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**IN THE CIRCUIT COURT OF THE STATE OF OREGON**

**FOR THE COUNTY OF MULTNOMAH**

| | |
|---|---|
| DANE HADACHEK, an individual, CECIL MININGER, an individual, SIERRA HADACHEK, an individual, CARTER MOODY, an individual, LANDON MOODY, an individual, JOHN DOE 1, an individual & JOHN DOE 2, an individual<br><br>Plaintiffs,<br><br>v.<br><br>THE STATE OF OREGON<br><br>Defendant. | No. 25CV18224<br><br>**Second Amended Complaint** seeking Declaratory and Injunctive Relief under ORS 28.010, et seq., or ORS 14.175, Recognizing that Oregon's Anti-Female Genital Mutilation Laws, ORS 163.207 and 431A.600, Violate Oregon's: (1) Equal Protection Clause, OR. CONST. art. I, § 20; and (2) Equal Rights Amendment, id. § 46.<br><br>**CLAIMS ARE NOT SUBJECT TO MANDATORY ARBITRATION**<br><br>$281 in fees under ORS 21.135(2)(f)<br><br>**JURY TRIAL REQUESTED** |

1.

Dane Hadachek, Sierra Hadachek, Cecil Mininger, Carter Moody, Landon Moody, and John Does Nos. 1 and 2 ("Plaintiffs") seek a judicial declaration that Oregon's anti-female genital mutilation statutes, ORS 163.207 and 431A.600, deny male children equal protection of the law and unjustifiably treat male and female children disparately in violation of Oregon's Equal Protection Clause, OR. CONST. art. I, § 20, and Equal Rights Amendment, *id.* § 46.

2.

This Complaint alleges that (1) male circumcision and some forms of female child genital cutting are similar enough to require equal legal treatment, (2) Plaintiffs suffered and continue to suffer harm because Oregon's child genital cutting policy treats males disparately from females, and (3) declaring Oregon's anti-female genital mutilation statutes unconstitutional would not make female genital mutilation legal or make medically necessary male circumcision illegal, nor would it unduly burden religious, parental, or other interests.

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## I. INTRODUCTION

3.

Every person, including every child, has a right to bodily integrity and personal autonomy. Every person also has a right to the equal protection of the law regardless of biological sex.

4.

These rights are violated when the law conditions the protection of bodily integrity and personal autonomy on an individual's sex. The law of Oregon does just that.

5.

Female genital mutilation (FGM), also known as female genital cutting (FGC) or female circumcision, is a brutal practice. It is explicitly outlawed in all forms federally and in 41 states, whether performed ritually or in a medical setting.[1] Among those states is Oregon, which has punished child FGC as a felony since 1999 and mandated public outreach on the harmful effects of the practice;[2] and with good reason. FGC, especially when imposed on non-consenting children, is painful, harmful, traumatic, and unethical. It violates the rights of girls to bodily integrity and personal autonomy. Where it is practiced, it is done primarily for cultural or religious reasons or out of a misguided conception of hygiene. Western medical authorities ubiquitously and rightly view FGC as non-medicine.

[1] *See* 18 U.S.C. § 116; EQUALITY NOW, *US Laws Against FGM – State by State (Table)* (Aug. 2023), https://equalitynow.org/us_laws_against_fgm_state_by_state/.

[2] *See* ORS 163.207, 431A.600.

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6.

To illustrate the gruesomeness of the practice, the following is an account of a "moderate" case of FGC imposed on a five-year-old girl, one performed by a doctor, in a hospital, under local anesthesia:

> "They told us we were going somewhere like to a party or somewhere like that, and we ended up at the hospital," says the daughter. "They grabbed me from all sides—my mother, my aunt and my grandmother and two or three nurses—pinned me down on the table, then they gave me an anesthesia . . . ."
>
> "I was really so scared, and I remember the guy, whatever he cut off, which I didn't feel, but I was screaming my head off, and he held it right over top of my mouth, and he said if you don't shut up I'm going to put this in your mouth. I will never forget that for the rest of my life."[3]

7.

The Court may be shocked to learn that practically everything quoted in the above account would be legal in Oregon if the victim were a boy. In fact, it would still be legal even if no anesthesia were used.

[3] Mary Ann French, *Tragedy or Tradition?*, OREGONIAN (Dec. 13, 1992). This story was attached to written testimony given in support of the bill that became ORS 163.207. Relating to Female Genital Mutilation: Hearing on H.B. 3608 Before the Senate Judiciary Comm., 1999 Leg., 70th Sess. (May 19, 1999) (statement of Lynn D. Partin, Women's Rights Coalition) ("I am attaching to the written version of my testimony a copy of an article entitled 'Tragedy or Tradition?' that appeared in The Oregonian on December 13, 1992 on this topic.").

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8.

Save for its prohibition, all that is true of FGC is also true of male genital cutting (MGC), typically and euphemistically called "circumcision." Aside from the United States, virtually no western nation routinely practices genital cutting of children and infants. But within the United States, starting in the late 19th century and picking up after World War II, child MGC came to be viewed as normal and even healthy, largely because it became "medicalized."[4] But MGC, especially when performed on non-consenting children, inflicts harm that is not principledly different from the harm caused by FGC.

9.

MGC does not confer medically cognizable benefits on healthy children. Even if MGC prophylactically reduces the risk of certain rare conditions (as some American health associations claim, over international objections), medical developments have made those risk reductions less relevant by the year. HIV and penile cancer—commonly cited diseases as reasons for MGC—can be prevented with "close to 100% effectiveness" by oral drugs or vaccines.[5]

10.

There is simply no rational medical reason to perform MGC on a healthy child in the United States in 2025. Widely available and more conservative measures provide better risk reductions for the already-rare diseases MGC purportedly prevents. And the reasons American

[4] *See* Mark E. Wojcik et al., *International Human Rights*, 34 INT'L LAW. 761, 768 (2000), https://scholar.smu.edu/cgi/viewcontent.cgi?article=2000&context=til.

[5] CDC, *About HPV Vaccines* (Nov. 16, 2021), https://www.cdc.gov/vaccines/vpd/hpv/hcp/vaccines.html; CDC, *Clinical Guidance for PrEP* (Aug. 20, 2024), https://www.cdc.gov/hivnexus/hcp/prep/index.html.

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parents choose MGC is seldom based on medical evidence anyway, but rather on the belief that MGC is normal, aesthetically pleasing, or hygienic.[6] They also wrongly—perhaps wishfully—believe MGC has no—or an enhancing—effect on sexual function. These views are misguided.

11.

The United States has a blind spot for MGC because it is so ubiquitous. Numerous procedures were once considered legitimate medicine, only for their true nature to be discovered after being performed on a vast number of patients. In spite of these sunk costs, medical authorities rightly relegated such procedures to the domain of pseudoscience. Examples include lobotomies to treat mental illness[7] and ovary removal to treat "hysteria" in women.[8]

12.

Like lobotomies, genital cutting is gaining worldwide recognition for being harmful. But genital cutting persists in the United States because admitting to the harms means telling

[6] Many also incorrectly believe their religions require it. But Christian doctrine squarely rejects circumcision as a requirement. ROBERT DARBY, A SURGICAL TEMPTATION 4 (2005) ("Although Genesis enjoined the rite on the children of Abraham, the early Christians decided that it was not necessary for converts; the Church Fathers condemned it; and in 1442 the Catholic Church determined that circumcision was incompatible with salvation."). And in Islam, the practice is never mentioned in the Qur'an, and many Islamic scholars consider it "not compulsory, but simply advisable," instead justifying it on hygiene grounds. Sami A. Aldeeb Abu-Sahlieh, *Islamic Law and the Issue of Male and Female Circumcision*, 13 THIRD WORLD L. STUDS. 73, 79–80 (1994).

[7] *See* Louis-Marie Terrier et al., *Brain Lobotomy: A Historical and Moral Dilemma with No Alternative?*, 132 WORLD NEUROSURGERY 211, 211 (2019), https://doi.org/10.1016/j.wneu.2019.08.254 ("Lobotomy has been one of the most criticized medical procedures in history, with thousands of patients lobotomized around the world and causing serious consequences to their personalities and intellectual function.").

[8] *See* Michel Thiery, *Battey's Operation: An Exercise in Surgical Frustration*, 81 EURO. J. OBSTETRICS & GYNECOLOGY & REPRODUCTIVE BIOLOGY 243, 243 (1998), https://doi.org/10.1016/S0301-2115(98)00197-3 ("Battey's operation [ovary removal] remained popular for several decades and was finally pushed from the scene as a consequence of improved physiological knowledge . . . .").

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generations of men and boys they were wronged.[9] Surmounting this fear, however, is necessary for societal progress.

13.

Not a single secular medical organization in the world, including in the United States, still recommends routine neonatal MGC. The leading pediatric medical organization in the United States—the American Academy of Pediatrics ("AAP" or "the Academy")—published its latest policy statement on MGC in 2012, in which it found MGC just medically legitimate enough to justify insurance coverage, but that the "health benefits are not great enough to recommend" it routinely for newborns.[10] The Statement automatically expired in 2017, as the Academy chose not to reaffirm it after five years. This marks the first time since 1971 that the Academy opted not to renew its MGC policy before expiration. Because it has still not affirmed the 2012 Statement, the Academy currently expresses no view on MGC, leaving us with international guidance.

14.

Western medical associations ubiquitously disfavor MGC. Indeed, the conversation surrounding MGC in European countries like Denmark, Germany, Norway, and Iceland has been whether to ban MGC entirely, even for religious purposes.[11] And members from 38

[9] It also requires those men and boys to face the reality that they are injured. A more comfortable story is that MGC is beneficial so those men and boys should be happy their genitals were cut.

[10] AM. ACAD. PEDIATRICS, *Circumcision Policy Statement*, 130 PEDIATRICS 585, 585 (2012) [hereinafter *AAP 2012 Policy Statement*], www.pediatrics.org/cgi/doi/10.1542/peds.2012-1989; *see also* AM. ACAD. PEDIATRICS, *Technical Report: Male Circumcision*, 130 PEDIATRICS e756 (2012) [hereinafter *AAP 2012 Technical Report*], www.pediatrics.org/cgi/doi/10.1542/peds.2012-1990.

[11] Michala Clante Bendixen, *Denmark: Renewed Debate on Circumcision of Boys*, EUR. WEBSITE ON INTEGRATION (Sept. 10, 2020), https://migrant-integration.ec.europa.eu/news/denmark-renewed-debate-

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western medical associations—representing seventeen countries including Canada, France, Germany, Ireland, Poland, and the United Kingdom—signed on to a 2013 response to the AAP's 2012 Policy Statement and Technical Report, disputing the Academy's findings and accusing the authors of cultural bias.[12] The AAP's failure to renew its expired 2012 Policy Statement, and its refusal to recommend routine MGC even in that Statement, suggests the Academy doubts its own health claims and advanced them pretextually to shield MGC for cultural reasons.

15.

This lawsuit seeks a judicial declaration that Oregon's anti-FGC statutes, ORS 163.207 and 431A.600, are unconstitutional under the Equal Protection Clause and the Equal Rights Amendment of the Oregon Constitution because they do not protect male children from conduct that is not principledly different from FGC. In terms of remedies, the Court could expand ORS 163.207 to protect all children equally, which is the default remedy for constitutionally underinclusive statutes in Oregon.[13] Or the Court could nullify the statute, a ruling that would uphold Oregon's constitutional guarantees against sex discrimination.

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circumcision-boys_en; Stephen Evans, German Circumcision Ban: Is It a Parent's Right to Choose?, BBC NEWS (July 13, 2012), https://www.bbc.com/news/magazine-18793842; Harriet Sherwood, *Iceland Law to Outlaw Male Circumcision Sparks Row over Religious Freedom*, GUARDIAN (Feb. 17, 2018), https://www.theguardian.com/society/2018/feb/18/iceland-ban-male-circumcision-first-european-country; Rachael Revesz, *Norwegian Ruling Party Votes to Ban Circumcision for Men Under 16 Years Old*, INDEPENDENT (May 8, 2017), https://www.the-independent.com/news/world/europe/norwegian-ruling-progress-party-ban-circumcision-men-under-16-years-old-vote-annual-conference-europe-a7723746.html.

[12] Morten Frisch et al., *Cultural Bias in the AAP's 2012 Technical Report and Policy Statement on Male Circumcision*, 131 PEDIATRICS 796 (2013), https://pubmed.ncbi.nlm.nih.gov/23509170/.

[13] *See infra* Subsection V.D.i.

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Nullifying ORS 163.207 would not legalize FGC because the practice would remain prohibited under federal law and other Oregon law like the provisions on assault and child abuse.[14]

16.

But such a ruling would put male and female children on equal legal footing with respect to non-medically necessary genital cutting, that is, genital cutting performed without a current medical indication or diagnosis, but rather for cosmetic or social reasons. The likely result of the ruling—and the one that Plaintiffs hope for if the Court were to choose the nullification remedy—is that the Oregon Legislative Assembly would amend ORS 163.207 to prohibit non-medically necessary genital cutting of all children, not just female ones.

17.

Importantly, the Court can resolve the present case without wading into complex constitutional questions surrounding religious freedom or parental rights. By declaring ORS 163.207 unconstitutional, the responsibility of weighing and balancing those competing interests would appropriately fall on the Oregon Legislative Assembly. It is conceivable that, were the issue before the Court, balancing the constitutional interest in the free exercise of religion against the constitutional interest in the equal protection of the laws would resolve in favor of religion, necessitating a religious exemption for child genital cutting. But the Court need not make that determination here, as no party is claiming its religious rights are impacted.

[14] MGC is unlikely to be prosecuted under such laws due to cultural norms. This is precisely why an explicit prohibition akin to that in ORS 163.207 is needed. The primary purpose of the bill that became ORS 163.207 and 431A.600 was not to outlaw FGC in the first instance, but rather to publicize that FGC was unacceptable. Relating to Female Genital Mutilation: Hearing on H.B. 3608 Before the H. Judiciary-Crim. Comm., 1999 Leg., 70th Sess. (Apr. 28, 1999) (statement of Lynn D. Partin, Women's Rights Coalition) ("We [Women's Rights Coalition] are less interested in the punishment aspect than we are in sending the message that this is not acceptable in Oregon.").

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Rather, a favorable ruling for the Plaintiffs in this case would merely hold that Oregon's policy of protecting only one sex from child genital cutting violates Oregon's constitutional guarantees of equal protection and against sex discrimination.

18.

On the other hand, a ruling against the Plaintiffs in this case would condone the continued genital cutting of Oregon's children, even in cases in which no religion is involved, contradicting the weight of global medical and bioethical authority.

19.

Finally, judicial action, as opposed to legislative action, is warranted in this case. Male genital cutting is an entrenched cultural norm that has been extant in the Anglosphere since at least the mid-nineteenth century and much longer elsewhere. As with other social norms, courts have been vital in helping to unstick the law.[15] So it is not only appropriate but essential that courts weigh in on this issue, one that is central to human dignity and equality.

20.

In 2008, the Oregon Supreme Court, speaking through Chief Justice Paul J. De Muniz, concluded that "circumcision is an invasive medical procedure that results in permanent physical alteration of a body part and has attendant medical risks."[16] The Court however had no occasion to rule on the acceptability or legality of male circumcision in that case.[17] But the

[15] *See Obergefell v. Hodges*, 576 U.S. 644, 686 (listing state court decisions legalizing same-sex marriage).

[16] *In re Marriage of Boldt*, 344 Or. 1, 12 (2008).

[17] *Id.* at 11–12 ("Although the parties and *amici* have presented extensive material regarding circumcision, we do not need to decide in this case which side has presented a more persuasive case regarding the medical risks or benefits of male circumcision.").

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present case gives this Court an opportunity to do just that. The time to abate needless child genital cutting is now.

## II. JURISDICTION AND VENUE

21.

This Court has jurisdiction over this action under ORS 14.030, which grants this Court jurisdiction over any cause of action arising within the state when the Court has jurisdiction over the parties.

22.

Venue is proper in the Circuit Court for Multnomah County under ORS 14.080(1) because the causes of action occurred in Portland, Oregon, within Multnomah County. Plaintiffs were genitally cut in Portland, establishing this location as the location in which the cause of action arose.

## III. JUSTICIABILITY

23.

This case is justiciable under Oregon's Uniform Declaratory Judgments Act, ORS 28.010, *et seq.*, or, alternatively, ORS 14.175.

### A. This case is justiciable under ORS 28.010, *et seq.*, since Plaintiffs suffer harm to a legally recognized interest that a favorable judgment would practically vindicate.

24.

The Oregon Supreme Court prescribed a three-prong test for justiciability under ORS 28.010, *et seq.*, in which Plaintiffs must establish that their "rights, status, or other legal relations are affected by the relevant instrument[s]," in this case, ORS 163.207 and 431A.600,

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Oregon's anti-FGC statutes.[18] In determining whether Plaintiffs have met this burden, the Court should consider "three related but separate considerations."[19]

25.

These three considerations are whether:

(1) Plaintiffs have suffered "some injury or other impact upon a legally recognized interest beyond an abstract interest in the correct application or the validity of a law";

(2) Plaintiffs' legal injury is "real or probable, not hypothetical or speculative"; and

(3) the Court's decision will have a "practical effect on the rights [Plaintiffs are] seeking to vindicate."[20]

26.

Plaintiffs satisfy all three prongs. Plaintiffs satisfy Prong (1) because they have a legally recognized interest in the equal protection of the law that is affected by ORS 163.207 and 431A.600. In specifying the meaning of a "legally recognized interest," the Oregon Supreme Court said that "legal recognition can come from many sources—statutes, constitutional provisions, . . . and evolving common law."[21] The Oregon Constitution creates a legally recognized interest in the equal protection of the law because it guarantees that no class of

[18] *Morgan v. Sisters Sch. Dist. No. 6*, 353 Or. 189, 194 (2013).

[19] *Id.* at 195.

[20] *Id.* at 195–97.

[21] *MT & M Gaming, Inc. v. City of Portland*, 360 Or. 544, 562 (2016).

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Oregon citizen will receive special privileges or immunities not available to others on equal terms[22] and categorically prohibits the "denial or abridgment of rights on account of sex."[23]

27.

Moreover, the Court has interpreted Prong (1) broadly, requiring only that the "legally recognized interest . . . [be] *affected by* the relevant statute."[24] ORS 163.207 and 431A.600 affect Plaintiffs' legally recognized interests because they are literally denied the law's protection from genital cutting, as that aegis currently only shields females. As this Complaint later alleges, males and females are similarly situated with regard to child genital cutting, so Plaintiffs are thus denied "privileges[] or immunities" that Oregon has granted to females but not males "upon the same terms."[25] Similarly, Plaintiffs' legally recognized interest in "[e]quality of rights under the law" has been "denied or abridged . . . on account of sex."[26] Additionally, ORS 163.207 and 431A.600 levy stigmatic harm on Plaintiffs by treating them as if they are less deserving of protection against genital cutting on account of their sex. This harm is ongoing. Stigmatic harm has been a mainstay of equal protection jurisprudence ever since it was famously recognized in *Brown v. Board of Education*, and it has since been invoked in sex discrimination cases arising under Oregon law.[27]

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[22] OR. CONST. art. I, § 20 (guaranteeing "[e]quality of privileges and immunities of citizens").

[23] *Id.* § 46 ("Equality of rights under the law shall not be denied or abridged by the State of Oregon or by any political subdivision in this state on account of sex.").

[24] *MT & M Gaming*, 360 Or. at 564–65.

[25] OR. CONST. art. I, § 20.

[26] *Id.* § 46.

[27] *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1136 (D. Or. 2014) ("Oregon's marriage laws [denying same-sex marriage rights] weigh on the plaintiffs in ways less tangible, yet no less painful. The laws leave the plaintiffs and their families feeling degraded, humiliated, and stigmatized."); *cf. Bostock v. Clayton County*, 590 U.S. 644,

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28.

Plaintiffs also satisfy Prong (2) because the impact on their legally recognized interest is "real or probable, not hypothetical or speculative." If ORS 163.207 and 431A.600 did not use a facial sex classification in prohibiting child genital cutting, Plaintiffs would probably not have been genitally cut. Plaintiffs only need to show that it is more likely than not ("probable") that they would have been protected from genital cutting absent the facial classification, not that it is certain they would have been. Absent the facial classification, the people who cut Plaintiffs probably would have been aware that their conduct was illegal, and the Oregon Health Authority would have been required to publicize the harmful effects of MGC, dissuading Plaintiffs' parents from assenting to the procedure. As such, the genital cuttings alleged in this Complaint probably would not have occurred. Alternatively, it is *certain* that Plaintiffs, being males, currently fall outside the aegis of protection that ORS 163.207 affords to females. Thus, the facial classification more than speculatively impacts their interest in the equal protection of the law.

29.

Finally, Plaintiffs satisfy Prong (3) because a favorable judgment would have a "practical effect on the rights [Plaintiffs are] seeking to vindicate." A judicial declaration stating that ORS 163.207 and 431A.600 are unconstitutionally narrow would vindicate Plaintiffs' constitutional right to the equal protection of the law and against the denial or abridgment of rights on account of sex. Although Plaintiffs already had much genital tissue

662 (2020) (holding that discrimination based on sexual orientation qualifies as sex discrimination in Title VII context).

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removed, they could still be victims of more extreme genital cutting that ORS 163.207 and 431A.600 protect against for females but not males.[28]

30.

Additionally, were the Court to adopt a saving construction of ORS 163.207 and 431A.600 that expanded the statutes' protections to all non-medically necessary child genital cutting, Plaintiffs could vindicate their rights practically by suing their circumcisers under a statutory torts legal theory that is currently available only to female victims of child genital cutting.

**B. This case is justiciable under ORS 14.175 since Plaintiffs have standing to challenge an ongoing policy that is likely to evade future judicial review.**

31.

In the alternative, this case is justiciable under ORS 14.175 which permits Plaintiffs to challenge the constitutionality of any "act, policy or practice of a public body . . . even though the specific act, policy or practice giving rise to the action no longer has a practical effect on the party."[29] Effectively, ORS 14.175 "leaves it to the court to determine whether it is appropriate to adjudicate an otherwise moot case under the circumstances of each case."[30] Plaintiffs must show:

---

[28] For example, ORS 163.207 prohibits non-medically necessary cutting of a child's clitoris, which is anatomically homologous to the head of the penis, a body part Plaintiffs still have. Were a statute to define a violent crime but limit its protection to one racial group or sex, it would be perverse to say that the statute could be held unconstitutional only if a plaintiff could show he or she is likely to be a victim of the crime in the future. In such circumstances, it should be sufficient to show that such an individual is within an excluded class, in this case, the male sex.

[29] ORS 14.175.

[30] *Couey v. Atkins*, 357 Or. 460, 522 (2015).

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(1) Plaintiffs had standing to commence the action;

(2) The act challenged by Plaintiffs is capable of repetition, or the policy or practice challenged by Plaintiffs continues in effect; and

(3) The challenged policy or practice, or similar acts, are likely to evade judicial review in the future.[31]

32.

Plaintiffs satisfy Prong (1) because they have standing under the same analysis as in Paragraphs 26 and 27. Plaintiffs satisfy Prong (2) because their lack of equal protection under the law and denial and abridgement of their rights based on sex is ongoing. So as ORS 14.175 requires, Oregon's "policy or practice" of protecting female, but not male, children from non-medically necessary genital cutting "continues in effect."

33.

Plaintiffs satisfy Prong (3) because "similar acts," i.e., other instances of MGC, are "likely to evade judicial review in the future." The specific context of child genital cutting makes standing for Plaintiffs—individuals who have already undergone genital cutting—appropriate. That is because situations in which genital cutting has not yet occurred are rare: Such a fact pattern would likely require the child's parents to disagree about whether genital cutting is appropriate, and for one parent to sue the other one in time to prevent the procedure, as only one parent's signature is generally required to provide consent for circumcision under Oregon law. All of that must happen before the child reaches the age of majority and escapes

[31] ORS 14.175; *see also E. Or. Mining Ass'n v. Dep't of Env't Quality*, 360 Or. 10, 16–19 (2016), *aff'd*, 365 Or. 313 (2019) (applying test).

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the scope of ORS 163.207. So, if Plaintiffs' case is not justiciable, then the likelihood that a plaintiff could ever vindicate his constitutional rights in a child genital cutting case is vanishingly small.

34.

Finally, the Oregon Supreme Court has recognized "public importance" as a factor "in guiding courts' discretion to exercise judicial power over otherwise moot cases."[32] The Court has recognized that "the Oregon Constitution does not '*require* dismissal' of a case that is moot if it is a 'public action[]' or one involving 'matters of public interest,'" and that courts may rightly consider "the universe of people and interests potentially affected by the challenged rule or practice" in making its determination.[33]

35.

Here, the public importance and universe of people affected is staggering. A favorable ruling for Plaintiffs in this case could affect the interests of every male child in Oregon by protecting them against non-medically necessary genital cutting. For all the foregoing reasons, the Court should find this case justiciable under Oregon law.

[32] *E. Or. Mining Ass'n v. Dep't of Env't Quality*, 285 Or. App. 821, 832 (citing *Couey*, 357 Or. at 508, 510–11, 519, 521–22). Plaintiffs do not however concede that this case is moot, since Oregon's child genital cutting policy actively discriminates against them on the basis of sex.

[33] *Id.* (quoting *Couey*, 357 Or. at 520).

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## IV. STANDARD OF REVIEW

36.

The duty to ensure that the constitutional rights of every Oregon citizen are "protected and preserved inviolate falls squarely upon the shoulders of the judiciary."[34] Oregon's Constitution was "not adopted to control the rights and procedures of the moment but to establish broad principles of justice and fair play for all time."[35]

37.

Oregon's Equal Rights Amendment—OR. CONST. art. I, § 46—requires that all Oregon citizens have "equality of rights . . . on account of sex." Indeed, long before the 2014 Amendment was ratified, Oregon recognized that its 1859 Equal Protection Clause—*id.* § 20—already prohibited laws and policies that grant one class of citizens privileges or immunities that are not available to similarly-situated classes of citizens.[36]

38.

Oregon's Female Genital Mutilation statute—ORS 163.207—makes it a felony for a person to knowingly circumcise, excise, or otherwise cut any part of the genitals of a female child absent medical necessity. Similarly, ORS 431A.600 directs the Oregon Health Authority to publicize the harmful consequences of genital cutting for female children.

[34] *State* ex rel. *Ricco v. Biggs*, 198 Or. 413, 430 (1953).

[35] *State v. Kuhnhausen*, 201 Or. 478, 516 (1954).

[36] *See Hewitt v. State Accident Ins. Fund Corp.*, 294 Or. 33, 45–46 (1982).

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39.

In contrast, Oregon provides no protection against genital cutting to male children. Facially, ORS 163.207 and 431A.600 discriminate on the basis of sex by granting protection from genital cutting to female children only.

40.

Sex is a "suspect" class.[37] Any law or policy that treats suspect classes differently are "subject to particularly exacting scrutiny."[38] Only if the sex classification is based on "specific biological differences between men and women" may a sex classification stand.[39]

41.

As alleged in Subsections V.A.ii–iii below, the male and female genitalia are biologically homologous structures that serve similar functions, and male and female child genital cutting are highly analogous in motivation, means, and effects. The biological differences that do exist between males and females are too minimal with respect to genital cutting to overcome the "particularly exacting scrutiny" that the law requires to treat males and females disparately.[40]

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[37] *See Tanner v. Or. Health Scis. Univ.*, 157 Or. App. 502, 522 (1998); *see also* Timothy W. Snider, *A Rational Basis for Rational Basis Review Under Article I, Section 20 of the Oregon Constitution?*, 39 WILLAMETTE L. REV. 1215, 1220 (2003) ("True classes of citizens are based on *ad hominem* characteristics such as gender. . . . Within 'true classes,' Oregon courts apply 'strict scrutiny' to laws that distinguish between persons based on 'suspect' characteristics. Examples of classifications Oregon courts deem 'suspect' include statutory distinctions based on . . . gender . . . .").

[38] *Tanner*, 157 Or. App. at 522 (citing *Hewitt*, 294 Or. at 45). The statutes also impinge on other fundamental interests—specifically, the rights of all persons to bodily integrity, autonomy, and privacy—which independently trigger strict scrutiny. *Gunn v. Lane County*, 173 Or. App. 97, 103 (2001), *review denied*, 334 Or. 631.

[39] *See Hewitt*, 294 Or. at 46.

[40] *Tanner*, 157 Or. App. at 522.

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42.

Finally, a principle of equal protection doctrine is that only an actor's actual purpose behind a sex classification may serve to justify it.[41] Unlike "rational basis" review, courts should not uphold a suspect classification merely because some valid purpose for the classification is conceivable. Instead, when evaluating a suspect classification in a statute, courts must generally find that the legislature's actual purpose for using an underinclusive classification is justified, which enhances Oregon's burden here.

## V. FACTUAL ALLEGATIONS

### A. Male and female child genital cutting are similar enough that the law should treat them the same.

43.

There are many forms of female genital cutting (FGC).[42] Some forms are more extensive than others, but all of them are wrong. And all are illegal in Oregon, in forty other states, and federally.[43]

[41] *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 533 (1996) ("The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation.").

[42] *See* Janine Young et al., *Diagnosis, Management, and Treatment of Female Genital Mutilation or Cutting in Girls*, 145 PEDIATRICS 1, 11–12 fig.12 (2020), https://doi.org/10.1542/peds.2020-1012 (chart of seven FGC types).

[43] *See* 18 U.S.C. § 116; EQUALITY NOW, *US Laws Against FGM – State by State (Table)* (Aug. 2023), https://equalitynow.org/us_laws_against_fgm_state_by_state/.

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44.

One form of FGC—Type Ia—is comparable to male circumcision ("male genital cutting" or "MGC").[44] Type Ia FGC, or "female circumcision" as some medical resources call it,[45] is the removal of the clitoral hood,[46] also known as the "clitoral foreskin" or "prepuce."[47] The female prepuce is anatomically homologous to the male prepuce, commonly called the foreskin.[48]

45.

Oregon categorically prohibits all forms of child genital cutting on females under ORS 163.207, yet it permits substantially similar cutting of male children. Thus, Oregon engages in disparate treatment on the basis of sex, a "suspect class."[49] Similarly, by requiring the Oregon Health Authority to educate the public about the harmful aspects of female, but not male, genital cutting under ORS 431A.600, Oregon engages in further disparate treatment of male children by affording them less of a shield against genital cutting than Oregon affords female

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[44] Arguably, male circumcision is worse than Type Ia FGC. *See* AM. ACAD. PEDIATRICS, *Ritual Genital Cutting of Female Minors*, 125 PEDIATRICS 1088, 1089 (2010), https://doi.org/10.1542/peds.2010-0187 ("Some forms of FGC are less extensive than the newborn male circumcision commonly performed in the West.").

[45] *See, e.g.*, Janine Young, *supra* note 42; Loretta M. Kopelman, *Female Circumcision/Genital Mutilation and Ethical Relativism*, 20 SECOND OPINION 55 (1994).

[46] WORLD HEALTH ORG., *Types of Female Genital Mutilation*, https://www.who.int/teams/sexual-and-reproductive-health-and-research-(srh)/areas-of-work/female-genital-mutilation/types-of-female-genital-mutilation ("Type Ia. Removal of the prepuce/clitoral hood only.").

[47] KEVIN T. PATTON & GARY A. THIBODEAU, ANTHONY'S TEXTBOOK OF ANATOMY & PHYSIOLOGY 1064 (21st ed. 2012), https://www.google.com/books/edition/Anthony_s_Textbook_of_Anatomy_Physiology/_n1_DwAAQBAJ?hl=en&gbpv=1&pg=PA1064&printsec=frontcover.

[48] *See id.*

[49] *See Tanner v. Or. Health Scis. Univ.*, 157 Or. App. 502, 521 (1998) (explaining that gender is a "suspect class," and laws that treat the genders differently are "subject to particularly exacting scrutiny" to comply with Oregon's Equal Protection Clause) (citing *Hewitt v. State Accident Ins. Fire Corp.*, 294 Or. 33, 45–46 (1982)).

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children. Oregon has protected females from child genital cutting under ORS 163.207 and 431A.600 since 1999 but has failed to extend equal protection of the law to male children in the quarter-century since.

46.

This disparate treatment can only be upheld in light of "specific biological differences between men and women" which, as established below, do not exist in this context.[50] But even if the Court finds that male and female child genital cutting differ in a material respect, it is likely that the difference is still not significant enough to satisfy the "particularly exacting scrutiny" required to justify a facial sex classification.[51]

**i. The history of male and female child genital cutting explains why the law has treated them differently until today.**

47.

Most children and adults worldwide—whether male or female—never undergo genital cutting of any kind. Generally, MGC is widely practiced only in places where FGC is also performed like the Islamic countries of Africa and western and southeastern Asia. The United States is one of the few nations that routinely practices male, but not female, genital cutting.

[50] *Hewitt*, 294 Or. at 46.

[51] *Tanner*, 157 Or. App. at 522.

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48.

The exact origins of genital cutting are unknown, but the practice is believed to stem from pagan rituals thousands of years ago.[52] The only modern religion whose holy book requires genital cutting at some point in one's life is Judaism; Christianity rebukes genital cutting, and the practice is observed in Islam, not as a religious covenant, but for perceived hygiene benefits.

49.

Male and female genital cutting have become deeply embedded cultural norms in the countries that practice them widely.[53] In the United States, MGC has been medicalized, which has lent it cultural legitimacy. In contrast, opponents of FGC—whose efforts contributed to the passage of ORS 163.207 and other state anti-FGC laws—specifically resisted FGC's medicalization out of fears that such a development would unduly legitimize the practice.[54]

50.

In reality, it is rarely medically necessary to cut off any part of a child's genitals whether male or female. This fact is corroborated by the opinions of the overwhelming

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[52] *See* Douglas Gairdner, *The Fate of the Foreskin: A Study of Circumcision*, 2 BRITISH MED. J. 1433, 1433 (1949), https://doi.org/10.1136/bmj.2.4642.1433; Anonymous, *A Ritual Operation*, 2 BRITISH MED. J. 1458, 1458 (1949), https://pmc.ncbi.nlm.nih.gov/articles/PMC2051965/.

[53] *See generally* Sarah E. Waldeck, *Using Circumcision to Understand Social Norms as Multipliers*, 72 U. CIN. L. REV. 455, 457 (2003), https://ssrn.com/abstract=1024777 ("[T]he practice of male circumcision is a quintessential social norm.").

[54] Indeed, the World Health Organization warns that healthcare providers condone FGC because "there may be a financial incentive to perform the practice" or because "health care providers who perform FGM are themselves members of FGM-practising communities and are subject to the same social norms." WORLD HEALTH ORG., *Female Genital Mutilation* (Jan. 31, 2025), https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation; *see also* Wojcik et al., *supra* note 4, at 768 ("Performance of this procedure [FGC] by health professionals in any setting, including hospitals . . . , has been resisted by a number of NGOs, as well as by the World Health Organization, because it would help to ingrain and legitimize the practice . . . .").

majority of European, Canadian, and Australian medical associations. American physicians and hospitals contravene the longstanding medical standards of these nations by routinely cutting children's genitals without a legitimate medical reason to do so.

51.

The very name "circumcision" is euphemistic. Before it was outlawed, female genital mutilation was sometimes called "female circumcision."[55] Indeed, ORS 163.207 itself refers to female genital mutilation as a "circumcision." But the "circumcision" moniker legitimizes the practice and hides what it truly is: genital mutilation. While some dispute whether male circumcision is properly called a "mutilation," it is inarguably a form of genital cutting that is more extensive than some forms of female genital mutilation.[56]

**ii. The male and female prepuce are substantially similar in anatomy, physiology, and psychosexual importance.**

52.

The anatomy and physiology of the male and female genitalia are highly analogous. Medical textbooks refer to the female clitoral hood as the "clitoral foreskin" or "prepuce" and note that it is anatomically homologous to the male counterpart of the same name.[57] Experts

[55] *See* AM. ACAD. PEDIATRICS, *Female Genital Mutilation*, 102 PEDIATRICS 153, 153 (1998), https://doi.org/10.1542/peds.102.1.153 ("The spectrum of these genital procedures has been termed female circumcision, or more frequently, female genital mutilation . . . .").

[56] *See* AM. ACAD. PEDIATRICS, *supra* note 44 ("Some forms of FGC are less extensive than the newborn male circumcision commonly performed in the West."). This Complaint refers to both practices as "genital cutting" to highlight the abject similarities that necessitate equal treatment under the law.

[57] JANELL L. CARROLL, SEXUALITY NOW: EMBRACING DIVERSITY 88 (3d ed. 2013) (chart showing clitoral hood is homologous to male foreskin); PATTON & THIBODEAU, *supra* note 47, at 1064.

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recognize the vital role of the female prepuce for sexual pleasure.[58] Likewise, medical literature recognizes a comparable role of the male prepuce in sexual pleasure.[59]

53.

The male prepuce is a complex and sophisticated structure. Contrary to the popular belief that the male foreskin is "just an extra flap of skin," it actually has significant sexual and immunological functions. Among other attributes, the male prepuce:

(1) is comprised of 15 square inches of "highly vascularized and densely innervated bilayer tissue," accounting for 51% of total penile shaft skin;[60]

(2) has fine touch receptors that are not present in the head or shaft of the penis;[61]

(3) "'unfolds' and glides" during sex to prevent vaginal chafing without the need for artificial lubricant;[62]

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[58] *See, e.g.*, CARROLL, *supra* note 57, at 118 ("[M]ost women do not enjoy direct stimulation of the [clitoral] glans and prefer stimulation through the prepuce."); Justine M. Schober et al., *Self-Assessment of Genital Anatomy, Sexual Sensitivity and Function in Women: Implications for Genioplasty*, 94 BJU INT'L 589, 589 (2004) ("The skin above the clitoris, and the clitoris itself, appeared to be the most sexually sensitive.").

[59] *See, e.g.*, Guy A. Bronselaer et al., *Male Circumcision Decreases Penile Sensitivity as Measured in a Large Cohort*, 111 BJU INT'L 820 (2013), https://pubmed.ncbi.nlm.nih.gov/23374102/ ("The present study shows that uncircumcised men experience mild to very strong sexual pleasure from the foreskin when stimulated by themselves or partners.").

[60] Valeria Purpura et al., *The Development of a Decellularized Extracellular Matrix-Based Biomaterial Scaffold Derived from Human Foreskin for the Purpose of Foreskin Reconstruction in Circumcised Males*, 9 J. TISSUE ENG'G 1, 2 (2018), https://doi.org/10.1177/2041731418812613.

[61] *See* Morris L. Sorrells et al., *Fine-Touch Pressure Thresholds in the Adult Penis*, 99 BJU INT'L 864, 864 (2007), https://doi.org/10.1111/j.1464-410x.2006.06685.x (finding that the head of the penis "primarily has free nerve endings that can sense deep pressure and pain" whereas the tip of the foreskin "has a high density of fine-touch neuroreceptors, such as Meissner's corpuscles"); *see also id.* (finding the tip of the foreskin "is the most sensitive region of the uncircumcised penis and more sensitive than the most sensitive region of the circumcised penis").

[62] Purpura et al., *supra* note 60.

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(4) prevents the head of the penis from drying and keratinizing like the exterior of one's lips;[63]

(5) defends against pathogens—including those that cause HIV—much like the internal microbiome of the vagina.[64]

54.

The male and female prepuces are similar in many material respects. "The clitoral prepuce and the male foreskin share the same embryonic origin; they are therefore analogous structures."[65] They are also substantially similar in:

(1) **Anatomical structure**: Both the male and female prepuce consist of folds of skin that cover the head of the penis in males and clitoris in females. (The clitoris and penile head, or "glans," are also anatomically homologous body parts.[66]) The male and female prepuces are composed of similar tissue, including skin, mucosa, specialized nerve endings, and blood vessels.

(2) **Protective function**: Both the male and female prepuce shelter sensitive genital structures (the glans or clitoris) and prevent mucous membranes from drying or "keratinizing." This protection maintains the sensitivity of these body parts and

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[63] John Warren, *Physical Effects of Circumcision*, *in* GENITAL AUTONOMY 76 (George C. Denniston et al. eds., 2010).

[64] Purpura et al., *supra* note 60; *see also* John R. Taylor et al., *The Prepuce: Specialized Mucosa of the Penis and Its Loss to Circumcision*, 77 BRITISH J. UROLOGY 291, 292 (1996), https://doi.org/10.1046/j.1464-410x.1996.85023.x ("The inner surface of the prepuce is lined by variably-keratinized squamous epithelium similar to frictional mucosa of the mouth, vagina and oesophagus.").

[65] Christopher J. Cold & John R. Taylor, *The Prepuce*, 83 (Suppl. 1) BJU INT'L 34, 41 (1999), http://artemide.bioeng.washington.edu/InformationIsPower/cold-taylor-prepuce_bju_1999_83_34-44.pdf.

[66] *See* sources cited *supra* note 57.

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prevents irritation and injury. But when a male child is circumcised, the head of his penis abrades against diapers and other clothing and over time develops a rough exterior, reducing sensitivity and causing friction during sex or masturbation.[67]

(3) **Sexual function**: Both the male and female prepuce are themselves erogenous zones and play a mechanical role in providing sexual pleasure. But when the male prepuce is cut off, not only does the male often require external lubrication to prevent friction during sex or masturbation, but the remaining mucous membrane of his penis develops a layer of keratin that blunts sensitivity.[68] To understand the difference between a keratinized and nonkeratinized mucous membrane, compare the difference in sensitivity between the inner and outer lips of the mouth. Female victims of genital cutting also report vaginal dryness as a consequence.

(4) **Need for hygiene**: Medical textbooks advise that "[i]t is important to clean under the [female] prepuce, for secretions can accumulate underneath as a material known as smegma," which, "if left uncleaned, can produce an unpleasant

[67] *See* John Warren, *supra* note 63, at 76 ("Immediately after [circumcision], [the penis] retains its exquisite sensitivity, and contact with clothing causes considerable discomfort, but it soon becomes desensitized, probably as a result of the laying down of a layer of keratin on the epithelium."); Sorrells et al., *supra* note 61, at 864 ("The glans of the circumcised penis is less sensitive to fine touch than the glans of the uncircumcised penis.").

[68] *See* Morten Frisch et al., *Male Circumcision and Sexual Function in Men and Women: A Survey-Based, Cross-Sectional Study in Denmark*, 40 INT'L J. EPIDEMIOLOGY 1367, 1367 (2011), https://doi.org/10.1093/ije/dyr104 ("Circumcision was associated with frequent orgasm difficulties in Danish men and with a range of frequent sexual difficulties in women, notably orgasm difficulties, dyspareunia [painful intercourse] and a sense of incomplete sexual needs fulfilment.").

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odor."[69] The same is true about the male prepuce which also traps "smegma," "a completely normal material created by" dead skin cells.[70]

55.

The male and female prepuce—like all genitalia—also have psychosexual importance. Healthy intact males of decision-making age rarely need or volunteer to be circumcised,[71] which is why proponents of genital cutting—whether on males or females—often insist on cutting people when they are children or infants. Even without accurate information on the risks and harms of genital cutting, Plaintiffs—like the vast majority of people who have the option—would likely not have chosen to have their prepuces cut off. Given that this strong preference against genital cutting is known, it is against the best interests a child—whether male or female—to cut off the prepuce before the child is old enough to express a contrary desire.

**iii. Male and female child genital cutting are substantially similar in motivation, means, and effects.**

56.

Male and female child genital cutting both:

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[69] CARROLL, *supra* note 57, at 118.

[70] Prasad Godbole, *General Paediatric Urology*, 26 SURGERY 223, 224 (2008), https://doi.org/10.1016/j.mpsur.2008.04.011.

[71] *See* Behnam Nabavizadeh et al., *Incidence of Circumcision Among Insured Adults in the United States*, 7 PLOS ONE 1, 3–4 (2022), https://doi.org/10.1371/journal.pone.0275207 ("Overall, circumcision is a relatively uncommon surgery among American adult men with a total average incidence rate of 99.7 per 100,000 person-years."). A 2016 Danish study showed that only 1.66% of intact boys will undergo "foreskin surgery due to medical reasons" before age 18, with only 0.6% undergoing circumcision; "foreskin-preserving operation[s]" were adequate in 71% of cases. *See* Ida Sneppen & Jørgen Thorup, *Foreskin Morbidity in Uncircumcised Males*, 137 PEDIATRICS, no. 5, May 2016, at 1, https://doi.org/10.1542/peds.2015-4340.

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(1) are major—not minor—operations that irreversibly remove functional and erogenous tissue in every case and are "emphatically linked to numerous sexual dysfunctions";[72]

(2) are performed on healthy children without the child's consent, usually requiring him or her to be physically restrained;

(3) are not medically necessary in the overwhelming majority of cases[73] and are usually performed without a medical diagnosis[74] but rather based on the parents' aesthetic, cultural, or religious preferences;[75]

(4) deprive the victim of the ability to decide the look and function of their own genitals despite the fact that most people who are left intact never elect to undergo genital cutting without a medical need to do so;[76]

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[72] *See* Purpura et al., *supra* note 60, at 1 ("The circumcision of males is emphatically linked to numerous sexual dysfunctions."); *see also* Verna L. Rose, *AAP Updates Its Recommendations on Circumcision*, 59 AM. FAM. PHYSICIAN 2918, 2918–19 (1999), https://www.aafp.org/pubs/afp/issues/1999/0515/p2918.html (discussing three circumcision methods resulting in "amputation of the foreskin"); Taylor et al., *supra* note 64; Sorrells et al., *supra* note 61 ("Circumcision ablates the most sensitive parts of the penis.").

[73] *See* AM. ACAD. PEDIATRICS, *Report of the Task Force on Circumcision* (1989), https://publications.aap.org/aapnews/article/5/3/7/20615/Report-of-the-Task-Force-on-Circumcision (reporting 1971 AAP committee found that "there are no valid medical indications for circumcision in the neonatal period").

[74] The 2020 ICD-10-CM Diagnosis Code, Z41.2, is entitled, "Encounter for routine and ritual male circumcision." Z41.2 is grouped within the diagnosis of "795 Normal newborn." Z1.2 reimburses physicians for "circumcision, ritual or routine Z41.2 (in absence of diagnosis)" and "Circumcision Z41.2 (in absence of medical indication) (ritual) (routine)." ICD10Data.com, *2025 ICD-10-CM Diagnosis Code Z41.2*, https://www.icd10data.com/ICD10CM/Codes/Z00-Z99/Z40-Z53/Z41-/Z41.2.

[75] Andrew L. Freedman, *The Circumcision Debate: Beyond Benefits and Risks*, *in* 137 PEDIATRICS (2016), https://doi.org/10.1542/peds.2016-0594. Among the most common reasons American parents elect to have their sons circumcised is so that the son's penis will "look like" the father's penis. *See* Christian G. Guevara et al., *Correction: Neonatal Circumcision: What Are the Factors Affecting Parental Decision?*, 13 CUREUS (2021), https://doi.org/10.7759/cureus.19415. Religion is apparently the least common reason given for MGC. *See id.*

[76] *See* Nabavizadeh et al., *supra* note 71.

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(5) are routinely performed without anesthetic—even in the medical setting—causing acute pain during and after the procedure;[77]

(6) carry risk of severe harm ranging from minor bleeding to death;[78]

(7) can cause psychological harm.[79]

57.

Despite the above evidence that removing "51% of total penile shaft skin"[80] is harmful to sexual function and sensitivity, the AAP's 2012 Technical Report dedicates less than one page—out of twenty-three substantive pages—to discussing effects of MGC on sexual function and sensitivity.[81] And this paltry discussion comes only after lengthy discussion on the merits of MGC for disease prevention, reflecting the Academy's disregard for the Hippocratic principle in the area of male circumcision (*first* do no harm). Moreover, the AAP has been criticized for considering methodologically flawed studies of African populations—which concluded *adult* MGC had low effects on sexuality based on survey responses—while excluding available studies on western industrialized populations that are more comparable to

[77] Anna Taddio et al., *Effect of Neonatal Circumcision on Pain Response During Subsequent Routine Vaccination*, 349 LANCET 599 (1997), https://pubmed.ncbi.nlm.nih.gov/9057731/ ("Despite evidence that circumcision causes intense pain and short-term alterations in infant feeding, sleeping, and crying behaviours, analgesia is rarely given." (footnotes omitted)).

[78] STANFORD MED., *Complications of Circumcision*, https://med.stanford.edu/newborns/professional-education/circumcision/complications.html (last visited Feb. 12, 2025) (listing 18 possible complications from circumcision, including "amputation of the glans" and "death").

[79] Gregory J. Boyle, *Circumcision of Infants and Children: Short-Term Trauma and Long-Term Psychosexual Harm*, 5 ADVANCES SEXUAL MED. 22 (2015), https://www.scirp.org/journal/paperinformation?paperid=55727; *see also AAP 2012 Technical Report*, *supra* note 10, at e770 ("[T]here is good evidence that infants circumcised without analgesia exhibit a stronger behavioral pain response to subsequent routine immunization . . . .").

[80] Purpura et al., *supra* note 60, at 9.

[81] *AAP 2012 Technical Report*, *supra* note 10, at e769–70 (two columns on e769 and seven words on e770).

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the U.S. population,[82] namely a 2011 study from Denmark which found significant differences in sexual function and sensitivity between cut and intact respondents.[83] The short shrift the Academy gave to the issues of sexual function and sensitivity betray its intentions in reporting the supposed "health benefits" of MGC, as explained in the next Subsection.

**iv. The "health benefits" of male genital cutting are disputed, pretextual, and, even if true, insufficient to distinguish male from female genital cutting.**

58.

The AAP and others argue that, while FGC has nothing to do with medicine, MGC has actual or potential "health benefits" and so is legitimate preventive medicine. Hence, their reasoning goes, it is permissible for the law to treat the two practices differently. This argument is untenable.

59.

Child genital cutting has not been, and is not, based in sound medical science, but rather it is perpetuated by a global minority of medical establishments for biased cultural reasons. Since ancient times, both MGC and FGC were performed primarily for reasons having nothing to do with medicine. Indeed, American physicians have performed both MGC and FGC and have advanced dubious medical rationales for both. FGC, including clitoridectomy, was practiced well into the mid-twentieth century by American physicians who claimed it could treat conditions such as hysteria, masturbation, or "excessive" sexuality.[84] Similar

[82] Svoboda & Van Howe, *infra* note 97, at 434–37.

[83] Frisch et al., *supra* note 68.

[84] *See* Sarah B. Rodriguez, FEMALE CIRCUMCISION AND CLITORIDECTOMY IN THE UNITED STATES: A HISTORY OF A MEDICAL TREATMENT 24–25 (2014).

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justifications were advanced for male circumcision into the twentieth century.[85] The difference is that the American medical establishment ultimately rejected FGC as advocacy groups warned that medicalizing FGC would "ingrain and legitimize the practice."[86] FGC quickly (and rightly) became stigmatized, framed as unscientific and unethical.[87]

60.

According to The World Health Organization (WHO), physicians in some countries continue to perform FGC, but that does not make FGC medicine. The WHO warns that these physicians continue to perpetuate FGC because "there may be a financial incentive to perform the practice" or because "health care providers who perform FGM are themselves members of FGM-practising communities and are subject to the same social norms."[88]

61.

Thus, the reason MGC and FGC have been treated differently by the law is not due to any principled biological distinction. FGC simply fell out of favor in the United States as medical norms shifted whereas MGC was medicalized.[89] Other countries' medical establishments have however sidelined MGC as well as FGC. For example, the United Kingdom (like Oregon) made the decision decades ago to not publicly fund routine child

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[85] *See* Frisch et al., *supra* note 68, at 1375–76.

[86] Mark E. Wojcik et al., *International Human Rights*, 34 INT'L LAW. 761, 768 (2000), https://scholar.smu.edu/cgi/viewcontent.cgi?article=2000&context=til.

[87] *Id.* at 768–69.

[88] WORLD HEALTH ORG., *supra* note 54.

[89] Padraig Malone & Henrik Steinbrecher, *Medical Aspects of Male Circumcision*, 335 BRITISH MED. J. 1206, 1206 (2007), https://pmc.ncbi.nlm.nih.gov/articles/PMC2128632/ ("[MGC] originated over 15 000 years ago, being performed for religious, ritualistic, and cultural reasons, and it was not until the 19th century that the procedure was 'medicalised.'"). *See generally* Sarah B. Rodriguez, *supra* note 84.

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circumcision.[90] And no secular national medical association in the world has ever recommended that healthy boys be circumcised.[91] The Royal Dutch Medical Association even "condemn[s] the practice of non-therapeutic circumcision of male minors" as not in the best medical interests of children.[92]

62.

The AAP correctly stated in 1971 that there is no medical indication to circumcise any boy.[93] When it last spoke on MGC in 2012, the Academy reported the "health benefits [of MGC] are not great enough to recommend routine circumcision for all male newborns" and instead invited parents to weigh this paucity of medical justifications against religious and cultural considerations.[94] In other words, the Academy thinks medical reasons alone are insufficient to justify MGC.

63.

The Academy's now-expired policy statement relied on the following claimed "health benefits" of MGC: If 100 boys are circumcised, that will prevent one case of urinary tract

[90] Laura M. Carpenter, *On Remedicalisation: Male Circumcision in the United States and Great Britain*, 32 SOCIO. OF HEALTH & ILLNESS 613, 619 (2010), https://doi.org/10.1111/j.1467-9566.2009.01233.x ("When architects of the National Health Service (NHS) decided how funds should be allocated in 1948, they declined to cover routine circumcision, lacking definitive evidence of its medical efficacy."). Oregon ended Medicaid funding for routine circumcision in 1994. Lee Warner et al., *Impact of Health Insurance Type on Trends in Newborn Circumcision, United States, 2000 to 2010*, 105 AM. J. PUB. HEALTH 1943, 1944 fig.1 (2015).

[91] Frisch et al., *supra* note 68, at 1368 ("[N]o professional medical organization recommends routine circumcision, not even in the USA where most newborn boys undergo the operation"); *AAP 2012 Policy Statement*, *supra* note 10, at 585 ("[The] health benefits [of circumcision] are not great enough to recommend routine circumcision for all male newborns . . . .").

[92] Gert Van Dijk, *Non-Therapeutic Circumcision: The Ethical Position of the Royal Dutch Medical Association*, 14 J. SEXUAL MED. e225, e225 (2017), https://doi.org/10.1016/j.jsxm.2017.04.181.

[93] AM. ACAD. PEDIATRICS, *supra* note 73.

[94] *AAP 2012 Policy Statement*, *supra* note 10, at 585.

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infection (UTI) per year.[95] Between 909 and "322,000 newborn circumcisions are required to prevent 1 penile cancer event per year."[96] Studies from Kenya, Uganda, and South Africa (which have been criticized for their methodology and applicability to U.S. populations)[97] found a 1.3% absolute lifetime risk reduction of acquiring HIV from *heterosexual* sex, a decrease from a ~2.1% lifetime risk of acquiring HIV for intact men to a ~0.85% chance for circumcised men.[98] But the Academy only reported this figure in terms of relative risk reduction—a much more impressive sounding 40–60% decrease.[99] And for *homosexual* HIV transmission—the primary vector in the United States—the Academy found that MGC "has not been associated with decreased acquisition of HIV."[100]

64.

The Academy also reported no evidence of "any relationship between circumcision and chlamydia infection" or "between circumcision and gonorrheal infection" and that the "protective effect of circumcision against [genital herpes]" had "borderline statistical significance" or "no effect."[101]

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[95] *AAP 2012 Technical Report*, *supra* note 10, at e767.

[96] *Id.* at e768. The Academy attributed the reduced penile cancer risk to the reduced risk of contracting human papillomavirus (HPV) among circumcised males. In recent years, HPV vaccines have become a widely available and more conservative means to reduce the risk of HPV and thus penile cancer. *See* CDC, *About HPV Vaccines*, *supra* note 5.

[97] *See, e.g.*, Frisch et al., *supra* note 12, at 798; J. Steven Svoboda & Robert S. Van Howe, *Out of Step: Fatal Flaws in the Latest AAP Policy Report on Neonatal Circumcision*, 39 J. MED. ETHICS 434, 437 (2013), https://doi.org/10.1136/medethics-2013-101346.

[98] *Id.*

[99] *Id.*

[100] *AAP 2012 Technical Report*, *supra* note 10, at e765.

[101] *Id.* at e766

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65.

Despite the Academy itself admitting the "health benefits are not great enough to recommend routine circumcision,"[102] it is debated whether its findings that nominally support MGC are even accurate. For example, HIV is much more prevalent in the United States and Africa—where MGC is common—than in Europe, where most males are genitally intact.[103] Additionally, a large Canadian study in 2022 suggested that MGC does not reduce HIV in North American populations.[104] And as discussed, various groups have published claim-by-claim refutations of the 2012 Report.[105]

66.

But even assuming the veracity of the claim that MGC marginally reduces the risk of some diseases, the implication is profound that *most minors do not benefit from MGC at all*. Because principles of medical ethics bar health care professionals from undertaking procedures without balancing harms, risks, and benefits,[106] circumcision on healthy children is arguably not medicine at all. The harms, risks, and benefits are profoundly unbalanced in the case of MGC on healthy children: Plainly, protection from sexually-transmitted infections is largely irrelevant as infants are not sexually active.[107] And according the Academy's own findings,

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[102] *AAP 2012 Policy Statement*, *supra* note 10, at 585.

[103] *See* Frisch et al., *supra* note 12, at 798.

[104] Madhur Nayan et al., *Circumcision and Risk of HIV Among Males from Ontario, Canada*, 207 J. UROLOGY 424, 424 (2022), https://doi.org/10.1097/ju.0000000000002234 ("We found that circumcision was not independently associated with the risk of acquiring HIV among males from Ontario, Canada.").

[105] *See, e.g.*, Frisch et al., *supra* note 12; Svoboda & Van Howe, *supra* note 97.

[106] *See infra* note 137 and accompanying text.

[107] Circumcision may itself expose infants to diseases like herpes. NYC Health, *Metzitzah B'peh (Direct Oral Suctioning)*, https://www.nyc.gov/site/doh/health/health-topics/safe-bris.page (warning one ritual circumcision

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only one infant will be spared a case of UTI for every 99 infants who gain nothing. Meanwhile, as established above, MGC harms sexuality in every case and carries a non-zero risk of serious complications.

67.

And even the potential health benefits of MGC are irrelevant because there are safer, more efficient, and less expensive ways to treat UTIs (with antibiotics),[108] to avoid penile cancer (with HPV vaccines),[109] and to prevent HIV (through condom use and oral antiretroviral medication colloquially known as "PrEP").[110]

68.

The weakness of the medical case for MGC indicates bias has played a role in the Academy's findings. Indeed, the Academy's 2012 Policy Statement triggered members of 38 international health associations—from Canada, Denmark, Germany, the United Kingdom, and other western nations—to issue a 2013 response finding the Statement "to be strongly culturally biased."[111]

69.

Like the WHO warns, members of the Academy's Task Force on Circumcision—which created the 2012 Policy Statement—came from "[MGC]-practising communities" and were

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practice "can put babies at risk of getting a harmful virus called herpes" that can cause "brain damage, . . . lifelong disability or, in some cases, d[eath]").

[108] Frisch et al., *supra* note 12, at 796 (finding "urinary tract infections in infant boys" can "easily be treated with antibiotics . . .").

[109] CDC, *About HPV Vaccines*, *supra* note 5.

[110] CDC, *Clinical Guidance for PrEP*, *supra* note 5 ("[T]he risk of HIV when oral PrEP is taken as prescribed is extremely low.").

[111] Frisch et al., *supra* note 12.

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likely "subject to the same social norms" thereof.[112] For example, the pediatric urologist on the eight-doctor Task Force told a newspaper in 2012 that he cut his infant son's genitals "on [his] parent's kitchen table . . . for religious, not medical reasons," and that "[he] didn't make any excuses that [the circumcision] was to avoid a UTI, or for medical reasons."[113] The Task Force likely had a bias in favor of MGC that made it reluctant to report that MGC warranted the same treatment as FGC. Instead, it claimed potential health benefits (i.e., reduced risks) minimally sufficient to keep the procedure medically permissible and funded by Medicaid (though Oregon ended Medicaid funding for routine circumcision in 1994).[114]

70.

Research on the potential medical benefits of child genital cutting must be treated with skepticism in light of the cultural bias of the Academy Task Force and indeed the likely cultural bias of American physicians writ large given that they "are themselves members of [genital cutting] communities and are subject to the same social norms."[115]

71.

Worryingly, the Academy's findings—if sufficient to justify MGC—would also suggest FGC is permissible, especially if a family's "religious, ethical, and cultural beliefs and

[112] WORLD HEALTH ORG., *supra* note 54.

[113] Ted Merwin, *Fleshing Out Change on Circumcision*, N.Y. JEWISH WEEK (Sept. 19, 2012), [https://web.archive.org/web/20120921024616/http://www.thejewishweek.com/features/new-york-minute/fleshing-out-change-circumcision]; Marnell Jameson, *Delicate Decision*, LA TIMES (Mar. 31, 2008), [https://web.archive.org/web/20220625020228/https://www.latimes.com/archives/la-xpm-2008-mar-31-he-circumcision31-story.html].

[114] Lee Warner et al., *supra* note 90, at 1944 fig.1.

[115] WORLD HEALTH ORG., *supra* note 54.

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practices" are allowed to put a thumb on the scale.[116] Although there is little literature looking for FGC's health benefits because it is rightly condemned as a non-medical practice, the Academy relies on inductive, "biologically plausible explanations" for why MGC is justified. For example, the Academy says the foreskin can facilitate HIV and UTI infection by trapping "pathogens and bodily secretions."[117]

72.

But the female prepuce and labia are also mucosal surfaces—close to the urethra—that trap bodily secretions like smegma.[118] So it would also be "biologically plausible" to suggest paring down the female genitalia would offer some protection against UTIs and venereal disease. (Per the Academy, if doing so reduced the lifetime risk of HIV acquisition in females by even 1.3%, FGC could be justifiable.) Indeed, the proffered justification for FGC in some schools of Islamic jurisprudence is in part that it "maintains cleanliness" and "prevents disease."[119] Yet it would be folly to suggest researchers should search for "benefits of [female] circumcision [that] are sufficient to justify access to this procedure for families choosing it."[120]

73.

Consistent with the belief that FGC promotes hygiene and repels disease, some Islamic jurists would "leave[] the choice to parents according to their beliefs."[121] While the notion that

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[116] *AAP 2012 Policy Statement*, *supra* note 10, at 585–86.

[117] *AAP 2012 Technical Report*, *supra* note 10, at e764, e767 (finding UTI-causing "bacteria adhered to, and readily colonized, the mucosal surface of the foreskin").

[118] *See* Bronselaer et al., *supra* note 59.

[119] Aldeeb Abu-Sahlieh, *supra* note 6, at 88.

[120] *AAP 2012 Policy Statement*, *supra* note 10, at 585.

[121] Aldeeb Abu-Sahlieh, *supra* note 6, at 83.

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parents should be able to choose whether to cut their daughter's genitals sounds outrageous to western ears, the notion that parents may make the same choice for their sons was AAP policy until 2017: "Parents ultimately should decide whether circumcision is in the best interests of their male child . . . weigh[ing] medical information in the context of their own . . . beliefs and practices."[122]

74.

Because the supposed "health benefits" of child MGC are disputed, speculative, pretextual, and—even if true—negligible, they cannot serve as "specific biological differences between men and women" that justify disparate treatment of males and females under the law.[123]

**v. Ethical principles prohibiting genital cutting of female children apply equally to genital cutting of male children.**

75.

There is an emerging consensus in bioethics that non-medically necessary child genital cutting is indefensible regardless of the sex of the child because it provides few, if any, medical benefits yet severely intrudes on bodily integrity and personal autonomy.[124]

[122] *AAP 2012 Policy Statement*, *supra* note 10, at 585–86.

[123] *Hewitt v. State Accident Ins. Fire Corp.*, 294 Or. 33, 46 (1982).

[124] Brian D. Earp et al., *Medically Unnecessary Genital Cutting and the Rights of the Child: Moving Toward Consensus*, 19 AM. J. BIOETHICS 17 (2019), http://dx.doi.org/10.1080/15265161.2019.1643945.

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76.

Physicians are only licensed to practice medicine, "the science or practice of the diagnosis, treatment, and prevention of disease."[125] They must provide competent medical care,[126] base their recommendations on each patient's actual medical needs,[127] and employ their independent medical judgment in all cases.[128] The physician's responsibility to the patient is paramount.[129] They may only operate on children after making a diagnosis and recommendation, and even then only when the operation is medically necessary[130] and when there are no more conservative alternative treatments available.

77.

Child genital cutting is unlike childhood vaccination, with which it has been compared. Parents and physicians can ethically subject a child to a *risk* of adverse effects so long as such risks are sufficiently low and appropriately balanced by medical benefits.[131] So child genital cutting and vaccination are similar in that both expose the child to the *risk* that harmful

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[125] *Medicine*, OXFORD ENG. DICTIONARY, https://www.oed.com/search/dictionary/?scope=Entries&q=medicine&tl=true.

[126] AM. MED. ASS'N, *AMA Principles of Medical Ethics*, Principle I (2001), https://code-medical-ethics.ama-assn.org/principles.

[127] AM. MED. ASS'N, *Code of Medical Ethics* § 11.2.2 (2017), https://policysearch.ama-assn.org/policyfinder/detail/11.2.2?uri=%2FAMADoc%2FEthics.xml-E-11.2.2.xml.

[128] Thomas L. Hafemeister & Richard M. Gulbrandsen, Jr., *The Fiduciary Obligation of Physicians to "Just Say No" if an "Informed" Patient Demands Services That Are Not Medically Indicated*, 39 SETON HALL L. REV. 379 (2009), https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1010&context=shlr.

[129] AM. MED. ASS'N, *AMA Principles of Medical Ethics*, Principle VIII (2001), https://code-medical-ethics.ama-assn.org/principles.

[130] AM. MED. ASS'N, *Code of Medical Ethics* § 2.1.1 (2017), https://policysearch.ama-assn.org/policyfinder/detail/2.1.1%20Informed%20Consent?uri=%2FAMADoc%2FEthics.xml-E-2.1.1.xml.

[131] TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 202 (2013) (discussing biomedical ethical principle of beneficence).

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complications will arise. But child genital cutting and vaccination are different in a significant way because, unlike vaccination, where the risk of significant harm is only *realized* in the minority of cases, child genital cutting *is guaranteed to cause significant harm in every case*. The harms outlined in Paragraph 53 are certain or likely to occur—and the functions described in Paragraph 54 are certain to be lost—in *every instance* of child genital cutting. Additionally, vaccination adds something to the body while genital cutting takes something away, and permitting vaccination is necessary for public policy as it protects against diseases spread widely through airborne and droplet transmission. The comparison to childhood vaccination is inapposite.[132]

78.

Genital cutting violates the American Medical Association's Code of Medical Ethics rules against unnecessary surgery. "Physicians are expected to refrain from offering or acceding to patients' [or parents'] requests for interventions or diagnostic tests that are medically unnecessary . . . or that cannot reasonably be expected to benefit the patient."[133] The rule for physicians is: "Do not operate on a healthy child."[134]

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[132] An apter comparison would be the routine, prophylactic removal of the appendix, which is seldom done on anyone, let alone unwilling children. Like the prepuce, the appendix is popularly viewed as a vestigial structure of limited function. (In truth, the appendix, like the prepuce, has immunological benefits that science has recently begun to recognize.) Removal of the appendix—before it ever becomes inflamed—would nullify the future risk of disease from the organ. Yet prophylactic appendicectomies are rarely performed. The difference is that removal of the appendix is not a culturally ingrained norm. Similarly, prophylactic mastectomies to prevent breast cancer are only performed after careful consideration in light of a strong family history of cancer.

[133] AM. MED. ASS'N, *Report of the Council on Ethical and Judicial Affairs 1-A-12*, at 3 (2012), https://code-medical-ethics.ama-assn.org/sites/amacoedb/files/2022-09/11.1.2%20Physician%20stewardship%20of%20health%20care%20resources%20--%20background%20reports.pdf.

[134] *See, e.g.*, ROYAL DUTCH MED. ASS'N, *Non-Therapeutic Circumcision of Male Minors* (May 27, 2010), https://www.knmg.nl/download/non-therapeutic-circumcision-of-male-minors-knmg-viewpoint.

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79.

Notably, physicians have a fiduciary duty to "just say no" to procedures that are not medically indicated,[135] like genital cutting. Saying "yes" crosses a line that fiduciaries are not allowed to cross, "*regardless of the explanation given for that behavior*."[136]

80.

Genital cutting violates fundamental principles of biomedical ethics: the cardinal rules of *autonomy* (respecting an individual's ability to make decisions for his or her own body); *non-maleficence* (avoiding the causation of harm, for which the Hippocratic Oath is a common shorthand); *beneficence* (preventing harm and balancing risk); *proportionality* (using the most conservative means to treat or prevent disease); and *justice* (fairly distributing benefits, risks, and costs).[137]

81.

Child genital cutting violates the rule of *autonomy* since it involves deciding permanently on the form and function of another individual's genitals; *non-maleficence* because it removes functional tissue in every case; *beneficence* because even the purported absolute risk reductions for certain conditions as a result of the procedure are slight;

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[135] *See* Hafemeister & Gulbrandsen, *supra* note 128.

[136] *Id.* (emphasis added) ("Fiduciary doctrine establishes that there are some actions by a physician (as with any fiduciary) . . . that excuses (that is, legal defenses) for failing to act in the expected manner should not be available. Thus, when a patient has demanded medically contraindicated care . . . such defenses should not be available . . . . *There are simply some things that a fiduciary cannot do.* When the fiduciary crosses that line, regardless of the explanation given for that behavior or whether harm directly resulted from it (the *sine qua non* of a negligence cause of action), consequences should flow, and a cause of action for breach of fiduciary duty should be available." (emphasis added)).

[137] BEAUCHAMP & CHILDRESS, *supra* note 131, at 13.

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*proportionality* because methods like vaccination, medication,[138] or even lesser surgeries[139] can more conservatively achieve better effects; and *justice* because others are enriched at the child's expense.[140]

**vi. Treating male and female child genital cutting equally is consistent with legal scholarship and global medical practice.**

82.

The view that male and female child genital cutting must be jointly prohibited is consistent with legal scholarship. As a law review article argued, published the same year that ORS 163.207 was enacted, "[s]tate FGM laws violate the constitutional guarantee that similarly-situated males and females be treated equally before the law. . . . [States] must extend the same legal protections to boys."[141]

83.

The view that male and female child genital cutting are both medically dubious practices coheres with the general consensus among western doctors.[142] Australian, Canadian, and European medical authorities are ubiquitously skeptical of the medical justifications for

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[138] *See* sources cited *supra* note 5.

[139] Daniar Osmonov, *Preputioplasty as a Surgical Alternative in Treatment of Phimosis*, 34 INT'L J. IMPOTENCE RSCH. 353, 353 ("Preputioplasty denotes various surgical techniques directed at resolving phimosis without the need for radical or partial circumcision.").

[140] J. Steven Svoboda, *Nontherapeutic Circumcision of Minors as an Ethically Problematic Form of Iatrogenic Injury*, 19 AMA J. ETHICS 815, 818–19 (2017) (applying principles of biomedical ethics to MGC of children).

[141] Shea Lita Bond, *Female Circumcision and the Equal Protection Clause*, 32 JOHN MARSHALL L. REV. 353, 380 (1999).

[142] *See, e.g.*, BRITISH MED. ASS'N, *The Laws and Ethics of Male Circumcision: Guidance for Doctors*, 30 J. MED. ETHICS 259, 261 (2006) ("The medical benefits previously claimed, however, have not been convincingly proved, and it is now widely accepted, including by the BMA, that this surgical procedure has medical and psychological risks.").

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genital cutting,[143] and no national medical association—not even in the United States—has ever recommended it as routine practice.[144] American doctors historically echoed the international view on MGC,[145] but they have since changed course to tolerate it for religious and cultural—not medical—reasons.[146] This is wholly inconsistent with the treatment of FGC which is banned regardless of religious or cultural preferences.[147]

84.

Even if MGC had no long-term harms, that would not be grounds to continue the practice. "[A]ny unnecessary surgery is inherently injurious in that the patient needlessly has gone under the knife and has been subjected to pain and suffering."[148]

85.

The defense that FGC is more dangerous or invasive than MGC fails because (a) even a ritual pinprick of a girl's genitals is considered unlawful,[149] (b) non-medically necessary FGC

[143] *See, e.g.*, ROYAL DUTCH MED. ASS'N, *supra* note 134; *see also* Circumcision.org, *Circumcision Policies of International Organizations*, https://circumcision.org/circumcision-policies-of-international-organizations/ (listing policy statements critical of circumcision from Australian, Belgian, British, Canadian, Dutch, German, Swedish, and pan-European medical associations).

[144] *See AAP 2012 Policy Statement*, *supra* note 10, at 585 (finding "health benefits are not great enough to recommend routine circumcision").

[145] *See* note 73 *supra* and accompanying text.

[146] *See AAP 2012 Policy Statement*, *supra* note 10, at 585–86 ("[Families] will need to weigh medical information in the context of their own religious, ethical, and cultural beliefs and practices. *The medical benefits alone may not outweigh these other considerations for individual families.*").

[147] *See, e.g.*, ORS 163.207(3)(b) ("In determining medical necessity . . . a person may not consider the effect on the child of the child's belief that the surgery is required as a matter of custom or ritual.").

[148] *Tortorella v. Castro*, 43 Cal. Rptr. 3d 853, 862 (2006).

[149] *See* AM. ACAD. PEDIATRICS, *supra* note 44, at 1092 (suggesting change to state laws to permit "ritual nick as a possible compromise" in FGC context).

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is illegal even if performed in a sterile hospital setting, and (c) some forms of FGC are *less* invasive than male circumcision.[150]

**vii. Oregon prohibits cosmetic body piercing of minors' foreskins but permits the foreskin to be cut off completely.**

86.

The Oregon Health Authority has promulgated administrative rules prohibiting "specialty level one genital piercing" to be performed on minors, which explicitly includes piercing of the "frenum [and] foreskin" for males and the "clitoral hood" on females.[151]

87.

Piercings are prohibited "on the genital . . . of a person younger than 18 *regardless of parental consent*."[152]

88.

Under Oregon's current regime, female children enjoy double protection against cosmetic genital alterations while male children only get nominal protection under these administrative rules. This means that, while parents may not choose to puncture a needle-thin hole in their child's foreskin, they may choose to have a doctor insert "a blunt-edged probe" to "dissect the foreskin away from the glans," place a "device . . . designed to crush the foreskin" with "8000 to 20,000 lb of hemostatic force," and finally use "the belly of [a] scalpel" to "cut

[150] AM. ACAD. PEDIATRICS, *Ritual Genital Cutting of Female Minors*, 125 PEDIATRICS 1088, 1089 (2010), https://doi.org/10.1542/peds.2010-0187 ("Some forms of FGC are less extensive than the newborn male circumcision commonly performed in the West.").

[151] OAR 331-905-0000, 331-905-0090.

[152] OAR 331-905-0090 (emphasis added).

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the foreskin off" entirely.[153] That Oregon's genital cutting policies lead to such surprising results reveals that something is wrong.

**B. Oregon's policy of protecting female, but not male, children from non-medically necessary genital cutting violates the Oregon Constitution.**

89.

Oregon subjects male children to disparate treatment on the basis of their sex in violation of OR. CONST. art. I, § 20 (the "Equal Protection Clause") and *id.* § 46 (the "Equal Rights Amendment").

**i. ORS 163.207 violates OR. CONST. art. I, § 20, because it grants "privileges[] or immunities" to females that it denies to similarly-situated males.**

90.

ORS 163.207 violates OR. CONST. art. I, § 20, because it grants "privileges or immunities" to female children that it denies from similarly-situated male children without strong enough "specific biological differences" to justify the disparate treatment.

91.

The Oregon Supreme Court has long recognized that OR. CONST. art I, § 20, "prevents the enlargement of rights" and "the granting of special privileges for a select few."[154] Moreover, the Court has long held that only a showing of "specific biological differences

[153] Nathan Hitzeman, *Newborn Circumcision: The Gomco Method*, CONTEMPORARY PEDIATRICS (July 1, 2010), https://www.contemporarypediatrics.com/view/newborn-circumcision-gomco-method (describing "the [circumcision] method most commonly used in the US").

[154] *Hewitt v. State Accident Ins. Fund Corp.*, 294 Or. 33, 42 (1982).

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between men and women" may save a facial sex or gender classification, and that sexist stereotypes are insufficient grounds to uphold a classification.[155]

92.

In *Hewitt v. State Accident Insurance Fund Corp.*, the Oregon Supreme Court held that a workers' compensation statute that allowed common law widows, but not widowers, to recover death benefits violated OR. CONST. art I, § 20.[156] The Court explained that "the law in question . . . grants an economic privilege to certain women . . . while withholding such benefits" from similarly-situated men. "The privilege created by [the statute] is bestowed or withheld solely on the basis of gender."[157]

93.

The *Hewitt* statute made no explicit mention of excluding male survivors of female workers from death benefits.[158] Nevertheless, its ultimate effect of conditioning a privilege on an immutable characteristic was enough to make the statute unconstitutional.

94.

ORS 163.207 is like the workers' compensation statute at issue in *Hewitt* because it extends a privilege to females that is not extended to similarly-situated males: in the present

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[155] *Id.* at 46; *accord Kramer v. City of Lake Oswego*, 365 Or. 422, 455–56 (2019).

[156] *Hewitt*, 294 Or. at 49–50.

[157] *Id.* at 42–43.

[158] The workers' compensation statute provided, in relevant part:

> In case an unmarried man and an unmarried woman have cohabited in this state as husband and wife for over one year prior to the date of an accidental injury received by such man, and children are living as a result of that relation, the woman and the children are entitled to compensation . . . the same as if the man and woman had been legally married.

*Id.* at 35.

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case, the privilege of bodily integrity.[159] ORS 163.207 also extends a legal privilege on the basis of sex. It permits females, but not males, to recover damages for certain forms of genital cutting under a statutory torts legal theory. For example, if a female child were subjected to Type Ia FGC in a medical setting with parental consent but without medical necessity, she would enjoy a presumption of negligence under a statutory torts theory in a suit against her parents and the person who cut her.[160] No such presumption is available to males under Oregon law.

95.

Like in *Hewitt*, ORS 163.207 extends these privileges to females without any explicit textual denial of any privileges to males.

96.

This sex-selective privilege is legally problematic for two reasons: (1) it is based on the sexist stereotype that female children are especially vulnerable compared to male children, and (2) there are not sufficient "specific biological differences" between the male and female prepuce to uphold a ban of Type Ia FGC while not also banning male circumcision.

[159] *See State v. Portulano*, 320 Or. App. 335, 345 (2022) (finding a mere blood draw to be a severe invasion of bodily integrity in state constitution context). Plaintiffs assert individuals have a right—not a mere privilege—to an intact body. But in light of the ubiquity of genital cutting of non-consenting minors, Oregon has treated bodily integrity as an alienable privilege, but only if the victim is male.

[160] *See* ORS 163.207 (placing criminal liability on any "person" who "[k]nowingly circumcises . . . a child" without medical necessity and any legal guardian who allows it to happen); Erin Olson et al., *Civil Justice for Victims of Crime in Oregon*, 10 (2013), https://cdnsm5-hosted.civiclive.com/UserFiles/Servers/Server_3585797/File/Government/HHS/oregoncivilljusticebrochure.pdf (highlighting "Statutory Torts" civil claim as remedy for crime victims in Oregon).

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97.

ORS 163.207's legislative history includes rhetoric that "little girls" are especially vulnerable victims of genital cutting as compared with similarly-situated male children.[161] While female neonates and minors are undoubtedly a vulnerable group, they are no more vulnerable or in need of protection against genital cutting than their male counterparts. As in *Hewitt*, sexist stereotypes cannot bless a sex classification, even if the stereotype is used to extend a privilege to the supposedly vulnerable class.[162]

98.

The only way to justify a sex classification is to point out sufficient "specific biological differences" between males and females[163] which Oregon cannot do here with regard to male circumcision and Type Ia FGC.

99.

As alleged above, the male and female genitalia are identical in early gestation and evolve into homologous parts. The male and female prepuces are similar in appearance, structure, and function. Removal of the prepuce (male circumcision or Type Ia FGC) has comparable physical, psychological, and ethical consequences whether done to a male or female. The purported health benefits of MGC are too slight to justify such disparate legal

[161] Relating to Female Genital Mutilation: Hearing on H.B. 3608 Before the Senate Judiciary Comm., 1999 Leg., 70th Sess. (May 19, 1999) (statement of Lynn D. Partin, Women's Rights Coalition) ("When I imagine that this year two million more little girls will go through what I went through, it breaks my heart." (quoting WARIS DIRIE, DESERT FLOWER: THE EXTRAORDINARY JOURNEY OF A DESERT NOMAD 358 (1998)).

[162] *See Hewitt*, 294 Or. at 47 (finding fact that widows are stereotypically more dependent on their partners than widowers to be invalid grounds for a gender classification).

[163] *Id.* at 46 ("[W]hen classifications are made on the basis of gender, they are, like racial, alienage and nationality classifications, inherently suspect. The suspicion may be overcome if the reason for the classification reflects specific biological differences between men and women.").

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treatment compared with FGC, especially in light of recent medical developments that have made MGC a redundant and intrusive prophylactic in comparison.[164] Regardless, according to 38 physicians and ethicists representing a panoply of western health authorities, the purported benefits of MGC are likely the pretextual products of wishful cultural bias.[165] Thus, there is no reasonable argument that male and female children are anything but on "the same terms" with respect to the removal of the prepuce.[166]

100.

Even if there were relevant biological differences between males and females, upholding ORS 163.207 would still be improper. In *Hewitt*, the Court disapproved of a 1956 opinion which upheld the constitutionality of a statute prohibiting females from participating in wrestling exhibitions or competitions.[167] Although there are clear biological differences between males and females in average size and strength, a law prohibiting females from publicly wrestling would never pass constitutional muster today. Courts are not obligated to rubber stamp a facial sex classification even when a significant biological difference exists[168]; rather they must subject the classification to "particularly exacting scrutiny" to determine whether it is justifiable.[169]

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[164] For example, vaccination has "close to 100%" effectiveness against HPV, the accepted cause of penile cancer, and oral medications have made the risk of contracting HIV "extremely low." *See* sources cited *supra* note 5.

[165] *See* Frisch et al., *supra* note 12.

[166] OR. CONST. art. I, § 20.

[167] *Hewitt*, 294 Or. at 37–38.

[168] *Id.* at 46 ("The suspicion *may* be overcome if the reason for the classification reflects specific biological differences . . . ." (emphasis added)).

[169] *Tanner v. Or. Health Scis. Univ.*, 157 Or. App. 502, 522–23 (1998).

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101.

Additionally, it should be noted that, even if MGC were completely harmless compared to FGC (which it abjectly is not, as established in Subsection V.A.iii), a law prohibiting FGC but not MGC would still fail constitutional scrutiny. To analogize to ear piercing, which may arguably be characterized as *de minimis* harm, a law prohibiting parents from piercing their daughters' ears but allowing them to pierce their sons' ears would plainly violate equal protection principles. Similarly, the argument that MGC is a *de minimis* harm is insufficient. Instead, the only way Oregon can justify a ban on FGC but not MGC is by making an affirmative case for health benefits of MGC. As established in Subsection V.A.iv above, this is something Oregon simply cannot do.

102.

In light of the medical and bioethical evidence, there is no reasonable justification to protect only female children from prepuce removal on the grounds of "specific biological differences,"[170] so ORS 163.207 should be declared unconstitutional.

**ii. ORS 163.207 violates OR. CONST. art. I, § 46, by "den[ying] or abridg[ing] male children's right to bodily integrity on account of sex.**

103.

ORS 163.207 violates Or. Const. art. I, § 46, because it "denie[s] or abridge[s]" Plaintiffs' rights on account of their sex.

[170] *Hewitt*, 294 Or. at 46.

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104.

Ratified in 2014, Oregon's Equal Rights Amendment (ERA) is modeled after the federal ERA proposed in 1972.[171] Though the federal Amendment was never ratified, many states adopted their own ERAs, which sought to uproot long-standing statutory sex classifications by subjecting them to heightened judicial scrutiny.[172]

105.

Oregon courts have recognized a right to bodily integrity arising from the state and federal Constitutions.[173] Thus, a denial of this right on account of sex would violate Oregon's ERA.

106.

Oregon case law on its ERA is thin, but dicta has indicated that even where there exist clear biological differences in the male and female reproductive systems, disparate treatment violates the Amendment.

107.

In *In re Parentage of S.D.S.*, the Oregon Supreme Court acknowledged the argument that an artificial insemination statute that included semen donors, but excluded egg donors,

[171] *Compare* H.R.J. Res. 208, 92d Cong. (1972) ("Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.") *with* OR. CONST. art. I, § 46 ("Equality of rights under the law shall not be denied or abridged by the State of Oregon or by any political subdivision in this state on account of sex.").

[172] *See* Lisa Baldez et al., *Does the U.S. Constitution Need an Equal Rights Amendment?*, 35 J. LEGAL STUDS. 243, 244–45 (2006).

[173] *See, e.g.*, *State v. Portulano*, 320 Or. App. 335, 345 (2022).

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could violate the ERA.[174] The Court did not reach that issue in that case because the statute at issue was stipulated to include both types of gamete donors.

108.

A major question in *S.D.S.* was whether SB 512 (2017), a bill that amended Oregon's artificial insemination laws to remove sex classifications (i.e., treat sperm and egg donors the same for parentage purposes), applied to the case.[175]

109.

In arguing that it did apply, the concurring opinion of the Court of Appeals of Oregon recognized that SB 512 "accomplishe[d] by its express terms what Oregon's Equal Rights Amendment . . . already required—equal treatment of male and female gamete donors under the law."[176] Although on appeal SB 512 was found not to apply, the notion that the bill achieved the objectives of the ERA was not disturbed.[177]

110.

The upshot is that Oregon's ERA prohibits sex classifications that disparately treat analogous, though vastly distinct, parts of the male and female reproductive systems. In the case of artificial insemination, Oregon precedents indicate that, to comply with the ERA, female egg donors must be treated the same as male sperm donors, even though egg and sperm cells have vast biological distinctions and are harvested in different ways.

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[174] *In re Parentage of S.D.S.*, 371 Or. 573, 599 n.6 (2023).

[175] *Id.* at 588–89.

[176] *In re Parentage of Schnitzer*, 312 Or. App. 71, 108 (2021) (Mooney, J., concurring), *aff'd in part, rev'd in part sub nom. In re Parentage of S.D.S.*, 371 Or. 573 (2023).

[177] *S.D.S.*, 371 Or. at 599 n.6.

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111.

Applying this principle to child genital cutting, the fact that the male and female prepuces have some anatomical or physiological differences should be no bar to requiring equal treatment under the ERA. Indeed, the male and female prepuces have *more* in common than do the male and female gametes: While sperm is uniquely male and eggs uniquely female, both sexes are born with the homologous structure known as the prepuce, which fulfills similar functions regardless of sex, as described in Paragraph 54. So if gametes demand equal legal treatment under the ERA, so must the prepuce.

**C. Plaintiffs suffer or will suffer physical, emotional, and stigmatic harm because Oregon treats male and female children disparately with respect to genital cutting.**

112.

Plaintiffs Dane Hadachek, Cecil Mininger, Sierra Hadachek, Carter Moody, and Landon Moody ("Plaintiffs") have suffered and continue to suffer irreparable harm from Oregon's disparate treatment of male and female children.

**i. Dane Hadachek suffered and continues to suffer harm because of Oregon's disparate treatment of males and females.**

113.

Plaintiff Dane Hadachek ("Dane") is a 17-year-old Oregonian boy. He is the son of Cecil Mininger and Sierra Hadachek. Dane was born in Bend, Oregon, on August 7, 2007. Shortly thereafter, in the same hospital as his birth, parts of Dane's genitals were cut off without any medical need or diagnosis.

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114.

Dane's parents and co-plaintiffs, Cecil Mininger and Sierra Hadachek, immediately saw that Dane bled profusely after the genital cutting. But Dane remained unaware of the existence and extent of harm done to him until he became a teenager.[178]

115.

Dane's brother was not genitally cut. Dane's mother Sierra told Dane the reason his genitals look different from his brother's is because she was uninformed about the nature and consequences of MGC at the time of Dane's birth. Had Sierra known that MGC comes with similar "health risks and emotional trauma"[179] to FGC, or believed that MGC was a crime, she would not have allowed Dane's genital cutting to occur. Unfortunately, Sierra only learned of the true risks and harms of MGC many years later.

116.

It was not until July 2024 that Dane discovered that the reason why his genital cutting occurred was because Oregon violated his rights—including his constitutional rights to the equal treatment of the law and against sex discrimination.

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[178] Physicians must obtain informed consent of the patient (or his parents if he is a minor) prior to any surgery. This requires a full disclosure of what the surgery entails, the material risks of the surgery, and what feasible alternatives are available to the patient. ORS 677.097; *see also Holland v. Sisters of St. Joseph of Peace*, 270 Or. 129, 133 (1974) ("[T]he duty to inform follows as a matter of law and does not depend upon what a 'reasonably prudent and skillful physician' would have explained under the circumstances."). Here, Dane's physicians did not disclose to his parents that the foreskin is a highly functional body part with the densest concentration of nerve endings on the male body, that a feasible alternative is to keep Dane intact, and that circumcision complications are common, including the excessive bleeding Dane suffered. As such, Dane's parents' "consent" to Dane's circumcision was invalid.

[179] ORS 431A.600.

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117.

Dane is aggrieved that the most sensitive part of his penis was cut off without medical need, and that Oregon law did not protect him despite protecting similarly-situated females from that result. He also suffered physical harm from his genital cutting including a dramatic change in the mechanical function of his penis, a circumferential scar on his penis, and difficulty achieving orgasm. Dane also suffers stigmatic harm because Oregon law treats female children as if they are more worthy of legal protection against genital cutting than male children like him.[180]

118.

But for the sex classification in Oregon's genital cutting policy, Dane would not have suffered physical and emotional harm because he would not have been genitally cut. The physician who cut Dane would not have done so because non-medically necessary genital cutting would have been illegal to perform on all children under a sex-neutral ORS 163.207. And a sex-neutral ORS 431A.600 would have ensured Sierra was aware of the "health risks and emotional trauma" inflicted by MGC, as well as its illegality, so she never would have pursued the procedure for Dane. Additionally, were the Court to issue a judicial declaration reconstruing or nullifying Oregon's genital cutting policy to treat all children equally, Dane would no longer suffer the stigmatic harm he currently suffers on account of his sex.

[180] *Cf. Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1136 (D. Or. 2014) ("Oregon's marriage laws [denying same-sex marriage rights] weigh on the plaintiffs in ways less tangible, yet no less painful. The laws leave the plaintiffs and their families feeling degraded, humiliated, and stigmatized.").

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**ii. Cecil Mininger suffered and continues to suffer harm because of Oregon's disparate treatment of males and females.**

119.

Plaintiff Cecil Mininger ("Cecil") is a 39-year-old Oregonian man. He is the father of Dane and the husband of Sierra. Cecil was born in Portland, Oregon, on October 6, 1985. Shortly thereafter, in the same hospital as his birth, Cecil had parts of his genitals cut off without any medical need or diagnosis.

120.

Cecil remained unaware of the harm he suffered until he was an adult. Nor did he discover that his genital cutting occurred because Oregon's policy on child genital cutting differs based on the sex of the victim. Although Cecil's genital cutting happened before Oregon passed legislation explicitly banning genital cutting for female children, FGC—whether performed in a medical setting or not—was already illegal as a form of assault and child abuse.[181] But Oregon had no comparable policy of prosecuting MGC as assault or child abuse, so at the time of his genital cutting, Cecil was denied the equal protection of the law on the basis of his sex. Cecil was unaware of these facts—including the fact that he has a right to declaratory relief—until July 2024.

[181] Indeed, a fiscal analysis of Oregon's anti-FGC bill found that "[f]emale genital mutilation is already prosecutable under various statutes." Or. Legis. Fiscal Off., Fiscal Analysis of HB 3608, 1999 Leg., 70th Sess. (June 14, 1999). The proponents emphasized that the bill's purpose was "less . . . in the punishment aspect than . . . in sending the message that [child FGC] is not acceptable in Oregon." Relating to Female Genital Mutilation: Hearing on H.B. 3608 Before the H. Judiciary-Crim. Comm., 1999 Leg., 70th Sess. (Apr. 28, 1999) (statement of Lynn D. Partin, Women's Rights Coalition).

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121.

Cecil is very angry that Oregon law did not protect him from genital cutting when it protected similarly-situated females. Cecil has suffered various harms including a circumferential scar on his penis, instances of hyper-sensitivity or no sensitivity, and difficulty achieving orgasm. Cecil also suffers stigmatic harm because Oregon law treats males like him as if they are less deserving of protection against genital cutting than females.

122.

If Oregon protected all children equally against non-medically necessary genital cutting, Cecil would not have suffered physical and emotional harm associated with his and his son's genital cuttings. Additionally, were the Court to issue a judicial declaration reconstruing or nullifying Oregon's genital cutting policy to treat all children equally, Cecil would no longer suffer the stigmatic harm he currently experiences because Oregon law treats his sex as being less deserving of protection against child genital cutting.

**iii. Sierra Hadachek suffered and continues to suffer harm because of Oregon's disparate treatment of males and females.**

123.

Plaintiff Sierra Hadachek ("Sierra") is Cecil's wife and Dane's mother.

124.

Sierra has two sons, Dane being the oldest. In 2007, physicians failed to truthfully inform Sierra about the nature and consequences of child genital cutting, leading her to sign a form to have parts of Dane's genitals cut off without medical need.

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125.

Immediately, Sierra knew something was wrong. Dane's genitals bled profusely for longer than is typical for victims of child genital cutting. Sierra suffered emotional and physical harm from witnessing her newborn's bloody genitals. She reports having nightmares about the ordeal and continues to regret allowing Dane's genitals to be cut. She did not repeat the mistake with her younger son.

126.

Sierra has continued to suffer emotionally as Dane has grown up. She had to inform Dane that she allowed physicians to cut off parts of his genitals because the physicians led her to believe doing so was acceptable. Explaining this to Dane was especially troubling in light of the fact that his brother was spared from genital cutting, something Dane has cause to resent.

127.

Oregon's statutes on child genital cutting would have prevented this result if they treated males and females the same. Not only would a sex-neutral ORS 163.207 have made it illegal for the physicians to cut Dane's genitals without medical need, but a sex-neutral ORS 431A.600 would have ensured Sierra received accurate information "of the health risks and emotional trauma inflicted by" child genital cutting. As such, Dane's genital cutting would not have happened, and Sierra would have nothing to regret.

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**iv. Carter and Landon Moody suffered and continue to suffer harm because of Oregon's disparate treatment of males and females.**

128.

Plaintiffs Carter Moody and Landon Moody ("the Moody Brothers") were born in Portland, Oregon, on April 24, 1998, and July 22, 2000, respectively. Shortly after their births, the Moody Brothers had parts of their genitals cut off without any medical need or diagnosis. Ever since they were genitally cut, the Moody Brothers have suffered similar harms as Plaintiffs Dane and Cecil.

**v. John Does Nos. 1 and 2 suffer harm, and may potentially suffer further harm, because of Oregon's disparate treatment of males and females.**

129.

Plaintiffs John Does Nos. 1 and 2 are unrelated intact male minors born and residing in Oregon. Under current Oregon law, they lack any statutory protection against non-consensual, non-medically necessary genital cutting solely because of their sex. If they had been born female, they would enjoy explicit statutory protection under Oregon's anti-FGC laws. The existence of this "state-sanctioned discrimination" inflicts concrete stigmatic harm upon the John Does, marking them as second-class citizens from birth and leaving them "feeling degraded, humiliated, and stigmatized[,] . . . [with] no rationale for such treatment."[182] John Does suffer this stigmatic harm regardless of whether they will actually be victims of genital

[182] *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1136 (D. Or. 2014) ("Oregon's marriage laws [denying same-sex marriage rights] weigh on the plaintiffs in ways less tangible, yet no less painful. The laws leave the plaintiffs and their families feeling degraded, humiliated, and stigmatized.").

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cutting in the future.[183] Under current Oregon law, John Does—and all similarly-situated male minors—suffer harm because they are unjustifiably deemed inherently less worthy of bodily integrity and legal protection due to their sex.

130.

This constitutional exclusion burdens the John Does. Their lack of agency over their own bodies causes psychological and dignitary harm, as they remain frightened they might be harmed by genital cutting. As long as the John Does remain minors, they remain under the legal authority of their guardians, who may at any time authorize the amputation of their foreskins without their consent. The John Does lack a legal defense against this consequence because of their sex. As male minors living in a state that grants greater bodily autonomy and integrity to their female peers, John Does Nos. 1 and 2 bear the daily harms of state-sanctioned sex discrimination.

**D. The Court can give Plaintiffs relief in this case without endangering religious, parental, or other interests.**

131.

Understandably, the Court may feel hesitant to issue a declaration prohibiting a practice of religious significance to some and a matter of parental rights to others. It may also fear that judicial action will produce unintended effects with respect to child genital cutting. While important to consider, these fears are not relevant to this case. Ultimately, the authority to

[183] *Cf. Virginia State Conference NAACP v. Cnty. Sch. Bd. of Shenandoah Cnty.*, 5:24-CV-040, 2025 WL 271705, at *11 (W.D. Va. Jan. 22, 2025) (discussing how the Supreme Court in *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 494 (1954), found that racial segregation inflicted stigmatic harm regardless of whether the educational facilities were "materially worse").

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fashion a remedy for constitutionally underinclusive statutes like ORS 163.207 "indisputably lies with the judiciary in cases properly before it."[184]

**i. The Court does not need to decide on the scope of religious freedom rights, but a generally applicable ban would nevertheless be constitutional.**

132.

The Court need not outlaw male circumcision to give Plaintiffs relief in this case because simply nullifying ORS 163.207 would eliminate the offending "privileges[] or immunities" given to female children but denied to male ones. No further action is necessary, as it will become the province of the Oregon Legislative Assembly to balance the competing interests while ensuring the equal protection of the law.[185]

133.

Alternatively, the Court may adopt a saving construction of ORS 163.207 that nullifies the statute only to the extent that it prohibits the forms of FGC that are less or equally as extensive as male circumcision, namely Type Ia FGC.[186] Or the Court could adopt a construction that eliminates the facial sex classification yet recognizes that religious freedom interests permit male circumcision in some circumstances, leaving the question open for a future case. Any of these declarations would be sufficient to put male and female children on equal footing under the law and put the Oregon Legislative Assembly on notice that its policy

[184] *Li v. State*, 338 Or. 376, 397 (2005).

[185] *Hewitt v. State Accident Ins. Fund Corp.*, 294 Or. 33, 54–59 (2005) (en banc) (Peterson, J., concurring in part and dissenting in part) (preferring invalidation rather than extension of underinclusive law to compel the "legislature, when it convenes in January . . . [to] consider the problem").

[186] This would not make FGC legal in Oregon as it would remain prosecutable under federal law and various state criminal statutes. *See infra* Subsection V.D.ii.

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on child genital cutting is inconsistent with the Oregon Constitution. None of these declarations makes male circumcision illegal.

134.

But if the Court is willing to go further and prohibit MGC, it may do so by adopting a saving construction of ORS 163.207 that prohibits non-medically necessary child genital cutting regardless of sex. Indeed, this type of "affirmative remedy" was preferred by the *Hewitt* Court, which extended death benefits to widowers because it found that doing so was not contrary to the statute's purpose.[187] Because the purpose of ORS 163.207 was to protect children from non-medically necessary genital cutting, extending protection to male children would only further, not frustrate, that purpose.[188]

135.

Extending ORS 163.207 would be consistent with religious freedom rights under either the Oregon or federal Constitution. "The Free Exercise Clause of the First Amendment [to the United States Constitution], incorporated against the states by the Fourteenth Amendment, provides that "Congress shall make no law respecting the establishment of religion, or *prohibiting the free exercise thereof*."[189] Similarly, OR. CONST. art. I, §§ 2–3 provide for

[187] *Li*, 338 Or. at 397 (citing *Hewitt*, 294 Or. at 53) ("The [*Hewitt* Court] ultimately chose the affirmative remedy of extending the benefits in question to the deprived class only when it satisfied itself that to do otherwise would thwart the overall legislative purpose behind the underinclusive statute.").

[188] *Cf. Hewitt*, 294 Or. at 53 ("Extension of benefits in this case advances the purpose of the legislation and comports with the overall statutory scheme."). Importantly, any alternative remedies will be made "no less available to the legislature by the extension of the statute to the excluded males should it decide to amend the law." *Id.* at 53 n.18.

[189] *Church at 295 S. 18th Street, St. Helens v. Emp. Dep't*, 175 Or. App. 114, 124 (2001).

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freedom of worship and religious opinion.[190] In general, the Oregon Supreme Court has held that "[t]he guaranty of religious freedom by the First Amendment of the Federal Constitution is identical in meaning with the constitutional provisions of [Oregon] relative to the same right although expressed in different language."[191]

136.

But the Free Exercise Clause "does not . . . prohibit the enactment and enforcement of laws that are neutral, generally applicable, and otherwise valid and that only incidentally affect religious belief or practice."[192] Nor does it render the states impotent to enact reasonable laws for the protection of the public health.[193] Indeed, these principles were famously established in *Employment Division v. Smith*, a case interpreting Oregon's criminal law itself.[194]

137.

In the child welfare context, the Court of Appeals of Oregon blessed a jury instruction recognizing a limit to religious free exercise rights: "Now, though it is true that [the Oregon

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[190] OR. CONST. art. I, § 2 ("All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences."); *id.* § 3 ("No law shall in any case whatever control the free exercise, and enjoyment of religeous [*sic*] opinions, or interfere with the rights of conscience.").

[191] *City of Portland v. Thornton*, 174 Or. 508, 512 (1944).

[192] *Church*, 175 Or. App. at 124.

[193] *Baer v. City of Bend*, 206 Or. 221, 236 (1956) (holding that city water fluoridation ordinance was a valid exercise of police power despite interfering with religious and parental liberties). *Cf. Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 885, 890 (1990) (holding that generally applicable Oregon law criminalizing peyote use did not violate federal Free Exercise Clause despite prohibiting Native American Church religious ceremony). Although Congress tried to overrule *Smith* with the Religious Freedom Restoration Act, 42 U.S.C. 2000bb (2012), the Supreme Court held this attempt unconstitutional as applied to the states. *City of Boerne v. Flores*, 521 U.S. 507 (1997). So except in cases involving certain prison and land use fact patterns, *see* Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc to 2000cc-5 (2000), the rule remains that states do not violate free exercise principles by passing generally applicable criminal laws that incidentally affect religious conduct.

[194] *Smith*, 494 U.S. at 890.

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C]onstitution generally protects free expression or religious practices and beliefs, *these constitutional protections are limited when the safety and welfare of children are involved*."[195] As a result, the parent-defendants in that case could not use free exercise as a shield from criminal prosecution for failure to provide medical care to their minor son, even though their religion shunned medicine in favor of "faith healing."[196] If Oregon can criminally proscribe an unscientific *omission* resulting in physical harm to a child without running afoul of free exercise principles, surely it can also proscribe the direct *commission* of unscientific acts leading to harm to a child, namely, genital cutting.

138.

No Oregon court has squarely decided whether parents have a right to elect to cut their sons' genitals for religious reasons.[197] But for the foregoing reasons, a generally applicable prohibition on genital cutting of minors would not violate the religious freedom clauses of the Oregon or federal Constitutions. But even if religious interests did require that any prohibition on child genital cutting be sufficiently tailored,[198] this is a question that may be handled another day by other courts, or by the legislature.

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[195] *State v. Beagley*, 257 Or. App. 220, 228 (2013).

[196] *Id.* at 222.

[197] For example, in *In re Marriage of Boldt*, a divorce case tangentially involving circumcision, a mother sought an order prohibiting the father from having their child circumcised. The father asserted he had the right to do so for religious reasons. The judge ultimately interviewed the boy who said he did not want to be circumcised, and the court enjoined the procedure pending an appeal. On appeal, the Oregon Supreme Court ruled that whether a twelve-year-old child desired or opposed circumcision warranted a hearing concerning whether to change custody. 344 Or. 1, 12 (2008). Notably, the *Boldt* courts did not rule that parents have a religious right to have their children circumcised.

[198] On the other hand, an increasing number of Jewish households are replacing the *brit milah* circumcision ceremony with *brit shalom*, a ritual that omits circumcision, or simply perform *brit milah* but substitute in the symbolic cutting of a pomegranate. *See* Max DuBoff & Dena S. Davis, *B'rit Shalom: A Jewish Ritual*

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139.

In the present case, Plaintiffs were harmed by non-religious, non-medically necessary child genital cutting that would probably not have occurred if Oregon had treated the sexes equally in its child genital cutting policy. If a future plaintiff believes his religious or parental rights are unduly burdened by a judicial declaration prohibiting non-medically necessary child genital cutting, he may challenge that policy and receive his own declaration. But the Court need not decide on such issues in this case.

**ii. Judicial action will not make female genital mutilation legal or make medically necessary circumcision illegal.**

140.

No action by the Court will permit genital cutting of female children to become legal. Even if the Court declared ORS 163.207 unconstitutional, FGC would remain prosecutable under numerous other Oregon laws and under federal law.[199] Indeed, a fiscal analysis of the bill that became ORS 163.207 found that "[f]emale genital mutilation is already prosecutable [in Oregon] under various statutes."[200]

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*Alternative to Newborn Male Circumcision*, 35 INT'L J. IMPOTENCE RSCH. 324 (2022), https://pubmed.ncbi.nlm.nih.gov/36042355/. Just as some African and Muslim communities have adapted their cultural and religious practices to comply with anti-FGC laws, Oregon may rightfully encourage other groups to do the same with anti-circumcision policies. Also, no action by the Court would make it illegal for individuals of these faiths to consent to genital cutting as adults.

[199] 18 U.S.C. § 116.

[200] Or. Legis. Fiscal Off., *supra* note 181. An Oregon public defender even raised concerns that the bill would unduly restrict a prosecutor's discretion to use first degree assault charges in cases of FGC. Relating to Female Genital Mutilation: Hearing on H.B. 3608 Before the H. Judiciary-Crim. Comm., 1999 Leg., 70th Sess. (May 19, 1999) (statement of Jesse William Barton, State Public Defender).

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141.

Few if any prosecutions have taken place under ORS 163.207 because, according to its legislative history, its main purpose is symbolic. The chief proponent of ORS 163.207, the Women's Rights Coalition, was "less interested in the punishment aspect [of the law] than [it was] in sending the message that [FGC] is not acceptable in Oregon."[201] So nullifying ORS 163.207 would have no downsides but would stoke the legislature to pass a sex-neutral statute.

142.

Nor would a saving construction that expands the scope of ORS 163.207 to include child genital cutting of males threaten to proscribe medically necessary cases of MGC because the statute features a medical necessity exception, even for FGC.[202]

## VI. FIRST CAUSE OF ACTION

### A. Plaintiffs seek a judicial declaration that Oregon's female genital cutting statutes violate the Equal Protection Clause, OR. CONST. art. I, § 20.

143.

Plaintiffs incorporate by reference the factual allegations set forth in all preceding paragraphs.

[201] Relating to Female Genital Mutilation: Hearing on H.B. 3608 Before the H. Judiciary-Crim. Comm., 1999 Leg., 70th Sess. (Apr. 28, 1999) (statement of Lynn D. Partin, Women's Rights Coalition).

[202] ORS 163.207(3)(a)(B) (carving out exception to FGC prohibition when "[t]he surgery is medically necessary for the physical well-being of the child").

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144.

Oregon's Equal Protection Clause invalidates any law that grants special privileges or immunities to any citizen or class of citizens.[203]

145.

Statutes that discriminate against males on the basis of sex carry a presumption of unconstitutionality that can be overcome only by a showing of "specific biological differences between men and women" that is strong enough to justify disparate treatment under a "particularly exacting scrutiny" standard.[204]

146.

When Oregon enacted ORS 163.207, it chose to protect only female children from non-medically necessary genital cutting. But it lacked a compelling justification to not also protect male children from substantially similar conduct. This arbitrary sex classification violated Plaintiffs' rights to the equal protection of the laws under Oregon's Equal Protection Clause because it granted special "privileges[] or immunities" to female children that were not made available to male children "upon the same terms."[205]

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[203] OR. CONST. art. I, § 20 ("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.").

[204] *Hewitt v. State Accident Ins. Fund Corp.*, 294 Or. 33, 45–46 (1982) (en banc) ("[W]hen classifications are made on the basis of gender, they are, like racial, alienage and nationality classifications, inherently suspect."); *Tanner v. Or. Health Scis. Univ.*, 157 Or. App. 502, 522 (1998).

[205] OR. CONST. art. I, § 20.

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147.

As such, under ORS 28.010, *et seq.* or, alternatively, ORS 14.175, Plaintiffs are entitled to a judicial declaration that ORS 163.207 and 431A.600 violate OR. CONST. art. I, § 20. Plaintiffs are also entitled to supplemental relief under ORS 28.080.[206]

## VII. SECOND CAUSE OF ACTION

### A. Plaintiffs seek a judicial declaration that Oregon's female genital cutting statutes violate the Equal Rights Amendment, OR. CONST. art. I, § 46.

148.

Plaintiffs incorporate by reference the factual allegations set forth in all preceding paragraphs.

149.

The Equal Rights Amendment (ERA) to the Oregon Constitution prohibits discrimination on the basis of sex.[207]

150.

The primary purpose of the ERA is to eliminate disparate treatment of males and females under the law. Because the Oregon Legislative Assembly made an intentional choice

[206] ORS 28.080 ("Further relief based on a declaratory judgment may be granted whenever necessary or proper.").

[207] OR. CONST. art. I, § 46 ("Equality of rights under the law shall not be denied or abridged by the State of Oregon or by any political subdivision in this state on account of sex."); *see also Freyd v. Univ. of Or.*, 990 F.3d 1211, 1229 (9th Cir. 2021) (citing *Klein v. Or. Bureau of Labor & Indus.*, 289 Or. App. 507 (2017), *vacated on other grounds*, 139 S. Ct. 2713 (2019) (Mem.)) (interpreting Oregon Equal Rights Amendment).

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to delimit the scope of ORS 163.207 based on sex, it denied males equal treatment "on account of sex" in violation of the ERA.[208]

151.

The disparate treatment is not justified by "specific biological differences between men and women" strong enough to overcome the "particularly exacting scrutiny" the law requires.[209] Regardless, Oregon appellate court dicta indicates that even biological differences as vast as those between male and female gametes are no excuse for sex discrimination.[210]

152.

As such, under ORS 28.010, *et seq.* or, alternatively, ORS 14.175, Plaintiffs are entitled to a judicial declaration that ORS 163.207 and 431A.600 violate OR. CONST. art. I, § 46. Plaintiffs are also entitled to supplemental relief under ORS 28.080.[211]

## VIII. PRAYER FOR RELIEF

153.

**WHEREFORE** Plaintiffs Dane, Cecil, Sierra, Carter, Landon, and John Does Nos. 1 and 2 pray for judgment against Defendant as follows:

[208] Philip E. Hassman, *Construction and Application of State Equal Rights Amendments Forbidding Determination of Rights Based on Sex* § 878 (1979).

[209] *Hewitt*, 294 Or. at 46; *Tanner*, 157 Or. App. at 522.

[210] *See supra* Subsection V.B.ii.

[211] ORS 28.080 ("Further relief based on a declaratory judgment may be granted whenever necessary or proper.").

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154.

For Count I, Oregon's Violation of its Constitution's Equal Protection Clause, OR. CONST. art. I, § 20, by enacting ORS 163.207 and 431A.600 without equally protecting male children from non-medically necessary genital cutting:

(1) That the Court issue a declaration under ORS 28.020 or 14.175 that Oregon's conduct in enacting ORS 163.207 and 431A.600 violates the Equal Protection Clause of the Oregon Constitution, and that ORS 163.207 and 431A.600 are unconstitutional; and

(2) That the Court enjoin Oregon from continuing to engage in such disparate treatment of children on the basis of their sex.

155.

For Count II, Oregon's violation of its Constitution's Equal Rights Amendment, OR. CONST. art. I, § 46, by enacting ORS 163.207 and 431A.600 without equally protecting male children from non-medically necessary genital cutting:

(1) That the Court issue a declaration under ORS 28.020 or 14.175 that Oregon's conduct in passing ORS 163.207 and 431A.600 violates the Equal Rights Amendment of the Oregon Constitution, and that ORS 163.207 and 431A.600 are unconstitutional; and

(2) That the Court enjoin Oregon from continuing to engage in such disparate treatment of children on the basis of their sex.

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156.

That the Court inform the Oregon Legislative Assembly of the above declarations so that the Assembly may enact sex-neutral child genital cutting policies.

157.

That the Court award Plaintiffs damages for the harm caused by Oregon's discriminatory conduct.

158.

That the Court award Plaintiffs attorney's fees and expert witness fees under ORS 20.107.

159.

That the Court grant such "[f]urther relief" that it deems "necessary or proper" to remedy Plaintiffs' injuries under ORS 28.080.

160.

**WHEREFORE** Plaintiffs pray that this honorable Court grant the relief requested and such other relief as it deems to be equitable.

Dated: July 17, 2025

Respectfully submitted,

**LAW WORKS LLC**

By: */s/ Lake Perriguey*

Lake James H. Perriguey, Esquire
Attorney for Plaintiffs OSB 983213
Dane Hadachek, Cecil Mininger, Sierra Hadachek, Carter Moody, Landon Moody, and John Does Nos. 1 and 2

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Certificate of Service

I certify that I served a copy of this document on Kate Morrow and on Morgan Shaunee and by Odyssey by email on July 17, 2025.
s/Lake Perriguey

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