus denying them access to federal benefits, is provided by declarant Eric Marcoux.[19] Marcoux and his partner of 60 years, Eugene Woodworth, had hoped to someday marry in Oregon. In December, Woodworth was diagnosed with aggressive congestive heart failure and told he would not have much longer to live. Despite wanting to marry in their home state, Marcoux and Woodworth raced to Washington to marry in the hope that this would make Marcoux eligible for Social Security benefits as Woodworth's surviving

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[16] *See* Declaration of Mark Clift ¶ 10. The declarations of non-parties are relevant and would be admissible at trial as evidence of, among other things, harm to Basic Rights. *See* Declaration of Jeana Frazzini ¶¶ 6-7.

[17] *See* Isaak Decl. Ex. 10.

[18] *See also* Declaration of Mark Johnson Roberts ¶ 3 (explaining difficulties created by the intersection of federal and state law in the context of divorce).

[19] *See* Declaration of Eric Marcoux.

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spouse. Woodworth passed away just nine days later. Because their marriage occurred so soon before Woodworth's death, it remains unclear whether the Social Security Administration will grant benefits to Marcoux.[20]

In addition to federal benefits, same-sex couples in Oregon are often denied benefits in the private sector because private actors, like the federal government, rely on the State to determine who is and is not married. For instance, declarant Nicola Cowie, a transgender person who married her wife Meg Cowie in the United Kingdom prior to transitioning from male to female, was denied spousal health insurance coverage by her employer because her marriage is not recognized in Oregon.[21] Adding insult to injury, Nicola and Meg Cowie determined that they could not avail themselves of Oregon's domestic partnership law because, to register as domestic partners in Oregon, they would have had to attest under oath that they were not already married in another jurisdiction, which they could not do honestly. Their story illustrates the unique burdens that Oregon's marriage exclusion imposes on transgender people.

Oregon's domestic partnership law does not remedy the inequities imposed on same-sex couples. Not only does it not provide all the rights, responsibilities, and privileges of marriage, as discussed above, but it often fails to accomplish even its more limited purpose of providing partial benefits. Because a domestic partnership is both legally inferior and not well understood, many members of the public, including lawyers and judges, do not give it the recognition to which it is legally entitled.[22] Problems have arisen for domestic partners in the context of hospital visitations and medical decision-making authority, as well as other public services such as the services of funeral parlors. All too often, these issues arise at times of family crisis.[23]

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[20] *See* 42 U.S.C. § 416(c) (defining "widow" for purposes of Social Security benefits as someone who had been married to the decedent for at least nine months at the time of death).

[21] *See* Declaration of Nicola Cowie.

[22] *See* Declaration of Mark Johnson-Roberts.

[23] *See id.*

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Perhaps even more unsettling than the obvious inequalities imposed by Oregon's marriage exclusion is the uncertainty it creates. Same-sex couples are beset with confusion about the legal status of their relationships. Declarant Mark Clift, a certified public accountant with many clients who are same-sex couples, describes the "veritable maze of rules and complexities" that same-sex couples must navigate "to understand their tax filings, jointly held investments (including rental properties), retirement assets, and issues associated with having children."[24] To take just one example: where an employer provides health insurance to an employee's same-sex domestic partner, the value of this benefit is taxable income to the employee and increases her tax liability. These sorts of complications, in addition to increasing tax liabilities, also impose a financial burden because same-sex couples often need to hire a professional like Clift to understand their legal rights and obligations.

In short, Oregon's marriage exclusion harms same-sex couples in numerous ways, both expected and unexpected.

II. OREGON'S MARRIAGE EXCLUSION DEPRIVES SAME-SEX COUPLES OF EQUAL PROTECTION OF THE LAWS.

A. Courts Apply More Exacting Scrutiny to Classifications Directed at Discrete and Insular Minorities.

The Fourteenth Amendment to the Constitution commands: "No state shall … deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). But all laws, to some extent, treat some persons differently than others.

Federal courts have developed a framework to "smoke out" illegitimate classifications. *Johnson v. California*, 543 U.S. 499, 506 (2005) (citation omitted). Under this framework, generally, "[t]he Equal Protection Clause permits discriminations between classes but requires

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[24] *See* Declaration of Mark Clift.

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that the classification bear some rational relationship to a permissible object sought to be attained by the statute." *San Antonio Indep. Sch'l Dist. v. Rodriguez*, 411 U.S. 1, 67 (1973) (White, J., dissenting). Courts applying this test — called "rational basis review" — do so with deference to lawmakers. It is not necessary that the classification's object "actually motivated the legislature," *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993), as long as it "might have concluded" that the law would achieve permissible purposes, *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955).

But the rational basis test is not always applied. For types of classifications that are "suspect" — that is, classifications that adversely affect important interests (like voting) or that distinguish based on characteristics that historically have been used for invidious purposes (such as race, sex, or sexual orientation) — the framework calls for a more searching and rigorous standard of review. There are two levels of this more searching inquiry.

First, where government classifies people based on criteria that are almost always irrelevant to valid public purposes — criteria including race, national origin, religion, and alienage — courts test these classifications with "strict scrutiny." "Under strict scrutiny, the government has the burden of proving that … classifications 'are narrowly tailored measures that further compelling governmental interests.'" *Johnson*, 543 U.S. at 505 (citation omitted).

Second, where government classifies people based on characteristics that are typically, but not always, irrelevant to valid public purposes — including sex and illegitimacy — courts test these classifications with "intermediate" or "heightened scrutiny." Under this standard, "the defender of the challenged action must show 'at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" *United States v. Virginia*, 518 U.S. 515, 524 (1996) (citation omitted). Although a lower bar than strict scrutiny, heightened scrutiny still requires that the government establish an "exceedingly persuasive justification" for the classification. *Id.* (internal quotation marks and citation omitted). Importantly, classifications subject to either

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strict or heightened scrutiny are presumptively unconstitutional; the classification's proponent bears the burden of overcoming this presumption by meeting the prescribed test. *Hibbs v. Dep't of Human Res.*, 273 F.3d 844, 855-56 (9th Cir. 2001), *aff'd*, 538 U.S. 721 (2003). In contrast, all other classifications are presumptively constitutional. *Id.*

Courts employ a set of factors to determine whether a classification is suspect. These factors trace their origin to a footnote in *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938), called "the most famous footnote in constitutional law." Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote*, 46 S. Tex. L. Rev. 163, 165 (2004). According to *Carolene Products* footnote four, statutes directed at discrete and insular minorities that cannot readily secure their own protection through ordinary political processes require a "searching judicial inquiry." 304 U.S. 152 n.4. From this seed, courts have developed a variety of factors to determine whether a group constitutes a "discrete and insular minority" that merits the protection of strict or heightened scrutiny, usually including: (a) whether the class has historically been subjected to discrimination, (b) whether the class's defining characteristic bears no relation to ability to perform in or contribute to society, (c) whether the class exhibits obvious, immutable, or distinguishing characteristics that define it as a discrete group, and (d) whether the class is a politically powerless minority. *Windsor v. United States*, 699 F.3d 169, 181-82 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013) (hereinafter "*Windsor I*"). Applying these factors, the Second Circuit in *Windsor I* concluded that classifications based on sexual orientation are inherently suspect and deserve heightened scrutiny. The Ninth Circuit recently followed suit.

Occasionally, the Supreme Court decides an equal protection case without specifying the level of scrutiny it has applied. It did so last June, in *United States v. Windsor*, 133 S. Ct. at 2675, in an appeal from the previously mentioned Second Circuit decision. *Windsor* struck down a provision of the so-called Defense of Marriage Act ("DOMA") that withheld recognition by the federal government of marriages of same-sex couples. Justice Kennedy's opinion for the

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Court held, among other things, that the law's "purpose and practical effect [were] to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages[.]" *Windsor*, 133 S. Ct. at 2693.

Though the case was only about federal recognition of married same-sex couples, the opinion's implications are broader. It calls the decision of some states to allow same-sex couples to marry "a new insight" and "a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages." *Id.* at 2689, 2692. It notes that denying recognition to the relationships of same-sex couples "places [them] in an unstable position of [having] a second-tier [legal status]." *Id.* at 2694. It recognizes that exclusion from marriage "demeans the couple, whose moral and sexual choices the Constitution protects[.]" *Id.* It further says that a law giving second-class status to same-sex relationships "humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Id.* In the months since *Windsor* was decided, a unanimous line of federal judges in Utah, Oklahoma, Ohio, Kentucky, and Virginia have held that its reasoning compels equal recognition of same-sex relationships, not just by the federal government, but by states as well.[25]

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[25] *See Bostic v. Rainey*, __ F. Supp. 2d __, 2014 WL 561978, at *16-17 (E.D. Va. Feb 13, 2014); *Bourke v. Beshear*, No. 13-750, 2014 WL 556729, *6-7 (W.D. Ky. Feb. 12, 2014); *Bishop v. United States ex rel. Holder*, No. 04-848, __ F. Supp. 2d __, 2014 WL 116013, at *17-33 (N.D. Okla. Jan. 14, 2014); *Obergefell v. Wymyslo*, No. 13-501, __ F. Supp. 2d __, 2013 WL 6726688, at *1 (S.D. Ohio Dec. 23, 2013); *Kitchen v. Herbert*, __ F. Supp. 2d __, 2013 WL 6697874, at *6-7 (D. Utah Dec. 20, 2013).

"Insofar as there was confusion about what *Windsor* meant at the time it was decided, the lower courts across the country have now effectively settled it. A survey of publicly available opinions shows that in the eight months since *Windsor*, 18 court decisions have addressed an issue of equality based on sexual orientation. And in those 18 cases, equality has won *every single time*." David S. Cohen & Dahlia Lithwick, *It's Over: Gay Marriage Can't Lose in the Courts*, Slate.com (Feb. 14, 2014) (Isaak Decl. Ex. 11).

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B. Classifications Based on Sexual Orientation Receive Heightened Scrutiny.

It is the law of the Ninth Circuit that classifications based on sexual orientation are subject to heightened scrutiny. In *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, Nos. 11-17357, 11-17373, 2014 WL 211807 (9th Cir. Jan. 21, 2014), the Ninth Circuit reevaluated its precedent in light of the Supreme Court's decision in *Windsor*. Though *Windsor* "did not expressly announce the level of scrutiny it applied to the equal protection claim at issue in that case," the Ninth Circuit "analyzed the Supreme Court precedent 'by considering what the Court actually did[.]'" *Id.* at *6 (citation omitted). The Ninth Circuit concluded that, "[i]n its words and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review. In other words, *Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation." *Id*.

In *SmithKline Beecham*, the Ninth Circuit dissected the rationale of *Windsor* to discern the level of scrutiny that the Supreme Court applied. *SmithKline Beecham* distinguishes *Windsor*'s equal protection analysis from rational basis review in three ways. First, the Ninth Circuit reasoned that rational basis review will sustain a classification based on post hoc rationalizations rather than the law's actual purposes, but *Windsor* did not entertain any such rationalizations. To the contrary, in *Windsor*, "instead of conceiving of hypothetical justifications for the law, the Court evaluated the [law's] … 'design, purpose, and effect.'" 2014 WL 211807, at *7 (quoting *Windsor*, 133 S. Ct. at 2689). Second, rational basis review is "extremely deferential" to legislative decisions and begins from a "strong presumption" of constitutionality, *id.* at *8 (quoting Erwin Chemerinsky, *Constitutional Law* 695 (4th ed. 2013)), but the Ninth Circuit interpreted *Windsor* as requiring the government to "'justify disparate treatment of the group'" with a "'legitimate purpose'" that would "'overcome[]'" the "'disability'" imposed on a "'class'" of individuals, *id.* at *7 (quoting *Windsor*, 133 S. Ct. at 2693, 2696). Third, the Ninth Circuit observed that *Windsor* follows *Department of Agriculture*

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v. Moreno, 413 U.S. 528 (1973), and *Lawrence v. Texas*, 539 U.S. 558 (2003), which are both precedents that the Ninth Circuit had already concluded apply a level of scrutiny more rigorous than the typical rational basis case. *See SmithKline Beecham*, 2014 WL 211807, at *9; *see also Windsor*, 133 S. Ct. at 2692-94.[26] For these three reasons, *SmithKline Beecham* concludes that "*Windsor* review is not rational basis review," 2014 WL 211807, at *6, and that heightened scrutiny controls challenges to classifications based on sexual orientation.

Moreover, the holding of *SmithKline Beecham* is consistent with *Carolene Products* footnote four and its progeny.[27] First, as the Second Circuit said in *Windsor I*, "It is easy to conclude that homosexuals have suffered a history of discrimination. … [This proposition] is not much in debate." 699 F.3d at 182; *see also High Tech Gays*, 895 F.2d at 573 ("[W]e do agree that homosexuals have suffered a history of discrimination[.]"). Volumes have been filled with the history of animus and discrimination toward gay men and lesbians, but the best evidence of this history "is that, for many years and in many states, homosexual conduct was criminal." *Windsor I*, 699 F.3d at 182. When it struck down these criminal proscriptions, the Supreme Court said that they were "demean[ing]," "stigma[tizing]," and "an invitation to subject homosexual persons to discrimination[.]" *Lawrence*, 539 U.S. at 575.

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[26] In *Witt v. Department of Air Force*, 527 F.3d 806, 816 (9th Cir. 2008), the Ninth Circuit conducted an analysis much like that in *SmithKline Beecham*, parsing *Lawrence* to conclude that the Supreme Court had in fact applied heightened scrutiny without saying so. In *Mountain Water Co. v. Montana Department of Public Service Regulation*, 919 F.2d 593, 599 (9th Cir. 1990), the Ninth Circuit asserted without analysis that the Supreme Court in *Moreno* had applied "'heightened' scrutiny" in that case.

[27] An emerging consensus among federal and state courts finds that heightened scrutiny should apply to classifications based on sexual orientation. *See Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 310-33 (D. Conn. 2012); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 985-90 (N.D. Cal. 2012); *In re Balas*, 449 B.R. 567, 573-75 (Bankr. C.D. Cal. 2011); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010); *In re Marriage Cases*, 183 P.3d 384, 441-44 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 425-31 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 885-96 (Iowa 2009); *Griego v. Oliver*, 316 P.3d 865, No. 34-306, 2013 WL 6670704, *16-18 (N.M. Dec. 19, 2013).

The argument is contrary to *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990); however, as the Ninth Circuit said in *SmithKline Beecham*, 2014 WL 211807, at *5-6, the holding of *High Tech Gays* does not survive *Windsor*.

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Second, the Second Circuit also found it "easy to decide" that identity as a gay or lesbian person is not normally related to "ability to perform or contribute to society." *Windsor I*, 699 F.3d at 182. "The aversion homosexuals experience has nothing to do with aptitude or performance." *Id.* at 182-83. Gay and lesbian individuals can do their jobs, take part in civic activities, and participate in family life — just as the plaintiff couples have done — as capably as others. Indeed, Oregon statute already recognizes this: "Many gay and lesbian … couples live together, participate in their communities together and often raise children and care for family members together, just as do couples who are married under Oregon law." ORS 106.300(3).

Third, "sexual orientation is a sufficiently distinguishing characteristic to identify [a] discrete minority class[.]" *Windsor I*, 699 F.3d at 184. This is already the law in the Ninth Circuit: "Sexual orientation and sexual identity are immutable; they are … fundamental to one's identity[.]" *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled on other grounds*, *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005). "'[H]omosexuality is as deeply ingrained as heterosexuality…. [It is] a basic component of a person's core identity.'" *Id.* at 1093-94 (citation omitted).

Finally, the gay, lesbian, bisexual, and transgender community lacks the political power to protect itself from discrimination. "The question is not whether homosexuals have achieved political successes over the years; they clearly have. The question is whether they have the strength to politically protect themselves from wrongful discrimination." *Windsor I*, 699 F.3d at 184. "[H]omosexuals are not in a position to adequately protect themselves from the discriminatory wishes of the majoritarian public." *Id.* at 185. One example of this relative political powerlessness: Under federal law and the laws of most states, there is still no federal ban on discrimination in employment, housing, or public accommodations based on sexual orientation, despite vigorous efforts by the gay, lesbian, bisexual, and transgender community to secure these protections. "[T]he basic inability to bring about an end to discrimination and pervasive prejudice, to secure desired policy outcomes and to prevent undesirable outcomes on

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fundamental matters that directly impact their lives, is evidence of the relative political powerlessness of gay and lesbian individuals." *Golinski*, 824 F. Supp. 2d at 989. *But see Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1008 (D. Nev. 2012) ("[T]he public media are flooded with editorial, commercial, and artistic messages urging the acceptance of homosexuals. Anti-homosexual messages are rare in the national informational and entertainment media, except that anti-homosexual characters are occasionally used as foils for pro-homosexual viewpoints in entertainment media.").

Accordingly, applying heightened scrutiny to classifications based on sexual orientation is appropriate not just because it is now the law of the Ninth Circuit, *SmithKline Beecham*, 2014 WL 211807, at *6-7, and not just because the State agrees,[28] but also because it faithfully implements the law of equal protection.

C. Classifications Based on Sex Receive Heightened Scrutiny.

Testing Oregon's marriage exclusion with heightened scrutiny is correct for yet a second reason: the exclusion classifies on the basis of sex. Paul Rummell and Benjamin West are precluded from marrying one another because they are both men; if either were a woman, they would be allowed to marry. Likewise, Lisa Chickadonz and Christine Tanner cannot marry because they are both women; if one were a man, their marriage would be permitted. Sex-based classifications are subject to heightened scrutiny. *Virginia*, 518 U.S. at 524. Accordingly, Oregon's marriage exclusion should be tested with heightened scrutiny for the independent reason that it classifies based on sex.

In the past, some courts rejected this approach because the exclusion from marriage of same-sex couples treats men and women the same: both are barred from marrying people of the

[28] *See* Isaak Decl. Ex. 12 at 6 ("[A] court is very unlikely to apply rational basis review. … [A] court might well apply strict scrutiny."); Brief for the States of New York, Massachusetts, California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, Oregon, Rhode Island, Vermont, and Washington, and the District of Columbia, as Amici Curiae in Support of Respondent Edith Schlain Windsor, 133 S. Ct. 2675 (2013) (No. 12-307) (advocating for "closer judicial scrutiny" and "searching scrutiny").

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same sex. *E.g.*, *Griego*, 2013 WL 6670704, at *13 ("The distinction between same-gender and opposite-gender couples in the challenged legislation does not result in the unequal treatment of men and women."). This "separate but equal" reasoning has long since been jettisoned when it comes to racial classifications, largely in recognition that social institutions separated by race are rooted in, and can serve to perpetuate, the supremacy of one race over another. *See*, *e.g.*, *Johnson*, 543 U.S. at 506 ("[T]he Court rejected the notion that separate can ever be equal — or 'neutral' — 50 years ago in *Brown v. Board of Education*[.]"); *Shaw v. Reno*, 509 U.S. 630, 651 (1993) (applying strict scrutiny to race-based congressional redistricting, despite that "they may be said to burden or benefit the races equally"); *Loving v. Virginia*, 388 U.S. 1, 11 & n.11 (1967) (noting that bans on interracial marriage operate to "maintain White Supremacy" and rejecting the argument that they are constitutional because they apply equally to people of different races). The same is true here. Limiting marriage to male-female relationships is rooted in a long history of unequal gender relations within marriage and serves now to perpetuate that stereotype. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 992-93 (N.D. Cal. 2010) ("[T]he exclusion exists as an artifact of a time when the genders were seen as having distinct roles in society and in marriage. That time has passed."). It is not susceptible to dispute that Oregon's marriage exclusion classifies people based on sex, and for that reason it should be subjected to heightened scrutiny.

D. Excluding Same-Sex Couples from Marriage Lacks a Substantial Relationship to an Important Government Interest.

Heightened scrutiny requires "the defender of the challenged action [to] show 'at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" *Virginia*, 518 U.S. at 524 (citation omitted). Heightened scrutiny thus requires the classification's proponent — the State — to establish an "exceedingly persuasive justification" for the classification. *Id.*

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1. Arguments for the Marriage Exclusion in the Voters' Pamphlet Do Not Survive Heightened Scrutiny.

It is the State's burden to identify actual reasons it adopted the discriminatory policy and explain why those reasons satisfy heightened scrutiny. But none of the justifications offered in favor of Measure 36 in the voters' pamphlet — (1) excluding same-sex couples from marriage is appropriate because different-sex relationships are the optimal conditions for child-rearing; (2) excluding same-sex couples from marriage maintains the traditional understanding of marriage; (3) excluding same-sex couples from marriage maintains the status quo; and (4) morality requires that same-sex couples be excluded from marriage[29] — pass this test.

a. The "Optimal Conditions for Child-Rearing" Argument Does Not Satisfy Heightened Scrutiny.

Perhaps the most commonly asserted justification for excluding same-sex couples from marriage is the claim that different-sex relationships provide the optimal conditions for raising children. This justification takes various forms in the voters' pamphlet arguments in favor of Measure 36.[30] Notably, it is sometimes conflated with a different proposition: that same-sex couples are inferior parents to different-sex couples. Because the latter proposition is patently indefensible, many institutional opponents of same-sex marriage have disclaimed it[31] and, in this

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[29] A fifth reason is mentioned in some judicial opinions on this subject: that excluding same-sex couples from marriage promotes "responsible procreation." This memorandum will not discuss the argument at length because it does not appear in the voters' pamphlet. Thus, the argument is the sort of post hoc rationalization that a court may consider when reviewing for rationality, but not when applying heightened scrutiny. *SmithKline Beecham*, 2014 WL 211807, at *7. In any event, this memorandum adopts the responsive arguments in *Perry v. Brown*, 671 F.3d 1052, 1088 (9th Cir. 2012), *vacated by Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), and *Varnum*, 763 N.W.2d at 901-02, which both explain that the exclusion of same-sex couples from marriage does not result in more procreation or more responsible procreation.

[30] *E.g.*, Isaak Decl. Ex. 1 at 4 ("Redefining marriage … will reduce the rights of children to live in a culture that by design affirms the role of marriage to give them a mom and dad."); *id.* at 5 ("Children do better with a mother and a father."); *id.* at 6 ("[O]n the whole, students do best when living in a home with a married mother and father.").

[31] *See* Reply In Support Of Application To Stay Judgment Pending Appeal, *Herbert v. Kitchen*, 134 S. Ct. 893 (2014) (No. 13A687) ("The State does not contend that the individual parents in same-sex couples are somehow 'inferior' as parents to the individual parents who are involved in married, mother-father parenting.").

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action, Defendants have already told the Court that they do not assert it.[32] Instead, opponents of same-sex marriage typically defend a somewhat more modest claim: that, across the population, children generally do better when raised by their biological mothers and fathers.

The premise of this argument is not supportable. As a factual matter, social science research clearly establishes that the children of different-sex couples fare no better than children of similarly situated same-sex couples. This is the scientific consensus of every national healthcare organization charged with the welfare of children and adolescents, including the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the American Psychiatric Association, the American Psychological Association, the American Psychoanalytic Association, the American Sociological Association, the National Association of Social Workers, the American Medical Association, and the Child Welfare League of America.[33] As the federal district court in Virginia recently said: "Gay and lesbian couples are as capable as other couples of raising well-adjusted children. In the field of developmental psychology, 'the research supporting this conclusion is accepted beyond serious debate.'" *Bostic*, 2014 WL 561978, at *18 (internal citations omitted). Further, the argument's premise is fundamentally at odds with Oregon public policy, which rejects any preference for different-sex parents over same-sex parents. *See* ORS 106.305(4), 106.340; *see also Perry*, 671 F.3d at 1086-87 ("Both before and after Proposition 8, committed opposite-sex couples ('spouses') and same-sex couples ('domestic partners') had identical rights with regard to forming families and raising children. Similarly, Proposition 8 did not alter the California adoption or presumed-parentage laws, which continue to apply equally to same-sex couples. In order to be rationally related to the purpose of funneling more childrearing into families led by two biological parents, Proposition 8 would

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[32] Defendants made this representation at a hearing on January 22, 2014.

[33] *See* Brief of Am. Psychological Ass'n, et al. as Amici Curiae on the Merits in Support of Affirmance, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 871958.

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have had to modify these laws in some way. It did not do so." (internal citations omitted)).

But the Court need not decide the factual merit of the argument's premise because there is no correlation between the premise and the marriage-exclusion policy. Excluding same-sex couples from marriage in Oregon does not prevent or dissuade them from having children, and it does not cause different-sex couples to form more stable relationships or to have more children. No child is better off because same-sex couples in Oregon are denied access to lawful marriage.

The federal district court in Utah recently concluded in evaluating Utah's constitutional ban on same-sex marriage:

> There is no reason to believe that Amendment 3 has any effect on the choices of couples to have or raise children, whether they are opposite-sex couples or same-sex couples. The State has presented no evidence that Amendment 3 furthers or restricts the ability of gay men and lesbians to adopt children, to have children through surrogacy or artificial insemination, or to take care of children that are biologically their own whom they may have had with an opposite-sex partner. Similarly, the State has presented no evidence that opposite-sex couples will base their decisions about having children on the ability of same-sex couples to marry.

Kitchen, 2013 WL 6697874, at *26. The court continued: "If anything, the State's prohibition of same-sex marriage detracts from the State's goal of promoting optimal environments for children. … [R]oughly 3,000 children are currently being raised by same-sex couples in Utah. These children are also worthy of the State's protection, yet Amendment 3 … humiliates [them] … [and] denies [them] … a panoply of benefits that the State and the federal government offer to families who are legally wed." *Id.* (internal quotation marks omitted).

Excluding same-sex couples from marriage is simply not "substantially related to the achievement" of any objective that children be raised in optimal conditions. No child of different-sex parents is better off because same-sex couples are excluded from marriage, and no child of same-sex parents is better off because his or her own parents are excluded from marriage. To the contrary, barring same-sex couples from marriage imposes a disability on the children being raised in those households. As noted in *Windsor*, 133 S. Ct. at 2694-96, it

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humiliates them, brands them and their families with a badge of inferiority, imposes financial hardship on them, and denies them important legal protections.

Accordingly, as a matter of law, the justification that different-sex relationships provide the optimal conditions for raising children is, at a minimum, not an "exceedingly persuasive" reason to exclude same-sex couples from marriage, *Virginia*, 518 U.S. at 524, falling well short of the hurdle of heightened scrutiny.

b. The "Traditional Understanding of Marriage" Argument Does Not Satisfy Heightened Scrutiny.

Another reason often given for excluding same-sex couples from marriage is that the policy maintains the traditional understanding of marriage. This justification, too, is repeated in various forms in voters' pamphlet arguments in favor of Measure 36.[34]

Deference to tradition does not survive rational basis, let alone heightened, scrutiny. "[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack[.]" *Williams v. Illinois*, 399 U.S. 235, 239 (1970); *see also Heller v. Doe*, 509 U.S. 312, 326 (1993) ("Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis."). If tradition alone were sufficient to sustain differential treatment, then numerous outmoded classifications based on gender, illegitimacy, religion, and race would have been upheld long ago.[35]

The "traditional understanding" argument must fail also because it is analytically circular: it permits a classification "'for its own sake.'" *Kerrigan*, 957 A.2d at 478 (citation

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[34] *E.g.*, Isaak Decl. Ex. 1 at 4 ("This will strengthen the historical definition that is in Oregon statute, and protect our traditional idea of marriage by adding it to the Oregon Constitution."); *id.* at 4 ("Throughout history there has been one consistent outlook for civilization: mom and dad."); *id.* at 7 ("This measure is about protecting an institution that has been the foundation of our society for centuries."); *id.* at 8 ("Marriage has always been a special relationship between a man and a woman. Let's keep it that way.").

[35] Justice Holmes famously said, "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from imitation of the past." O.W. Holmes, *The Path of the Law, Address at the Dedication of the New Hall of the Boston University School of Law*, 10 Harv. L. Rev. 457, 469 (1897).

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omitted). "When a certain tradition is used as both the governmental objective and the classification to further that objective, the equal protection analysis is transformed into the circular question of whether the classification accomplishes the governmental objective, which objective is to maintain the classification." *Varnum*, 763 N.W.2d at 898. "This approach is, of course, an empty analysis." *Id.*

Accordingly, the justification that the marriage exclusion maintains the traditional understanding of marriage also fails to provide an "exceedingly persuasive" reason to exclude same-sex couples from marriage. *Virginia*, 518 U.S. at 524.

c. The "Maintenance of the Status Quo" Argument Does Not Satisfy Heightened Scrutiny.

The most often-repeated argument in the voters' pamphlet is some variation on: "we must protect the status quo."[36] But this reason fails for largely the same reasons as the deference-to-tradition justification: that a classification exists, and has existed for a long time, is not sufficient reason to sustain the classification against equal protection challenge. *See Bowers v. Hardwick*, 478 U.S. 186, 210 (1986) (Blackmun, J., dissenting), *overruled by Lawrence*, 539 U.S. at 558 ("[N]either the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from [constitutional] scrutiny."). Simply put, keeping things the way they have been for the sake of consistency is not a sufficient reason to justify the exclusion at issue.

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[36] *E.g.*, Isaak Decl. Ex. 1 at 4 ("Change is not always good just because it's new…. This clearly would be the case if we were to dramatically alter the reserved design for marriage between a husband and wife."); *id.* at 5 ("Most Oregonians thought marriage was already concretely defined in the Constitution."); *id.* at 6 ("Measure 36 affirms what Oregon law and our citizens have long held as true. … Never before had people questioned the intent of our marriage law."); *id.* at 7 ("This measure is about … ensuring that the law continues to reflect the values and beliefs that the overwhelming majority of Oregonians already believed were enshrined in law."); *id*. at 7 ("It is important to affirm what we all thought was already in the Oregon Constitution[.]").

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The "status quo" argument is sometimes framed in terms of being cautious not to undertake social change too rapidly.[37] But this spin fares no better. "The State can plead an interest in proceeding with caution in almost any setting. If the court were to accept the State's argument here, it would turn the [equal protection] analysis into a toothless and perfunctory review." *Kitchen*, 2013 WL 6697874, at *27. The argument is particularly inapt here, where the State otherwise grants virtually all the privileges, immunities, rights, benefits, and responsibilities of marriage to same-sex domestic partners that it can, *see* ORS 106.340, and now recognizes the out-of-state marriages of same-sex couples in some circumstances, *see* OAR 105-010-0018. Expanding these existing protections to include marriage would not work any fundamental social change for which one might urge caution.

d. The "Morality" Argument Does Not Satisfy Heightened Scrutiny.

Finally, Oregon's marriage exclusion was touted as a justifiable expression of moral disapproval of same-sex relationships. While all people are entitled to their private moral views, the Supreme Court has held that such views cannot alone provide justification sufficient to withstand constitutional challenge.

"[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice[.]" *Lawrence*, 539 U.S. at 577 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)). "Moral disapproval of [gay and lesbian individuals], like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons." *Id.* at 582 (O'Connor, J., concurring). "[T]he State cannot single out one identifiable

[37] *E.g.*, Isaak Decl. Ex. 1 at 4 (referring to marriage of same-sex couples as a "social experiment[]"); *id.* at 10 ("No society has ever raised a generation of children in same-sex homes. To do so is a vast, untested social experiment on children.").

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class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law." *Id.* at 584.[38] More recently, in *Windsor*, the Supreme Court affirmed this principle in the context of rejecting the federal government's exclusion of same-sex couples from marriage, when it cited Congress's "moral disapproval of homosexuality" as evidence that the law had the impermissible "purpose and effect of disapproval of that class." 133 S. Ct. at 2693.

Accordingly, the marriage exclusion cannot survive heightened scrutiny on this basis.

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The Ninth Circuit recently resolved the level of scrutiny applicable to laws, like Oregon's marriage exclusion, which facially discriminate against same-sex couples. *SmithKline Beecham*, 2014 WL 211807, at *6. With that issue settled, there can be no question that Oregon's marriage exclusion denies equal protection to committed same-sex couples.

Laws excluding same-sex couples from marriage cannot survive heightened scrutiny, particularly in a state like Oregon that otherwise offers same-sex couples many of the legal obligations and protections associated with marriage. For this reason, defendants in a lawsuit challenging Nevada's marriage exclusion (now pending before the Ninth Circuit) have withdrawn their defense of the law. In an eloquent submission, the Nevada defendants acquiesced: "The decision in *SmithKline* is controlling, and as a result, the State has determined that its arguments grounded upon equal protection and due process are no longer sustainable."[39] *See also Windsor I*, 699 F.3d at 210 (Straub, J., dissenting) (noting that laws excluding same-sex couples from marriage "face[] a high likelihood of invalidation under heightened scrutiny"); Eric

[38] The Supreme Court adopted this view in *Lawrence* understanding the effect it would have on future cases, like this one, challenging exclusion of same-sex couples from marriage. In dissent, Justice Scalia vigorously criticized the Court's holding that, he said, "effectively decrees the end of all morals legislation." *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting). He protested: "This reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples. … '[P]reserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples." *Id.* at 601.

[39] Isaak Decl. Ex. 13 at 6.

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Berger, *Lawrence's Stealth Constitutionalism & Same-Sex Marriage Litigation*, 21 Wm. & Mary Bill Rts. J. 765, 797 (2013) ("[H]eightened scrutiny [would] almost certainly invalidate the marriage ban.").[40]

2. Oregon Policy Attempting to Grant Same-Sex Couples Equal Rights, Benefits, and Privileges Undermines State Justifications for the Marriage Exclusion.

Whatever justifications the State might offer for its exclusion of same-sex couples from marriage, to survive heightened scrutiny (or, for that matter, even rational basis review) such justifications must be reconciled with the State's public policy in most other matters attempting to grant gay, lesbian, and bisexual individuals equal rights, benefits, and privileges.

The Oregon Constitution guarantees equal privileges and immunities to gay, lesbian, and bisexual individuals. Article I, section 20, of the Oregon Constitution promises that all privileges and immunities granted by the State shall "upon the same terms … equally belong to all citizens." In the landmark case *Tanner v. Oregon Health Sciences University*, 157 Or. App. 502, 524-25, 971 P.2d 435 (1998) — an action brought by Christine Tanner and Lisa Chickadonz, with others — the Oregon Court of Appeals held that the State Constitution's equality guarantee applies to gay, lesbian, and bisexual Oregonians.

Oregon statutes set out to implement the Constitution's equality promise. The Oregon Equality Act, ORS 659A.001 *et seq*., bars discrimination in employment, housing, and public accommodations on the basis of sexual orientation. The Oregon Family Fairness Act, ORS 106.300 *et seq*., establishes "a domestic partnership system [to] provide legal recognition to same-sex relationships [and] ensur[e] more equal treatment of gays and lesbians and their families under Oregon law," ORS 106.305(6). Oregon law also permits same-sex couples to adopt children on equal terms as different-sex couples, *see Shineovich and Kemp*, 229 Or. App.

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[40] Judge Straub also argued that heightened scrutiny is at odds with *Baker v. Nelson*, 409 U.S. 810 (1972). For the reasons explained in *Kitchen*, 2013 WL 6697874, at *7-8, *Baker* is no longer binding precedent.

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670, 686, 214 P.3d 29 (2009) (requiring that adoption laws be applied equally to same-sex couples), and protects gay, lesbian, bisexual, and transgender people from crimes motivated by animus against them, ORS 166.165, 181.550. In sum, with the notable exception of the marriage exclusion, it is the State's policy to treat gay, lesbian, and bisexual individuals with equality. Yet at the same time, gay and lesbian couples face daunting discrimination when it comes to the legal, social, and dignitary status of marriage.

To survive heightened scrutiny, the State must justify this disparity. The New Jersey Supreme Court has recognized that a state cannot rationally exclude same-sex couples from marriage while at the same time adopting a "public policy … to eliminate sexual orientation discrimination and support[ing] legally sanctioned domestic partnerships." *Lewis v. Harris*, 908 A.2d 196, 217 (N.J. 2006). "There is no rational basis for, on the one hand, giving gays and lesbians full civil rights in their status as individuals, and, on the other, giving them an incomplete set of rights when they follow the inclination of their sexual orientation and enter into committed same-sex relationships." *Id.*

The Ninth Circuit agreed in *Perry v. Brown*.[41] There, the court considered the tension between a state's marriage exclusion and its otherwise protective policies toward gay, lesbian, and bisexual individuals. Because California had a domestic partnership law in place, the Ninth Circuit said, "Proposition 8 left the incidents [of marriage] but took away the status and the dignity." 671 F.3d at 1079. "Proposition 8 … excise[d] with surgical precision one specific right: the right to use the designation of 'marriage' to describe a couple's officially recognized relationship." *Id.* at 1081. The court added: this "surgical precision … makes [a law] even more suspect. A law that has no practical effect except to strip one group of the right to use a state-authorized and socially meaningful designation is all the more 'unprecedented' and 'unusual' than a law that imposes broader changes, and raises an even stronger 'inference that the

[41] *Perry* is not binding precedent because it was vacated by the Supreme Court for lack of standing to appeal. Its reasoning is nonetheless persuasive.

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disadvantage imposed is born of animosity toward the class of persons affected[.]" *Id.* The Ninth Circuit concluded that California could not rationally reconcile its laws extending rights to gay, lesbian, and bisexual Californians with the putative justifications for excluding the same population from marriage.

So too for Oregon. Whatever "important government interests" the State may assert to support the marriage exclusion, it must explain why it holds itself out as a jurisdiction that "promot[es] stable and lasting families, including the families of same-sex couples and their children," ORS 106.305(4), why it sees merit in "extending benefits, protections and responsibilities to committed same-sex partners and their children that are comparable to those provided to married individuals and their children," ORS 106.305(5), and why it recognized that "provid[ing] legal recognition to same-sex relationships … ensur[es] more equal treatment of gays and lesbians and their families under Oregon law," ORS 106.305(6), while at the same time it excludes same-sex couples from marriage.

This burden cannot be met, particularly with the application of the rigors of heightened scrutiny.

E. Oregon's Marriage Exclusion Is Also Unconstitutional Under Any Standard of Review Because It Operates as a Bare Exclusion and Demeans Same-Sex Couples.

As shown above, Oregon's marriage exclusion cannot survive heightened scrutiny. But even if heightened scrutiny did not apply and instead the marriage exclusion were tested under a rational basis standard of review, it still would not satisfy equal protection.

Under any standard of constitutional review, Oregon's marriage exclusion offends equal protection in a fundamental way: it expressly and impermissibly targets gay and lesbian individuals for unfair and unequal treatment with no legitimate justification. The Supreme Court has recently reiterated: "[t]he Constitution's guarantee of equality 'must at the very least mean that a bare … desire to harm a politically unpopular group cannot' justify disparate treatment of that group." *Windsor*, 133 S. Ct. at 2693 (2013) (quoting *Moreno*, 413 U.S. at 534-35). Indeed,

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the Supreme Court, and other lower courts, have expressly found restrictions on same-sex couples' freedom to marry, or to have their marriages respected, to have been motivated by animus. *See, e.g.*, *id.* at 2695 (finding that "the principal purpose and the necessary effect of this law are to demean"); *Perry*, 671 F.3d at 1082.

This case law — and the facts underlying this particular case[42] — invite an argument about the intentions behind Measure 36, and whether they, too, reflect a "desire to harm." Statements in the voters' pamphlet demonstrate that Measure 36, and the harms it has caused, arose out of unfortunate misunderstandings, unfounded fears, and long-held stereotypes about gay and lesbian individuals. As Justice Kennedy has observed: "Prejudice … rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). While many of the attitudes underlying the law have changed in the decade since the marriage exclusion was passed, its historic roots remain.

Oregon's marriage exclusion must be struck down because it offends the core of the Equal Protection Clause in two related ways: (1) its purpose is solely to exclude gay and lesbian individuals from the status, responsibilities, protections, and other benefits associated with marriage for reasons that are rooted in historic animus; and (2) in so doing, it undermines the dignity of gay and lesbian individuals in Oregon. When a law's principal effect is to exclude a

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[42] *See* Isaak Decl. Ex. 1 at 5 ("To radically and fundamentally change the definition of marriage to include what God considers an 'abomination' is to reject God's purpose in marriage for men, women, children, and a nation; to 'exchange the Glory of God for a lie', and to reject the 'eternal rules of order and right' which God has ordained."); *id* at 4 ("If we 'normalize' homosexual marriage, the state will be forced to place foster children in same-sex households. Schools, and society, will be teaching the next generation the 'equality' of same-sex marriage, changing our views of the importance of gender and the nature of the family. It will cause kids to question their sexual identity, and increase experimentation with a behavior that is neither emotionally nor physically healthy.").

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social group and undermine the personal dignity of its members, and it lacks any purpose apart from that bare desire to exclude, it falls well short of the promise of equal protection.

1. Measure 36 Is a Law of an Unusual Character.

It is important first to put Measure 36 in context. For nearly Oregon's entire history, limitations on marriage, such as age requirements and a prohibition on bigamy, were confined to statute. *See Li*, 338 Or. at 385-86 (discussing Oregon's statutory regime regulating marriage). Indeed, the Legislature's monopoly over regulating marriages has been well documented by the Oregon Supreme Court. *See id.* at 392 ("The foregoing cases demonstrate that the state and, more specifically, the legislature, is the locus of power over marriage-related matters in Oregon."); *Rugh v. Ottenheimer*, 6 Or. 231, 237, 25 Am. Rep. 513 (1877) ("The marriage relation, affecting the whole public, and being an institution of society, affecting more deeply than any other the foundations of social order and public morals, has always been under the control of the legislature.").

In 2004, a presidential election year, Oregon departed from its traditional approach to regulating marriage. Measure 36 enacted a specific definition of marriage — specifically excluding same-sex couples — and elevated it from statute to the State's Constitution, engraving it into the bedrock of state law and placing it on the same footing as other constitutional provisions, to which it previously was subordinate. *See Li*, 338 Or. at 390 ("As the later-enacted (and more specific) constitutional provision, Measure 36 resolves any prospective claims that plaintiffs may have had under Article I, section 20 [equality of privileges and immunities of citizens], to obtain marriage licenses.").[43] Measure 36 was also unusual in terms of its substance,

[43] The fact that Measure 36 may have reflected the majority of Oregonians' traditional view of marriage does not make it "usual." In *Windsor*, the Supreme Court determined that DOMA deviated from legal tradition, not because it did not reflect the majority conception of marriage, but because it etched that definition into a new place — federal law. Shifting the regulation of marriage from its traditional place as a statutory matter to one of constitutional import was a similar deviation of structure.

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carving into the State Constitution the exclusion of a particular social group from a traditional social institution. *Cf. Romer v. Evans*, 517 U.S. 620, 632, 633 (1996) (describing "the peculiar property of imposing a broad and undifferentiated disability on a single named group" as "exceptional," and observing that "laws singling out a certain class of citizens for disfavored legal status or general hardships are rare.").

Although it is not necessary to find that a law has an unusual character in order to find that it is predicated on unconstitutional animus, "'discriminations of an unusual character' *especially* require careful consideration." *Windsor*, 133 S. Ct. at 2693 (emphasis added) (quoting *Romer*, 517 U.S. at 633).

2. Oregon's Marriage Exclusion Is Unconstitutional Because it Operates as a Bare Exclusion to Gay, Lesbian, and Bisexual Individuals.

"[M]arriage is more than a routine classification for purposes of certain statutory benefits." *Windsor*, 133 S. Ct. at 2692. Marriage has "extraordinary significance … because 'marriage' is the name that society gives to the relationship that matters most between two adults. … It is the designation of 'marriage' itself that expresses validation, by the state and the community, and that serves as a symbol, like a wedding ceremony or a wedding ring, of something profoundly important." *Perry*, 671 F.3d at 1078; *see also Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."). Indeed, if there is one point on which people on all sides of Measure 36 agreed, it was that marriage is a profoundly important institution.

Yet the singular purpose and effect of Measure 36 is to exclude same-sex couples from this institution (and the rights, responsibilities, and benefits that come with it) in Oregon. The text could not be clearer: "It is the policy of Oregon, and its political subdivisions, that *only a*

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marriage between one man and one woman shall be valid or legally recognized as a marriage." Or. Const. art. XV, § 5a (emphasis added). Nor could the campaign to enact it. Voters' pamphlet arguments in favor of Measure 36 were pointed in stating a purpose to exclude: "Marriage has always been a special relationship only between a man and a woman. Let's keep it that way."[44] By stating that, as a constitutional matter, a marriage between two gay or lesbian individuals is invalid, Measure 36 stated not "only … the policy itself, but also [the] particular *consequences* that are to occur as a result of that policy." *Li*, 338 Or. at 389-90.

The Equal Protection Clause does not tolerate legislation that operates simply to exclude a social group from benefits and protections, especially one as personal and important as marriage, without a legitimate purpose. "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Romer*, 517 U.S. at 633. This principle is deeply embedded in equal protection doctrine. In 1973, the Supreme Court considered the constitutionality of an exclusion from the food stamp program of persons living in a household together but not related to one another. *Moreno*, 413 U.S. at 528. In the absence of any other plausible justification, the Court concluded that the exclusion was motivated by a desire to exclude people living on "hippy" communes. *Id.* at 543. The Court held that a law whose "purpose [is] to discriminate against hippies … is wholly without any rational basis." *Id.* at 535-38. Twelve years later, in 1985, the Supreme Court considered whether a city may require a special use permit for group homes for people with cognitive disabilities, when it does not require permits for any other type of group living facility, such as sororities, apartments, or nursing homes. *Cleburne*, 473 U.S. at 432. After examining the city's justifications for the ordinance, the Court found that the ordinance was based simply on "an irrational prejudice," and that the city's attempt to exclude a certain class of people, or to allow a "majority of property

[44] Isaak Decl. Ex. 1 at 8.

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owners" to do so, was unconstitutional. *Id.* at 448-50. Ten years later, the Court struck down Colorado's constitutional ban on local ordinances prohibiting discrimination based on sexual orientation, observing that the law "imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint." *Romer*, 517 U.S. at 631. Once again, a law intended simply to exclude a social group — with no other legitimate justification — was found to violate equal protection.

Last year, the Court applied this exclusion analysis to the marriage context. Following the path of its prior holdings, the Court struck down DOMA, in part on the ground that the act "deprive[d] same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages." *Windsor*, 133 S. Ct. at 2693.

The lesson of these cases is clear: because Measure 36 was designed simply to exclude gay and lesbian people from the benefits, rights, responsibilities, and protections of marriage, based solely on their membership in a particular social group, it is at odds with the Equal Protection Clause and cannot stand.

3. Oregon's Marriage Exclusion Is Unconstitutional Because it Operates to Undermine the Fundamental Dignity of Gay, Lesbian, and Bisexual Individuals.

The institution of marriage carries with it extensive rights, responsibilities, and privileges, not to mention a unique place within the fabric of society. It is therefore central to the dignity of individuals who are in loving, committed relationships, as well as their children. *See Windsor*, 133 S. Ct. at 2689, 2694 (observing that a lawful marriage confers "status and dignity," and that "[r]esponsibilities, as well as rights, enhance the dignity and integrity of the person," and acknowledging that the law's failure to recognize the relationship between two parents has a detrimental effect on their children).

By excluding gay and lesbian individuals from marriage, Measure 36 carves into the State Constitution a second-tier position for same-sex couples. Since January 1, 2008, Oregon

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has offered these couples the option of registering as "domestic partners." *See* ORS 106.300 *et seq*. But even Oregon statute recognizes that domestic partnerships are not equivalent to marriage. *See* ORS 106.305(7) ("The Legislative Assembly recognizes that numerous distinctions will exist between these two legally recognized relationships. The Legislative Assembly recognizes that the legal recognition of domestic partnerships under the laws of this state may not be effective beyond the borders of this state and cannot impact restrictions contained in federal law.").

Like the gap between state and federal definitions of marriage, the gap between marriage and domestic partnerships "places same-sex couples in an unstable position of being in a second-tier [legal relationship]. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples." *Windsor*, 133 S. Ct. at 2693-94 (internal citation omitted) (also observing the "stigma" that is created by a law whose "avowed purpose and practical effect … are to impose a disadvantage [and] a separate status"); *see also Romer*, 517 U.S. at 635 (finding that laws that "classif[y] homosexuals not to further a proper legislative end but to make them unequal to everyone else" are unconstitutional).

When the purpose and effect of a law are to demean, the law is unconstitutional "as a deprivation of the liberty of the person protected by the Fifth [and Fourteenth] Amendment[s] of the Constitution." *Windsor*, 133 S. Ct. at 2695 (also observing that "the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, [and] the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved"); *see also Perry*, 671 F.3d at 1093-96 (finding California's ban on same-sex marriage unconstitutional because "[b]y withdrawing the availability of the recognized designation of 'marriage,' [it] enacts nothing more or less than a judgment about the worth and dignity of gays and lesbians as a class," and had no practical effect other than stripping gay and lesbian individuals of rights, "thereby adversely affecting the

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status and dignity of the members of a disfavored class").

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In short, the Equal Protection Clause has a directive as profound as it is straightforward: "all persons similarly situated should be treated alike." *Cleburne*, 473 U.S. at 440. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). This is true whether the law is enacted out of malice, or whether it operates to deprive a social group of benefits and responsibilities, or to demean and degrade the people in that group. Because Oregon's marriage exclusion offends the core principles and promise of the Equal Protection Clause, it cannot survive any standard of review. It must be struck down.

III. OREGON'S MARRIAGE EXCLUSION DEPRIVES SAME-SEX COUPLES OF DUE PROCESS OF LAW.

A. Marriage Is a Fundamental Right, Burdens on Which Are Evaluated with Heightened Scrutiny.

The liberty guarantee of the Fourteenth Amendment's Due Process Clause "afford[s] constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Lawrence*, 539 U.S. at 574.

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Id. (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

Among the most fundamental of these "choices central to personal dignity and autonomy," *id.*, is marriage. "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Loving*, 388 U.S. at 12 (citation omitted). It is a "fundamental freedom … at the heart of the Fourteenth Amendment[.]" *Id.* Thus, "[u]nder our Constitution,

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the freedom to marry or not marry … resides with the individual and cannot be infringed by the State." *Id.*

In *Lawrence*, the Supreme Court applied the Fourteenth Amendment's liberty guarantee to gay and lesbian individuals. The Court held that gay and lesbian individuals are entitled to personal dignity and autonomy on the same terms as others. *See* 539 U.S. at 574 ("Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.").

Applying *Lawrence* in *Witt*, the Ninth Circuit held that burdens on the substantive due process rights of gay and lesbian individuals are tested with heightened scrutiny. 527 F.3d at 816-19. *Witt* was a substantive due process case challenging the Air Force's suspension of a nurse because of her lesbian relationship. The Ninth Circuit conducted an analysis akin to that applied in *SmithKline Beecham* in "considering what the [*Lawrence*] Court actually *did*[.]" *Id.* at 816. *Witt* notes that in *Lawrence*, the Supreme Court did not apply post hoc rationalizations, it relied on precedents applying heightened scrutiny, and put the onus on the state to "'justify its intrusion into the personal and private life of the individual.'" *Id.* at 817 (quoting *Lawrence*, 539 U.S. at 578). Citing these indicia of heightened, not rational basis, scrutiny, *Witt* held that state intrusions into the personal and private lives of gay, lesbian, and bisexual individuals on account of their sexual orientation warrant heightened scrutiny.

Oregon's marriage exclusion, by interfering with the intensely personal choice of marriage, intrudes into the private lives of gay, lesbian, and bisexual individuals on account of their sexual orientation, and, therefore, must be tested with heightened scrutiny.

B. Oregon's Marriage Exclusion Lacks a Substantial Relationship to an Important Government Interest.

For all of the reasons discussed in sections II(D)-(E), Oregon's marriage exclusion cannot survive heightened or rational basis scrutiny. None of the arguments in support of the marriage exclusion in the voters' pamphlet presents an "exceedingly persuasive" justification, that is, a

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justification substantially related to an important government interest. Further, singling out gay and lesbian individuals for unequal treatment operates as a demeaning, bare exclusion. This violates not just equal protection, but the liberty guarantee of due process as well. *See Windsor*, 133 S. Ct. at 2692 ("[Using] this state-defined class … to impose restrictions and disabilities … is a deprivation of an essential part of the liberty protected by the Fifth Amendment."). Accordingly, Oregon's marriage exclusion is a deprivation of liberty in violation of due process.

CONCLUSION

Just days before this memorandum was filed, a federal district court in Virginia struck down that state's marriage exclusion. The court so eloquently said:

> A spirited and controversial debate is underway regarding who may enjoy the right to marry in the United States of America. America has pursued a journey to make and keep our citizens free. This journey has never been easy, and at times has been painful and poignant. The ultimate exercise of our freedom is choice. Our [Declaration of Independence] declares that "all men" are created equal. Surely this means all of us. While ever-vigilant for the wisdom that can come from the voices of our voting public, our courts have never long tolerated the perpetuation of laws rooted in unlawful prejudice. One of the judiciary's noblest endeavors is to scrutinize laws that emerge from such roots. …
>
> "[T]he history of our Constitution … is the story of the extension of constitutional rights and protections to people once ignored or excluded." *United States v. Virginia*, 518 U.S. 515, 557 (1996). Our nation's uneven but dogged journey toward truer and more meaningful freedoms for our citizens has brought us continually to a deeper understanding of the first three words in our Constitution: we the people. "We the People" have become a broader, more diverse family than once imagined.
>
> Justice has often been forged from fires of indignities and prejudices suffered. Our triumphs that celebrate the freedom of choice are hallowed. We have arrived upon another moment in history when We the People becomes more inclusive, and our freedom more perfect.

Bostic, 2014 WL 561978, at *1, 23.

So too here in Oregon. Paul Rummell, Benjamin West, Lisa Chickadonz, Christine Tanner, and Basic Rights Education Fund respectfully request that this Court enter summary

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judgment declaring Article XV, section 5a, of the Oregon Constitution an unconstitutional deprivation of equal protection and due process, and granting such other relief necessary to ensure equal access to and recognition of marriage for same sex couples in this State.

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