

**IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH**

**DANE HADACHEK,
NATHANIEL HELLEWELL &
LANDON MOODY**

Plaintiffs,

v.

**THE STATE OF OREGON,

Defendant.**

Case No. 25CV18224

**PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

Oral Argument Requested

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. SUMMARY OF ARGUMENT	2
III. LEGAL STANDARD.....	4
IV. ARGUMENT	5
A. The State cannot obtain summary judgment because its biological-differences defense is unsubstantiated, necessarily rests on disputed facts, and is supported only by immaterial assertions.	5
1. Plaintiffs provide undisputed expert testimony to rebut the State’s unsubstantiated claim that sufficient biological differences exist to justify disparate treatment under the challenged statutes.	7
2. The State makes several immaterial factual claims that Plaintiffs nevertheless dispute.	9
(a) Sexist Motives for FGC	10
(b) Prevalence of Traditional or “Primitive” Cutting	11
(c) Differences in Religious Doctrine	13
B. The State is not entitled to prevail as a matter of law because Oregon’s anti-FGC statutes violate the Oregon Constitution, and Plaintiffs’ extension remedy is within the Court’s power.....	13
1. The challenged statutes violate Article I, Section 20 of the Oregon Constitution..	14
(a) The State collapses “particularly exacting scrutiny” into rational-basis review and makes no attempt to satisfy heightened scrutiny.....	16
(b) Even under rational-basis review, the sex classification is invalid because the State failed to show “genuine differences” relevant to genital cutting.	19
(c) The State’s “sex-specific practice” argument is circular.	19
2. The challenged statutes violate Article I, Section 46 of the Oregon Constitution..	21
(a) Section 46 constitutionalized Section 20’s prohibition on sex classifications. ..	21
(b) Section 46 embodies an anti-classification principle: sex-based lines are forbidden regardless of which sex they favor.	24

1		
2		
3	(c) The supposed “characteristic unique to one sex” exception to Section 46 is	
4	meritless.	25
5	3. This Court has the power to extend the underinclusive statutes but cannot decide	
6	that issue on summary judgment.....	26
7	(a) Oregon courts may extend underinclusive statutes so long as doing so does not	
8	do violence to the legislature’s intentions.....	27
9	(b) Extending the challenged statutes is appropriate because doing so coheres with	
10	the legislature’s purpose to protect children against medically unnecessary	
11	genital cutting.....	28
12	(c) Whether extension is available is immaterial on summary judgment and should	
13	be decided at the remedy stage.	30
14	C. Even if the Court revisited standing, Plaintiffs have established a redressable	
15	stigmatic injury.	31
16	1. The State’s attempt to relitigate standing is strongly disfavored by the law-of-the-	
17	case doctrine.....	33
18	2. Plaintiffs satisfy each element of stigmatic standing.....	34
19	(a) Plaintiff Dane Hadachek	35
20	(b) Plaintiff Nathaniel Hellewell	36
21	(c) Plaintiff Landon Moody.....	38
22	3. A favorable decision would redress Plaintiffs’ stigmatic injuries.	39
23	(a) Plaintiff Dane Hadachek	40
24	(b) Plaintiff Nathaniel Hellewell	40
25	(c) Plaintiff Landon Moody.....	40
26	4. The Oregon Constitution does not bar Plaintiffs’ standing.	41
	V. CONCLUSION	41

TABLE OF AUTHORITIES**CASES**

5	<i>Allen v. Wright</i> ,	
6	468 U.S. 737 (1984).....	31, 33, 38
7	<i>Baker v. State</i> ,	
8	170 Vt. 194, 226–27 (1999).....	2, 3
9	<i>Bergmann v. Hutton</i> ,	
10	337 Or. 596 (2004).....	4, 6, 32
11	<i>Berry v. State Tax Commission</i> ,	
12	241 Or. 580 (1964).....	37
13	<i>Brown v. Board of Education</i> ,	
14	347 U.S. 483 (1954).....	32
15	<i>Burwell v. Hobby Lobby Stores, Inc.</i> ,	
16	573 U.S. 682 (2014).....	13
17	<i>Carello v. Aurora Policemen Credit Union</i> ,	
18	930 F.3d 830 (7th Cir. 2019)	32
19	<i>City of Klamath Falls v. Winters</i> ,	
20	289 Or. 757 (1980).....	4
21	<i>Coleman v. Court of Appeals of Maryland</i> ,	
22	566 U.S. 30 (2012).....	15
23	<i>Cooper v. Or. Sch. Activities Ass’n</i> ,	
24	52 Or. App. 425 (1981).....	4
25	<i>Couey v. Atkins</i> ,	
26	357 Or. 460 (2015).....	41
27	<i>Delta Air Lines, Inc. v. Department of Revenue</i> ,	
28	374 Or. 58 (2025).....	<i>passim</i>
29	<i>Dobbs v. Jackson Women’s Health Organization</i> ,	
30	597 U.S. 215 (2022).....	15
31	<i>English v. Pub. Emps. Ret. Bd.</i> ,	
32	230 Or. App. 506 (2009).....	27

1		
2		
3	<i>Foote v. State,</i>	
4	364 Or. 558 (2019).....	34
5	<i>Geduldig v. Aiello,</i>	
6	417 U.S. 484 (1974).....	15, 19
7	<i>Geiger v. Kitzhaber,</i>	
8	994 F. Supp. 2d 1128 (D. Or. 2014)	35
9	<i>Griffin v. Dep't of Lab. Fed. Credit Union,</i>	
10	912 F.3d 649 (4th Cir. 2019)	32
11	<i>Gryczan v. State,</i>	
12	283 Mont. 433 (1997)	32
13	<i>Heckler v. Mathews,</i>	
14	465 U.S. 728 (1984).....	<i>passim</i>
15	<i>Hewitt v. SAIF,</i>	
16	294 Or. 33 (1982).....	<i>passim</i>
17	<i>Hewitt v. SAIF,</i>	
18	54 Or. App. 398 (1981).....	16, 30
19	<i>Hunter v. U.S. Dep't of Educ.,</i>	
20	650 F. Supp. 3d 1104 (D. Or. 2023)	32
21	<i>In re Madrone,</i>	
22	271 Or. App. 116 (2015).....	27, 28
23	<i>In re Parentage of S.D.S.,</i>	
24	371 Or. 573 (2023).....	26
25	<i>In re Parentage of Schnitzer,</i>	
26	312 Or. App. 71 (2021).....	9, 26
	<i>Koch v. Southern Pacific Transportation Co.,</i>	
	274 Or. 499 (1976).....	34
	<i>Kramer v. City of Lake Oswego,</i>	
	365 Or. 422 (2019).....	16
	<i>Laufer v. Acheson Hotels, LLC,</i>	
	50 F.4th 259 (1st Cir. 2022).....	32

1		
2		
3	<i>Li v. State,</i>	
4	338 Or. 376 (2005).....	27, 28
5	<i>Marteeny v. Brown,</i>	
6	321 Or. App. 250 (2022).....	41
7	<i>McIntyre v. Crouch,</i>	
8	98 Or. App. 462 (1989).....	17
9	<i>MT & M Gaming, Inc. v. City of Portland,</i>	
10	360 Or. 544 (2016).....	39, 40
11	<i>Parsons v. U.S. Dep’t of Just.,</i>	
12	801 F.3d 701 (6th Cir. 2015)	32
13	<i>Personnel Administrator of Massachusetts v. Feeney,</i>	
14	442 U.S. 256 (1979).....	16
15	<i>Power Co. v. Saunders,</i>	
16	274 U.S. 490 (1927).....	<i>passim</i>
17	<i>Roe v. Critchfield,</i>	
18	137 F.4th 912 (9th Cir. 2025)	4
19	<i>Romer v. Evans,</i>	
20	517 U.S. 620 (1996).....	33
21	<i>Rutan-Ram v. Tennessee Dep’t of Children’s Servs.,</i>	
22	698 S.W.3d 540 (Tenn. Ct. App. 2023).....	32
23	<i>Shineovich v. Shineovich,</i>	
24	229 Or. App. 670 (2009).....	27, 28
25	<i>State v. Baxter,</i>	
26	141 P.3d 92 (Wash. Ct. App. 2006).....	11
27	<i>State v. Borowski,</i>	
28	231 Or. App. 511 (2009).....	22, 23
29	<i>State v. Elmore,</i>	
30	24 Or. App. 651 (1976).....	1
31	<i>State v. Portulano,</i>	
32	320 Or. App. 335 (2022).....	28

1		
2		
3	<i>Stewart v. Heineman</i> ,	
4	296 Neb. 262 (2017)	32
5	<i>Tanner v. Or. Health Scis. Univ.</i> ,	
6	157 Or. App. 502 (1998).....	5, 16, 18, 22
7	<i>United States v. Nagarwala</i> ,	
8	350 F. Supp. 3d 613 (E.D. Mich. 2018).....	11
9	<i>United States v. Skrmetti</i> ,	
10	605 U.S. 495 (2025).....	15
11	<i>United States v. Virginia</i> ,	
12	518 U.S. 515 (1996).....	4, 18
13	<i>Welsh v. United States</i> ,	
14	398 U.S. 333 (1970).....	39
15		
16	CONSTITUTIONAL PROVISIONS	
17		
18	Or. Const. art. I, § 20	<i>passim</i>
19	Or. Const. art. I, § 46	<i>passim</i>
20		
21	STATUTES	
22		
23	18 U.S.C. § 116.....	26
24	Or. Laws 2015, ch. 321, §§ 1–6.....	21
25	Or. Laws 2017, ch. 651, § 4.....	26
26	ORCP 47	4, 5, 6, 13
27	ORS 163.207.....	<i>passim</i>
28	ORS 163.700.....	21
29	ORS 163.701.....	21
30	ORS 28.120.....	32
31	ORS 431A.600.....	1, 8, 14, 29

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26

Summary Judgment Opposition – Page viii of 42

1		
2		
3	Dena S. Davis, <i>Male and Female Genital Alteration: A Collision Course with the Law?</i> , 11	
4	HEALTH MATRIX 487 (2001)	14
5	Frederick M. Hodges, <i>The Antimasturbation Crusade in Antebellum American Medicine</i> , 2 J.	
6	SEXUAL MED. 722, 730 (2005)	11
7	Ibrahim Lethome Asmani & Maryam Sheikh Abdi, POPULATION COUNCIL, <i>De-Linking</i>	
8	<i>Female Genital Mutilation/Cutting from Islam</i> (2008), https://doi.org/10.31899/rh14.1025	
9		13
10	<i>Imbalu: Turning Boys into Men Among the Bamasaba</i> , DAILY MONITOR (Jan. 8, 2021),	
11	https://www.monitor.co.ug/uganda/magazines/life/imbalu-turning-boys-into-men-among-	
12	the-bamasaba-1773000	12
13	Jessica A. Clarke, <i>Scrutinizing Sex</i> , 92 U. CHI. L. REV. 1 (2025).....	14
14	<i>Khitān</i> , ENCYC. BRITANNICA (July 11, 2007), https://www.britannica.com/topic/khitan-	
15	Islam#ref137179	13
16	<i>Missouri Couple Charged with Child Abuse over Botched Home Circumcision</i> , NBC News,	
17	https://www.nbcnews.com/news/us-news/missouri-couple-child-abuse-botched-home-	
18	circumcision-rcna183178 (Dec. 6, 2024)	11
19	N.Y.C. Dep’t of Health & Mental Hygiene, <i>Safe Bris</i> ,	
20	https://www.nyc.gov/site/doh/health/health-topics/safe-bris.page	12
21	Pamela Khanakwa, <i>Male Circumcision Among the Bagisu of Eastern Uganda</i> , in DOING	
22	CONCEPTUAL HISTORY IN AFRICA (Axel Fleisch & Rhiannon Stephens eds., 2016)	12
23	Rachel L. Walden et al., <i>Labiaplasty in Minors: Medicalizing Mutilation?</i> , 54 ARCHIVES	
24	SEXUAL BEHAVIOR 95 (2025), https://doi.org/10.1007/s10508-024-03021-1	13
25	Shea Lita Bond, <i>State Laws Criminalizing Female Circumcision: A Violation of the Equal</i>	
26	<i>Protection Clause of the Fourteenth Amendment</i> , 32 J. MARSHALL L. REV. 353 (1999)...	14
	Stanford Med. Newborn Nursery, <i>Complications of Circumcision</i> ,	
	https://med.stanford.edu/newborns/professional-	
	education/circumcision/complications.html	12
	Thomas Healy, <i>Stigmatic Harm and Standing</i> , 92 IOWA L. REV. 417 (2007).....	35
	World Health Org., <i>Female Genital Mutilation</i> (Jan. 31, 2025), https://www.who.int/news-	
	room/fact-sheets/detail/female-genital-mutilation	7

**PLAINTIFFS' BRIEF IN OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

In 1999, Oregon made it a Class B felony to perform medically unnecessary genital cutting on a child—but only if the child is a girl. ORS 163.207. In the same bill, the legislature directed the State to mount emergency education, prevention, and outreach campaigns against the practice—again, only for girls. ORS 431A.600 (together, the “anti-female-genital-cutting or anti-FGC laws”). In sharp contrast, a boy’s genitals may be cut in Oregon without any medical justification at all, and the State imposes no criminal consequences, requires no education, and mounts no outreach campaigns against the practice. “The statutory scheme here attacked is, frankly, a hangover from an earlier era when double standards applying to men and women were more widely accepted.” *State v. Elmore*, 24 Or. App. 651, 655 (1976).

Plaintiffs are three young men who were circumcised as children in Oregon after those statutes took effect. Their claim is simple: Oregon extends the protection of its criminal law to children of one sex and categorically withholds it from the other, in violation of Article I, Section 20, of the Oregon Constitution (“Section 20” or the “Privileges or Immunities Clause”)—which provides that “[n]o 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,” and Article I, Section 46 (“Section 46” or the “Equal Rights Amendment”)—which provides that “[e]quality 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.”

Like the State’s Motion to Dismiss, the State telegraphs the outcome everyone actually wants (and equal protection demands)—the anti-FGC laws protections should be extended to boys. The tells are: (a) the State only defends the anti-FGC laws under the rational-basis test which presumes it applies, not the applicable heightened (or strict) scrutiny test which

Summary Judgment Opposition – Page 1 of 42

requires the State to provide supporting evidence; (b) the State’s rational-basis analysis is entirely based on a legally unsupported tautological fallacy—that the anti-FGC laws do not impermissibly discriminate on the basis of sex because “female genital mutilation” can occur only to females; and (c) that this Court lacks the power to extend the anti-FGC laws to boys, which is not true, while ignoring the concededly available remedy of nullification or other options, such as staying a favorable ruling for Plaintiffs until the legislature has a reasonable opportunity to correct the statutes, as in the Vermont Civil Union Cases. *See, e.g., Baker v. State*, 170 Vt. 194, 226–27 (1999).

II. SUMMARY OF ARGUMENT

The State’s Motion for Summary Judgment’s five fundamental flaws require that summary judgment be denied and this case be set for trial.

First, under Oregon law, sex classifications are inherently suspect and subject to heightened scrutiny. Here, the constitutional question is whether Oregon may protect only girls from medically unnecessary genital cutting while denying the same protection to boys. Such laws are constitutional only if supported by specific biological differences between female and male children. Since the reality is both female genital cutting (“FGC”) and male genital cutting (“MGC”) involve the surgical removal of healthy genital tissue of infants and children without consent, the State bears the burden of showing sufficient biological differences as a prerequisite to the Court applying the rational-basis test.

Second, the State’s *strategic decision to not submit any evidence* to meet its burden under heightened scrutiny implicitly concedes the State cannot meet its burden. Instead, the State focuses on irrelevant non-biological justifications for the sex-based classification while ignoring the proper focus of this litigation: the undisputed severe and ongoing harms to thousands of boys annually in Oregon, who are denied equal protection. Plaintiff’s undisputed expert testimony and competent medical evidence establishes that MGC is not biologically,

1
2 medically, or constitutionally different from FGC. At a minimum, Plaintiffs' evidence
3 generates genuine disputes of material fact requiring a trial on the merits.

4 Third, the State's defense of unequal treatment depends entirely on the improper
5 application of the rational-basis test and the presumption of validity, which would shift the
6 evidentiary burden to Plaintiffs. Once the State's tautology—that the challenged statutes may
7 classify on the basis of sex because "female genital mutilation" can occur only to "females"—
8 is disproven, the Motion must be denied and the case set for trial.

9 Fourth, the constitutionality of the challenged statutes does not depend on which
10 remedy this Court later selects if Plaintiffs prevail. The State's remedial arguments therefore
11 provide no basis for summary judgment. Nevertheless, the State unfairly portrays Plaintiffs as
12 seeking to eliminate legal protections for girls. Nothing could be further from the truth.
13 Plaintiffs seek equal protection for boys, preferably by extending Oregon's existing protections
14 to all children, rather than alternative options such as the Court staying a favorable ruling for
15 Plaintiffs until the Legislature has a reasonable opportunity to also protect boys from genital
16 cutting as in the Vermont Civil Union Cases.¹ Nullification is a last resort, and even if this
17 Court nullified the anti-FGC laws, girls would remain protected by state child-abuse laws and
18 the federal anti-FGC statute. The Court should ignore the State's fearmongering.

19 Finally, the State improperly asks this Court to reconsider its prior standing ruling, even
20 though the Court already ruled that Plaintiffs have standing if discovery confirmed the
21 allegations of the Third Amended Complaint. Discovery did so and the State does not offer
22 any contrary evidence. Because the State identifies no material factual change, the law-of-the-
23 case doctrine strongly disfavors relitigation. Plaintiffs therefore address standing last.

24
25
26

¹ In *Baker v. State*, 170 Vt. 194, 226 (1999), the Vermont Supreme Court held that excluding same sex couples from marriage benefits violated the Vermont constitution's "Common Benefits Clause," but gave the legislature the opportunity to create a parallel legal status with identical benefits, which led to the creation of civil unions.

In short, the Motion fails on every ground the State raises. It asks this Court to treat assumptions as facts, disputed facts as immaterial, and a facial sex classification as constitutional without the evidentiary showing Oregon law requires. The Motion should be denied in its entirety.

III. LEGAL STANDARD

Summary judgment is proper only when the record shows “that there is no genuine issue as to any material fact” and that the moving party “is entitled to prevail as a matter of law.” ORCP 47 C. “No genuine issue as to a material fact exists if, based on the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment.” *Id.* On summary judgment, the court may not weigh competing evidence, draw factual inferences in the moving party’s favor, or resolve credibility: it must review the facts and all reasonable inferences that may be drawn from them in the light most favorable to the nonmoving party. *Bergmann v. Hutton*, 337 Or. 596, 599 (2004).

Oregon’s equal protection provisions are at least as protective as the federal Equal Protection Clause, *City of Klamath Falls v. Winters*, 289 Or. 757, 759 n.10 (1980), and Oregon courts are free to fashion more stringent standards. *Cooper v. Or. Sch. Activities Ass’n*, 52 Or. App. 425, 432 (1981). In a federal challenge alleging a sex classification, the burden of justifying the sex classification “is demanding and it rests entirely on the State,” and “[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation.” *United States v. Virginia*, 518 U.S. 515, 533 (1996), accord *Roe v. Critchfield*, 137 F.4th 912, 922 (9th Cir. 2025).

Sex is a suspect class in Oregon, and sex classifications are held to the same standard as other suspect classifications like race. *Delta Air Lines, Inc. v. Department of Revenue*, 374 Or. 58, 77 (2025) (“Oregon subjects [gender] classifications to the same scrutiny as other ‘suspect’ classifications”). That is a standard of “particularly exacting scrutiny.” *Tanner v.*
Summary Judgment Opposition – Page 4 of 42

1
2 *Or. Health Scis. Univ.*, 157 Or. App. 502, 521–22 (1998) (citing *Hewitt v. SAIF*, 294 Or. 33,
3 45 (1982)). Laws that grant a privilege conditional on membership in a suspect class “may
4 be upheld only if the failure to make the privileges . . . available to that class can be justified
5 by genuine differences between the disparately treated class and those to whom the
6 privileges . . . are granted.” *Id.* at 523. The State thus bears the burden of production and
7 persuasion to show that the sex classification is based on “specific biological differences
8 between men and women,” *Hewitt*, 294 Or. at 46, that are “genuine” and “relate to the
9 governmental purpose.” *Delta Air Line*, 374 Or. at 83 (quoting *Power Co. v. Saunders*, 274
10 U.S. 490, 493–94 (1927) (finding the differences must be “real and substantial”)). If the State
11 fails to produce any admissible evidence of genuine biological differences justifying the sex
12 classification, summary judgment must be denied.

13 IV. ARGUMENT

14 This Court should deny the State’s Motion because there are “genuine issue[s] of
15 material fact,” because the State is not “entitled to prevail as a matter of law,” ORCP 47 C, and
16 because Plaintiffs have standing to pursue these claims.

17 A. The State cannot obtain summary judgment because its biological- 18 differences defense is unsubstantiated, necessarily rests on disputed facts, 19 and is supported only by immaterial assertions.

20 As discussed *infra* Subsection IV.B.1, to justify a sex classification the State must at
21 minimum show that there are “specific biological differences between men and women,”
22 *Hewitt*, 294 Or. at 46, that are “real and substantial” and relevant to the reasons for the
23 classification. *Delta Air Lines*, 374 Or. at 83 (quoting *Saunders*, 274 U.S. at 493–94). So
24 even if some biological difference could in principle justify the classification in Oregon’s
25 anti-FGC laws, whether any differences between the male and female prepuce are “real and
26 substantial,” *id.*, and whether they “reflect” the “reason for the classification,” *Hewitt*, 294
Or. at 46, is a disputed question of material fact.

1
2
3 The State submits no expert testimony or scientific literature suggesting the male and
4 female prepuces differ in a “real and substantial” way to justify disparate treatment. Instead,
5 the State erroneously insists that the “risks, harms, or benefits” of FGC and MGC are
6 “immaterial.”² Def.’s Mot. for Summ. J. (“MSJ”) at 2:18. But the presence or absence of
7 biological differences is at the core of the State’s defense that biological differences exist to
8 justify the sex classification.

9 The few sources the State does cite if anything support Plaintiffs’ position that males
10 and females have materially similar genitals when it comes to genital cutting: the clitoris “is
11 the homologue of the penis,” the labia majora are “the female homolog of the scrotum,” and
12 children of both sexes have a prepuce. MSJ at 26 n.14 (quoting *Stedman’s Medical*
13 *Dictionary*). Children of both sexes are subjected to medically unnecessary genital cutting
14 according to the State’s dictionary, which defines circumcision as occurring in both “males
15 and females.” MSJ at 27 n.15 (quoting *Webster’s Third New Int’l Dictionary*). The State
16 even admits (tucked away in a footnote) that “infibulation” can happen to both boys and girls
17 by “stitch[ing] the labia majora in girls and the prepuce in boys in order to prevent sexual
18 intercourse.” *Id.* (quoting *Webster’s*).

19 On summary judgment, with every reasonable inference drawn in Plaintiffs’ favor, the
20 State cannot say without evidence that there are real and substantial biological differences
21 sufficient to justify laws that admittedly discriminate based on sex. ORCP 47 C; *Bergmann*,
22 337 Or. at 599. Because the State can win only if it shows such biological differences, it has
23 not met its evidentiary burden on summary judgment.

24
25
26 ² Moreover, on March 27, 2026, Plaintiffs provided the State with a proposed set of stipulated facts on the anatomy and effects of genital cutting. On June 16, 2026, the State informed Plaintiffs that “[t]he State’s position is that there are no genuine issues of material fact” and dismissed Plaintiffs’ proposed stipulated facts regarding the substantially similar effects of male and female genital cutting as “immaterial and irrelevant to the issues in the case.” Clopper Decl. at ¶¶ 2–3, Exs. 1–2.

1. Plaintiffs provide undisputed expert testimony to rebut the State’s unsubstantiated claim that sufficient biological differences exist to justify disparate treatment under the challenged statutes.

Because the State submitted no medical evidence showing any biological differences sufficient to support two-tiered protection for the male and female prepuces, summary judgment must be denied on that basis alone. But even if the State submitted such evidence, a genuine dispute of material fact exists because Plaintiffs provide expert testimony and other evidence showing there are no genuine biological differences sufficient to uphold the statutes. *See, e.g.*, Decl. of Christopher J. Cold, M.D. ¶¶ 5–21.; Decl. of Robert Van Howe, M.D, M.S. ¶¶ 8–20; Decl. of Mathias Masem, M.D. ¶¶ 13–29 (“In my professional opinion, I know of no specific biological difference between the male and female prepuces that eliminates the physical injury, permanent anatomical alteration, loss of normal tissue, or need for a sufficient medical justification when preputial tissue is removed from a male child.”).

First, Plaintiffs provide evidence that the human prepuce (in males, the “penile foreskin/prepuce” and in females the “clitoral hood/prepuce”) are homologous structures that share the same embryological origin, histology, and physiological, protective, immunological, sensory, sexual, and lubricative functions. Cold Decl. ¶¶ 5–17; Masem Decl. ¶¶ 15–18; Van Howe Decl. ¶ 8. Second, Plaintiffs’ evidence shows that, when cutting occurs under apples-to-apples circumstances, FGC Type Ia and Type IV have materially similar effects on female victims as circumcision has on male victims. Masem Decl. ¶ 20 (“Removal of the clitoral prepuce and removal of the penile prepuce are therefore comparable at the level most relevant to surgical judgment”); Van Howe Decl. ¶ 8. The World Health Organization classifies FGC by severity. *See* World Health Org., Female Genital Mutilation (Jan. 31, 2025), <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation>.

Type	Name	Description
Type Ia	Female circumcision	“Removal of the prepuce/clitoral hood only.”
Type Ib	Clitoridectomy	“Removal of the clitoral glans with the prepuce/clitoral hood.”
Type II	Excision	“Partial or total removal of the clitoral glans and the labia minora . . . , with or without removal of the labia majora.”
Type III	Infibulation	“(Often referred to as infibulation). Narrowing of the vaginal opening with the creation of a covering seal.”
Type IV	E.g., “Ritual/ceremonial nick”	“All other harmful procedures to the female genitalia for non-medical purposes, for example pricking, piercing, incising, scraping and cauterization.”

Relevant here is FGC Type Ia or “female circumcision,” removal of the clitoral prepuce only, and FGC Type IV, which includes mere pricking. Oregon’s anti-FGC laws prohibit both. *See* ORS 163.207 and 431A.600 (prohibiting “circumcis[ing]” or “excis[ing] . . . any part of the labia” and mandating outreach efforts for “female circumcision” and “excision”). Plaintiffs’ experts opine that removing the penile prepuce has consequences for males that are materially the same as the consequences for females of removing the clitoral prepuce, and worse than pricking the clitoral glans. Masem Decl. ¶ 20; Van Howe Decl. ¶ 8. As the American Academy of Pediatrics has recognized, “[s]ome forms of FGC are less extensive than the newborn male circumcision commonly performed in the West.” AM. ACAD. PEDIATRICS, *Ritual Genital Cutting of Female Minors*, 125 PEDIATRICS 1088, 1089 (2010), <https://doi.org/10.1542/peds.2010-0187>.

1
2
3 Finally, Plaintiffs' experts opine that male circumcision performed on healthy children
4 violates established bioethical principles, as does FGC. Cold Decl. ¶ 6; Masem Decl. ¶¶ 8–
5 13, 24; Van Howe Decl. ¶ 18.

6 In summary, the State has provided no evidence showing material biological
7 differences between the prepuce in males and females, while Plaintiffs provide substantial
8 biological evidence in the form of expert testimony that they are the same in all material
9 respects with regard to genital cutting. Cold Decl. ¶¶ 5–21; Masem Decl. ¶¶ 13–29; Van
10 Howe Decl. ¶¶ 8–20. At a minimum, there is a dispute of material fact as to whether there
11 are any differences sufficiently “real and substantial” to justify the State’s disparate legal
12 treatment of boys and girls under Section 20. *Delta Air Lines*, 374 Or. at 83 (quoting
13 *Saunders*, 274 U.S. at 493–94). Indeed, Section 46 likely requires equal legal treatment even
14 where the relevant anatomy is indisputably different. *See In re Parentage of Schnitzer*, 312
15 Or. App. 71, 108 (2021) (Mooney, J., concurring) (finding Section 46 likely requires equal
16 legal treatment of sperm and egg donors), discussed *infra* Subsection IV.B.2(c). Since the
17 State provides no evidence establishing that the prepuce in males and females differs in any
18 biologically relevant respect that would justify the sex classification, and Plaintiffs provide
19 substantial evidence that male and female genital anatomy warrant the same treatment with
20 regard to medically unnecessary genital cutting, the Court must deny the Motion.

21 **2. The State makes several immaterial factual claims that Plaintiffs**
22 **nevertheless dispute.**

23 The Court should ignore the State’s many immaterial factual assertions as irrelevant
24 to the dispositive issues of Plaintiffs’ Section 20 and 46 claims: namely, whether there are
25 real and substantial biological differences between males and females that justify disparate
26 treatment under the Oregon Constitution. The State attempts to justify its sex-specific
treatment by asserting that FGC: (a) is performed to control girls’ sexuality, purity, and
marriageability; (b) is commonly carried out by untrained practitioners under primitive

conditions and without anesthesia, causing serious medical complications; and (c) is a cultural practice not required by religion. MSJ at 4–5, 27–29. Those assertions are immaterial because none identifies a *biological* difference relevant to the challenged sex classification. They are also disputed and, even if accepted, do not meaningfully distinguish FGC from male circumcision. Plaintiffs address each assertion in turn.

(a) Sexist Motives for FGC

The State argues that FGC is sometimes performed to control girls’ sexuality so therefore deserves special condemnation over male circumcision. MSJ at 2, 5, 27–29. That assertion is immaterial to Plaintiffs’ claims because motives of FGC practitioners are not a “specific *biological* difference[] between men and women.” *Hewitt*, 294 Or. at 46 (emphasis added). Instead, those motives are grounded in the very “social or political premises” and “stereotypes” that Oregon law says are insufficient to sustain a sex classification. *Id.* at 45–47. “[A] statutory classification relying on gender as legislative shorthand for dependency is the kind of stereotype that cannot withstand an article I, section 20 challenge.” *Id.* at 47. The anti-FGC laws embody both the stereotype that boys are unlikely victims of gender-based violence, and the stereotype that girls are especially dependent on the state for protection from gender-based violence. In reality, minors of both sexes are vulnerable to genital cutting.

Moreover, FGC is not unique from male circumcision in its sexist motivations. Male circumcision has been performed since ancient times to control boys’ sexuality. For example, preeminent rabbi Maimonides observed roughly 900 years ago that the purpose of circumcision is to reduce sexual pleasure to control male sexuality.³ In the modern era, American physicians long promoted routine circumcision specifically to control boys’

³ MOSES MAIMONIDES, THE GUIDE FOR THE PERPLEXED pt. III, ch. 49 (Michael Friedländer trans., 2d ed. 1904), https://oll.libertyfund.org/titles/friedlaender-a-guide-for-the-perplexed#lf0739_head_245 (finding circumcision’s object “is to limit sexual intercourse, and to weaken the organ of generation as far as possible” to “perfect[] man’s moral shortcomings,” and that “there is no doubt that circumcision . . . lessens the natural enjoyment”).

sexuality—to prevent them from masturbating.⁴ And to this day, parents routinely elect circumcision to make their sons’ genitals more “aesthetic” and “hygienic” for future sexual partners. One study found that “the mother’s ideal male partner’s circumcision status for intercourse” “correlated strongly” with her decision to circumcise her son.⁵ So even if motives were relevant, they do not distinguish FGC from male circumcision.

(b) Prevalence of Traditional or “Primitive” Cutting

The State argues FGC and male circumcision can be treated differently because FGC is often performed “in primitive circumstances” by untrained practitioners and without anesthetic. MSJ at 5. That argument is irrelevant because ORS 163.207 prohibits even cutting by trained physicians in hospitals. And the premise that FGC is different in this way is false because male circumcision continues to be performed “in primitive circumstances” by laypeople in the U.S. and abroad.⁶ For example, in 2024, an untrained Missouri couple “used a utility tool” to cut off their son’s foreskin at home; the father “had conducted research and prayed a blessing.”⁷ In another case, a Washington man “who had no medical training” placed his eight-year-old son “in a dirty bathtub,” “attempted to remove the boy’s foreskin with a hunting knife,” and “attempted to control the bleeding with an animal wound cauterizing powder.” *State v. Baxter*, 141 P.3d 92, 94 (Wash. Ct. App. 2006). And in New York City, several infants have died following traditional circumcision rituals requiring

⁴ See, e.g., Frederick M. Hodges, *The Antimasturbation Crusade in Antebellum American Medicine*, 2 J. SEXUAL MED. 722, 730 (2005) (“[C]ircumcision in the United States became the most common medical method of controlling masturbation.”).

⁵ Christian G. Guevara et al., *Neonatal Circumcision: What Are the Factors Affecting Parental Decision?*, CUREUS, at 4 (2021), <https://doi.org/10.7759/cureus.19415>.

⁶ To Plaintiffs’ knowledge, Oregon has never brought a case under its anti-FGC laws. The only federal prosecution for performing FGC in the U.S. was the 2017 *Nagarwala* case, in which a licensed doctor was indicted for performing FGC in a clinic. See *United States v. Nagarwala*, 350 F. Supp. 3d 613 (E.D. Mich. 2018).

⁷ *Missouri Couple Charged with Child Abuse over Botched Home Circumcision*, NBC News, <https://www.nbcnews.com/news/us-news/missouri-couple-child-abuse-botched-home-circumcision-rcna183178> (Dec. 6, 2024).

direct oral suction of the circumcision wound.⁸ *See also* Van Howe Decl. ¶ 17 (stating male child circumcision is often performed with no or ineffective anesthesia). None of these incidents triggered special criminal liability beyond generally applicable child-abuse law, and none prompted any education or outreach campaign to “send[] the message” that this gender-based abuse of boys “is not acceptable in Oregon.”⁹

Abroad, traditional mass male circumcision rituals remain a human-rights problem. In the Ugandan *Imbalu* ritual for example, hundreds of boys are gathered in the village center and cut with unsterilized blades: “the candidates are expected to stand firm as a sign of courage and boldness,” and “the candidate’s ability to withstand pain . . . is a signifier of his manhood and masculine status.”¹⁰ That gender-based expectation imposed on boys warrants the same condemnation, education, and outreach the State reserves for FGC, lest such rituals be imported to Oregon.

Traditional and at-home circumcisions produce the same adverse health consequences that the State fears for FGC—“infections,” “pain during urination . . . and sexual intercourse,” “cysts,” “brain damage,” and “death.”¹¹ MSJ at 5; *see* Van Howe Decl. ¶¶ 16–20 (discussing pain, risks, and harm of male child circumcision); Masem Decl. ¶¶ 7, 25. Nor is it any defense that complications of traditional male circumcision can be mitigated by

⁸ *Controversial Circumcision Ritual Led to Infant’s Death from Herpes, Says Death Certificate*, CBS News (March 7, 2012), <https://www.cbsnews.com/news/controversial-circumcision-ritual-led-to-infants-death-from-herpes-says-death-certificate/>.

⁹ Testimony of Lynn D. Partin, Women’s Rights Coalition, H. Judiciary-Crim. Comm., H.B. 3608, Apr. 28, 1999 [Clopper Decl. ¶ 9, Ex. 8].

¹⁰ *Imbalu: Turning Boys into Men Among the Bamasaba*, DAILY MONITOR (Jan. 8, 2021), <https://www.monitor.co.ug/uganda/magazines/life/imbalu-turning-boys-into-men-among-the-bamasaba-1773000>; Pamela Khanakwa, *Male Circumcision Among the Bagisu of Eastern Uganda*, in *DOING CONCEPTUAL HISTORY IN AFRICA* 115 (Axel Fleisch & Rhiannon Stephens eds., 2016).

¹¹ N.Y.C. Dep’t of Health & Mental Hygiene, *Safe Bris*, <https://www.nyc.gov/site/doh/health/health-topics/safe-bris.page> (last visited Aug. 4, 2026) (warning a traditional circumcision ritual can cause babies to get “brain damage, develop a lifelong disability or, in some cases, die”); Stanford Med. Newborn Nursery, *Complications of Circumcision*, <https://med.stanford.edu/newborns/professional-education/circumcision/complications.html> (last visited Aug. 4, 2026) (listing complications including “cysts,” “amputation,” and “death”).

better training and standards—the same is true of traditional FGC, especially given how common cosmetic clitoral hood reduction and labiaplasty surgery has become in the United States, including on minor females.¹²

(c) Differences in Religious Doctrine

The State is flatly wrong when it asserts that “FGM is a cultural practice, and no religion requires it.” MSJ at 5. All four principal schools of Sunni Islam for example regard FGC as permissible, honorable, or obligatory.¹³ Under U.S. Supreme Court precedent, this Court in a free exercise case could not second-guess the genuinely held religious beliefs of an FGC practitioner. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724–25 (2014). Regardless, this is not a free exercise case, so the religious status of FGC—or of male circumcision—only serves to distract from Plaintiffs’ equal protection claims.

B. The State is not entitled to prevail as a matter of law because Oregon’s anti-FGC statutes violate the Oregon Constitution, and Plaintiffs’ extension remedy is within the Court’s power.

Even if there were no genuinely disputed material facts, the State has not shown it is “entitled to prevail as a matter of law” on any claim or legal issue. ORCP 47 C. Nor could it. The State repeatedly admits that the legislature intended a sex-based classification. By its own telling, “[t]he legislature intended the anti-FGM laws to be sex-specific.” MSJ at 28. It repeats that point throughout: “[T]he legislature intended only to prohibit and deter the sex-specific practice of FGM.” MSJ at 27. “[I]t sought to prevent and prohibit young girls from being subjected to female genital mutilation.” *Id.* The bill’s proponents considered the problem of genital cutting “only as to young girls.” MSJ at 27–28. “The anti-FGM laws, by

¹² See Rachel L. Walden et al., *Labiaplasty in Minors: Medicalizing Mutilation?*, 54 ARCHIVES SEXUAL BEHAVIOR 95 (2025), <https://doi.org/10.1007/s10508-024-03021-1>.

¹³ Ibrahim Lethome Asmani & Maryam Sheikh Abdi, POPULATION COUNCIL, *De-Linking Female Genital Mutilation/Cutting from Islam* 13–14 (2008), <https://doi.org/10.31899/rh14.1025>; accord *Khitān*, ENCYC. BRITANNICA (July 11, 2007), <https://www.britannica.com/topic/khitan-Islam#ref137179>.

their terms, provide a privilege to female minors—a protection from FGM—that is not extended to males.” MSJ at 30. Simply put, “the anti-FGM laws . . . favor one class.” MSJ at 22. These admissions establish that the laws intentionally classify on the basis of sex and thus are subject to heightened scrutiny. The State makes no effort to satisfy heightened scrutiny, so its defense to Plaintiffs’ constitutional claims cannot prevail as a matter of law.

That result is consistent with a growing body of legal and bioethical scholarship on the specific issue of whether anti-FGC laws violate equal protection principles. Commentators warn that “state laws criminalizing genital alteration on female minors are so broad that they cover even procedures significantly less substantial than newborn male circumcision”¹⁴—and that they do so “no matter how minimal the surgery or how safe and sanitary the procedure,” raising “troubling implications for the constitutional requirement of equal protection.”¹⁵ Oregon’s anti-FGC laws can be brought into compliance only by extending the statutory protection to boys, which one commentator recommends, or invalidating the female-only prohibition.¹⁶

Finally, the State’s contention that this Court lacks the power to extend Oregon’s anti-FGC laws is both incorrect as a matter of law and irrelevant at summary judgment.

1. The challenged statutes violate Article I, Section 20 of the Oregon Constitution.

The State does not dispute that ORS 163.207 and 431A.600 discriminate based on sex. MSJ at 30 (“The anti-FGM laws grant a privilege to one class, female minors.”). Instead, it

¹⁴ See, e.g., Shea Lita Bond, *State Laws Criminalizing Female Circumcision: A Violation of the Equal Protection Clause of the Fourteenth Amendment*, 32 J. MARSHALL L. REV. 353 (1999); Dena S. Davis, *Male and Female Genital Alteration: A Collision Course with the Law?*, 11 HEALTH MATRIX 487 (2001); Jessica A. Clarke, *Scrutinizing Sex*, 92 U. CHI. L. REV. 1, 84 (2025).

¹⁵ Davis, *supra* note 14, at 488; see also Brendon Marotta, *FGM ‘Ritual Nick’ Policy Author Says AAP Wrong to Retract Statement*, HEGEMON MEDIA (June 23, 2026), <https://www.hegemonmedia.com/p/fgm-ritual-nick-policy-author-says>.

¹⁶ Bond, *supra* note 14, at 380.

argues that the unequal classification is permissible because only girls can undergo a procedure named “female genital mutilation.” *See, e.g.*, MSJ at 27, 34, 37, 39. That is a state-law revival of *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974), which infamously held that excluding pregnancy-related conditions from disability coverage was not sex discrimination—reasoning the Supreme Court relied on in *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 215, 236 (2022) (“The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a ‘mere pretext[t] designed to effect an invidious discrimination against members of one sex or the other.’”), and in *United States v. Skrametti*, 605 U.S. 495, 517 (2025). But *Geduldig* has been condemned for half a century. As Justice Sotomayor’s *Skrametti* dissent recounted, *Geduldig* was “‘egregiously wrong’ when it was decided,” and it remains “widely rejected as indefensible even 40 years ago.” *Skrametti*, 605 U.S. at 599–600 (Sotomayor, J., dissenting) (quoting *Coleman v. Court of Appeals of Maryland*, 566 U.S. 30, 57 (2012) (Ginsburg, J., dissenting)).

Even assuming that *Geduldig* retains force as a matter of federal constitutional law, it does not control in this case. First, the Oregon Department of Justice itself rejected *Geduldig*’s logic. In *Skrametti*, the Oregon Attorney General joined an amicus brief arguing that “[a]ll gender-based classifications today warrant heightened scrutiny” and that “[b]ans on gender-affirming care necessarily classify on the basis of sex” because, to determine whether the statute applies, “one must know the adolescent’s sex.” *Brief for California et al. as Amici Curiae Supporting Petitioner* at 14, *United States v. Skrametti*, No. 23-477 (U.S. Sept. 3, 2024) (internal quotation marks omitted), Clopper Decl. ¶ 7, Ex. 6. The same is true here. Whether ORS 163.207 prohibits genital cutting depends entirely on the child’s sex. One cannot determine whether the statute applies without first determining whether the child is male or female. The State should be held to the same constitutional standard it urged that the U.S. Supreme Court adopt in its *Skrametti* amicus brief. *Id.*

Second, neither *Geduldig* nor its progeny control the Oregon Constitution. The Supreme Court of Oregon has expressly “decline[d] the opportunity to adopt the present standards of the United States Supreme Court’s opinions” for “gender-specific statute[s],” citing *Geduldig* as an example of the “inconsistency of results” the federal cases produce. *Hewitt*, 294 Or. at 41–42 & n.6. Section 20 charts its own course, and under it the State’s *Geduldig*-style defense fails for three independent reasons: (a) it collapses heightened scrutiny into rational-basis review; (b) it fails even to meet rational-basis review; and (c) it relies on circular logic.

(a) The State collapses “particularly exacting scrutiny” into rational-basis review and makes no attempt to satisfy heightened scrutiny.

Section 20 “prevents the enlargement of rights” and “the granting of special privileges for a select few.” *Hewitt*, 294 Or. at 42. Sex is a suspect class in Oregon, and “[c]lassifications based on sex must have a ‘close and substantial relationship to important governmental objectives,’” *Hewitt v. SAIF*, 54 Or. App. 398, 402 (1981) (quoting *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 273 (1979)), *aff’d*, 294 Or. 33 (1982). That is a standard of “particularly exacting scrutiny.” *Tanner v. Oregon Health Sciences University*, 157 Or. App. 502, 521–23 (1998) (citing *Hewitt*, 294 Or. at 45–46); *accord Kramer v. City of Lake Oswego*, 365 Or. 422, 455–56 (2019). A sex classification’s “suspicion may be overcome if the reason for the classification reflects specific biological differences between men and women,” *Hewitt*, 294 Or. at 46—differences that must, at minimum, be “real and substantial.” *Delta Air Lines*, 374 Or. at 83 (quoting *Saunders*, 274 U.S. at 493–94).

The State’s faulty reading of *McIntyre v. Crouch* flips that framework upside down. *McIntyre* proposed a two-prong test:

A statute that gives a privilege to women while denying it to men is inherently suspect and subject to strict scrutiny, unless the classification (1) is based on specific biological

1
2 differences between men and women and (2) is rationally related to the purposes of the
3 statute.

4 98 Or. App. 462, 469 (1989) (citing *Hewitt*, 294 Or. at 46). The *McIntyre* court found “the
5 classification of unmarried males and unmarried females” was “based on biological
6 differences” because “[o]nly a male could contribute the sperm to accomplish conception,”
7 and “only a female could conceive and bear the child.” *Id.* at 469–70 (emphasis added). That
8 distinction alone is fatal. Unlike conception, both males and females are capable of having
9 their prepuce cut off or pricked. And unlike Plaintiffs, the State has submitted no medical
10 evidence of “real and substantial” differences between the male and female prepuce that
11 would justify protecting one organ but not the other. *Delta Air Lines*, 374 Or. at 83. *But see*
12 Cold Decl. ¶ 6 (“There are no differences between the prepuce in the male and female that
13 warrant denying [equivalent] protection”); Masem Decl. ¶ 22–24 (finding “I know of no
14 specific biological difference between the male and female prepuces” that justifies different
15 treatment); Van Howe Decl. ¶ 8. Because the State bears the burden of justifying a sex
16 classification, and the State has produced no evidence to meet its burden while Plaintiffs
17 produce ample rebuttal evidence, the Court must deny the State’s Motion on the Section 20
18 claim.

19 The State’s reading would drain Section 20’s heightened scrutiny of any force. Under
20 its proposed test, once the State identifies some biological difference between males and
21 females, the resulting sex classification survives so long as it is rationally related to the
22 statute’s purpose. That is merely rational-basis review in another form, allowing the State to
23 discriminate without meaningful scrutiny. The threshold biological-differences inquiry
24 instead asks whether the particular difference is real, relevant, and substantial enough to
25 justify the unequal treatment.

26 Pregnancy illustrates the flaw. Under the State’s approach, Oregon could deny
insurance coverage for pregnancy-related conditions (as in *Geduldig*) merely because

pregnancy is a biological difference and the exclusion bears some rational relationship to cost control. But Section 20 does not permit the State to evade heightened scrutiny simply by describing the subject of regulation in sex-specific biological terms.¹⁷

Federal equal protection doctrine reaches the same result. Even under the less demanding federal intermediate standard, the burden of justifying a sex classification “is demanding and it rests entirely on the State,” and “[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation.” *Virginia*, 518 U.S. at 533. The State’s justification here is precisely a litigation construct: an attorney-drawn comparison between the worst forms of FGC, MSJ at 4–5, and an idealized and medicalized form of male circumcision, supported by no expert declaration or medical literature.

Nor could the State satisfy Oregon’s heightened scrutiny if it tried. The characteristic that matters—a child’s vulnerability to medically unnecessary genital cutting—is the same for all children: male, female, or intersex. Because the male and female prepuces lack real and substantial biological differences, the State must show a sufficiently compelling justification to protect the female prepuce over the male prepuce. The State has advanced no such justification. Plaintiffs, however, provide competent and *undisputed* expert testimony and evidence that the male and female prepuce have no biological difference that would justify protecting female children from medically unnecessary genital cutting while withholding that protection from male and intersex children. Cold Decl. ¶ 6; Masem Decl. ¶ 22–24 (“The same surgical principles apply to an intersex child.”); Van Howe Decl. ¶ 8.

¹⁷ Oregon courts even read Section 20 as prohibiting sexual orientation discrimination. *Tanner*, 157 Or. App. at 523–24. So the State’s narrow view of Section 20 is at war with Oregon law.

(b) Even under rational-basis review, the sex classification is invalid because the State failed to show “genuine differences” relevant to genital cutting.

Even if rational-basis review applied, the State could not satisfy it. Having cited no medical evidence of differences between the male and female prepuce in the context of genital cutting, the State urges that differences in nomenclature alone justify protecting girls only. But per the State’s own authority, “the rational basis test requires more than identifying *some* difference between the classes.” *Delta Air Lines*, 374 Or. at 83 (emphasis in original). Rather, “equal protection requires ‘that the classification be not arbitrary but based on a *real and substantial difference* having a reasonable relation to the subject of the particular legislation.’” *Id.* (quoting *Power Co. v. Saunders*, 274 U.S. 490, 493–94 (1927)) (emphasis added); *see also id.* (“A classification is not valid merely because some difference between the classes exists; those differences must somehow relate to the governmental purpose.”). In a word, the classes must have “genuine differences.” *Id.*

The State has shown no “genuine differences” in biology between the male and female prepuce bearing “a reasonable relation” to the “governmental purpose” of reserving genital-cutting protection for girls only. *Delta Air Lines*, 374 Or. at 83. Moreover, the governmental purpose itself must be “legitimate.” *Id.* at 78. Limiting protection against medically unnecessary genital cutting to one sex of children is not a legitimate governmental purpose where, as here, the State admits that the legislature’s discrimination was intentional. MSJ at 28 (“The legislature intended the anti-FGM laws to be sex-specific.”). Even under *Geduldig*, sex classifications premised on anatomical differences are invalid if based on animus. *See* 417 U.S. at 496 n.20.

(c) The State’s “sex-specific practice” argument is circular.

The State argues that the sex classification is constitutional because FGC is “a harmful practice that only happens to females”—a “female-anatomy-specific practice.” MSJ at 21–

22. But “female genital mutilation” is, by definition, genital cutting performed on a female. That is simply the classification itself restated as its own defense.

The flaw is apparent by analogy. “Femicide” is the killing of a woman or girl. On the State’s logic, because only females can by definition be victims of femicide, a statute punishing only the murder of women would rest on “specific biological differences between men and women.” *Hewitt*, 294 Or. at 46. In reality, femicide is just a form of homicide; the victim’s sex does not transform the underlying harm, so a state cannot create special homicide protections based only on the sex of the victim, let alone leave masculicide unpunished. So too here: the underlying conduct is the medically unnecessary cutting of a child’s genitals, and the tissue’s sex does not change the act. To justify the classification, the State must show that cutting (or pricking) the clitoral prepuce is sufficiently more harmful than cutting off the penile prepuce that the Oregon Constitution permits criminalizing the former alone. The State has not done that.

Tellingly, the State analogizes genital cutting to “pregnancy and lactation.” MSJ at 34. But gestation and lactation are biological functions that separate the sexes by definition; prepuce cutting or pricking is not—both sexes can and do undergo it. A better comparison is nipple piercing, which Oregon restricts equally for minor boys and girls.¹⁸ Oregon could not ban piercing of the female nipple alone by declaring “female nipple mutilation” a “female-anatomy-specific practice.” MSJ at 22. It would at least need evidence that the female procedure differs in “real and substantial” ways to justify protecting girls but not boys. *Delta Air Lines*, 374 Or. at 83 (quoting *Saunders*, 274 U.S. at 493–94). The same is true here.

Another example is Oregon’s invasion-of-privacy statute, which criminalizes surreptitiously photographing another person without consent when he or she expects

¹⁸ OAR 331-900-0100 (“Piercing is prohibited . . . [o]n the genital or nipple of a person younger than 18 years of age regardless of parental consent”). To underscore Plaintiffs’ case, Oregon law prohibits piercing a boy’s “frenum [or] foreskin,” OAR 331-905-0000, but permits amputation of that anatomy for no medical purpose.

1
2 privacy. ORS 163.700–163.701. The same Women’s Rights Coalition that lobbied for
3 Oregon’s anti-FGC bills lobbied for the invasion of privacy bills, characterizing secret
4 photography as an especially female-specific experience. *See* Testimony of Marcia Latta,
5 Women’s Rights Coalition, S. Comm. on Crime & Corrections, S.B. 1076, Apr. 28, 1997
6 [Clopper Decl. ¶ 10, Ex. 9]. Nevertheless, the enacted statute is sex-neutral because both
7 males and females are capable of having their bodies secretly photographed. The legislature
8 followed the same pattern in 2015 when it confronted “upskirting”—the practice of
9 surreptitiously photographing up a skirt. Despite upskirting being almost exclusively a threat
10 to women and girls, the 2015 amendment was also sex-neutral, protecting “another *person’s*
11 intimate area” from secret photography. Or. Laws 2015, ch. 321, §§ 1–6 (HB 2596); ORS
12 163.700(1)(b). The sex-neutral language in these laws addressing largely female-specific
13 issues shows how aberrant Oregon’s anti-FGC laws are, and it perhaps indicates legislative
14 recognition that a sex-specific invasion-of-privacy statute would be unconstitutional.

15
16 **2. The challenged statutes violate Article I, Section 46 of the Oregon
Constitution.**

17 The State’s arguments under Section 46 all rest on the mistaken premise that Section
18 46 prohibits only laws that disadvantage one sex. The text says no such thing. It forbids the
19 State from “deny[ing] or abridg[ing] equality of rights on account of sex.” Or. Const. art. I,
20 § 46(1). To “abridge” means to “reduce or diminish.” *Abridge*, Black’s Law Dictionary (12th
21 ed. 2024). By banning only one form of genital cutting “on account of sex,” Oregon has put
22 males and females on unequal footing, reducing and diminishing the state of “equality” the
23 sexes previously enjoyed, in violation of Section 46.

24
25 **(a) Section 46 constitutionalized Section 20’s prohibition on sex
classifications.**

26 Oregon voters adopted Section 46, also called the Equal Rights Amendment (“ERA”),
in 2014 to constitutionalize the gloss Oregon courts had already developed for Section 20:

that sex is a suspect class and facial sex classifications are inherently suspect unless justified by specific biological differences. *See Hewitt*, 294 Or. at 45–46; *Tanner*, 157 Or. App. at 521–23. Ballot Measure 89 told voters that “The Oregon Supreme Court has held that [Section 20] prohibits laws treating people differently based on sex unless justified by specific biological differences,” but that “[n]o current provision in the constitution expressly states that prohibition.”¹⁹ Thus, Section 46 was presented to voters as a way of codifying the existing judicial gloss on Section 20 into Oregon’s Constitution. There is nothing “ambiguous,” MSJ at 32, about what Measure 89 was doing. So anything that violates Section 20 therefore also violates Section 46 because Section 46 codified the judicial interpretation of Section 20.²⁰

The State’s own brief concedes that Section 46 goes at least as far as Section 20 at prohibiting sex discrimination: the Measure history “demonstrates that the ERA is at least as protective as the Privileges and Immunities Clause,” and the arguments in favor “suggest that the ERA goes further”—promising “a higher level of protection against sex discrimination than we have now.” MSJ at 33 (quoting Morrow Decl. Ex. 5, at 7) (emphasis added). An ERA that prohibits only laws disadvantaging one sex, as the State suggests, would not “go further” than Section 20, because Section 20 already prohibits any sex classification, whether it disadvantages one sex or favors the other. *See State v. Borowski*, 231 Or. App. 511, 519–20 (2009).

That concession is fatal to the State’s threshold argument that Section 46 “does not apply” to the anti-FGC laws just because they “favor one class.” MSJ at 22, 30. On the State’s theory, Sections 20 and 46 occupy entirely separate domains—Section 20 polices privileges,

¹⁹ Oregon Measure 89, Equal Rights for Women Amendment (2014), Ballotpedia, [https://ballotpedia.org/Oregon_Measure_89,_Equal_Rights_for_Women_Amendment_\(2014\)](https://ballotpedia.org/Oregon_Measure_89,_Equal_Rights_for_Women_Amendment_(2014)) (last visited Aug. 4, 2026).

²⁰ *Id.*

Section 46 polices only burdens—so a law framed as a “privilege” to girls escapes Section 46 entirely. That reading is implausible. First, it misrepresents the scope of Section 20 as it existed in 2014. Far from being a mere “leveling provision aimed at prohibiting laws that confer special benefits,” “section 20 . . . ha[d] for many years [also] served as the state constitutional analog to the federal Equal Protection Clause, prohibiting legislation that imposes burdens on a historically oppressed minority.” *Borowski*, 231 Or. App. at 519–20. That latter function is the very function the State claims is exclusive to Section 46. So the bright-line distinction the State draws between Sections 20 and 46 is belied by Oregon law.

Second, the State’s siloed reading is inconsistent with Section 46’s express purpose: placing the judicial rule developed under Section 20 into the Oregon Constitution. Before Measure 89, the protection recognized in *Hewitt* and *Tanner* rested on judicial precedent rather than constitutional text. Measure 89 placed that protection in the Oregon Constitution itself. If Section 46 does not overlap with and reinforce Section 20, then nothing but stare decisis would stop a future court from reinterpreting Section 20 to permit the very sex classifications the State defends. Eliminating that vulnerability was the point of Measure 89: to place the guarantee of sex equality into the Oregon Constitution so it could not be undone by future courts. *See* MSJ at 33 & n.16 (measure history described Section 46 as an “express” constitutional prohibition). The State’s non-overlap theory would hand back to judges the very power the people took away.

Plaintiffs’ reading is well-supported by scholarship on the federal ERA proposal, which the State says “is nearly identical” to Section 46. MSJ at 35. Scholars have explained that the federal ERA would have forbidden extending special privileges to women—precisely what the State admits these statutes do. Barbara A. Brown, Thomas I. Emerson, Gail Falk & Ann E. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 904 (1971) (“In equal protection theory, . . . where the courts determine that the purpose of the differentiation is to benefit members of

Summary Judgment Opposition – Page 23 of 42

1
2 the minority race . . . they are likely to find there are ‘compelling reasons’ for the special
3 treatment. Such an approach would not be permissible under the Equal Rights Amendment.”
4 (internal citation omitted)); MSJ at 30 (“The anti-FGM laws grant a privilege to one class,
5 female minors.”).

6 The State also argues Section 46 is inapplicable because it bars only limits on “rights,”
7 whereas protection of bodily integrity and autonomy is merely a “privilege” in the State’s
8 view. MSJ at 30. But proponents and opponents of the federal ERA agreed “that the term
9 ‘rights’ [as used in the ERA] includes all forms of privileges, immunities, benefits and
10 responsibilities of citizens.” Brown et al., *supra*, at 908. Thus, if Section 46 is based on the
11 federal ERA, it likewise prohibits extending “privileges” or “benefits” to one sex but not the
12 other.

13
14 **(b) Section 46 embodies an anti-classification principle: sex-
based lines are forbidden regardless of which sex they favor.**

15 Under either Section 46 or Section 20, the constitutional vice is the sex classification
16 itself. Oregon law has never conditioned scrutiny on which sex the classification favors:
17 *Hewitt* expanded a statute that granted survivor benefits to women but not similarly situated
18 men because the privilege was “bestowed or withheld solely on the basis of gender.” 294 Or.
19 at 42–43, 49–50, 54. The State’s privilege/burden dichotomy seeks to resurrect a pre-*Hewitt*
20 regime in which the government may draw sex lines freely so long as it calls them privileges.
21 But granting special privileges to only one class is the epitome of unequal treatment. The
22 anti-FGC statutes “provide a privilege to female minors.” MSJ at 30. That necessarily means
23 they deny male minors equal protection “on account of sex.” Or. Const. art. I, § 46(1). By
24 enacting the anti-FGC statutes, Oregon has unbalanced the “equality of rights” Section 46
25 guarantees.

26 Consider an egregious hypothetical to drive the point home: a law providing that “all
women may vote twice for Governor” grants a privilege to women. On the State’s reading,

1
2 such a law would not offend Section 46 at all because it grants a privilege—a plaintiff could
3 proceed only under Section 20. But it is beyond peradventure that Oregon voters
4 contemplated that Section 46—which “is at least as protective as” Section 20—would also
5 reach such a law. MSJ at 33 (quoting Morrow Decl. Ex. 5, at 7).

6
7 **(c) The supposed “characteristic unique to one sex” exception**
8 **to Section 46 is meritless.**

9 The State’s fallback—that Section 46 apparently tolerates laws addressing a
10 “characteristic unique to one sex,” MSJ at 31, 34—also fails. First, the State admits there is
11 no Oregon precedent supporting this proposed exception. MSJ at 29. Second, its premise is
12 inapplicable, because unlike pregnancy and lactation, vulnerability to genital cutting is not a
13 “characteristic unique to one sex.” The State admits children of both sexes have homologous
14 genitalia, including a prepuce, and children of both sexes are cut. *See supra* Subsection
15 IV.A.1. Whatever room Section 46 leaves for laws regulating sex-specific procedures, this
16 is not such a law.

17 Third, the State resorts to cases from Washington, MSJ at 35–36, even though
18 Oregon’s own courts have already suggested that even *genuine* reproductive differences do
19 not justify different treatment under Section 46. Sperm and egg cells are about as biologically
20 distinct as two components of human reproduction can be: different cells, produced in vastly
21 different quantities, harvested by procedures of vastly different invasiveness. Yet Oregon
22 courts have indicated that Section 46 requires treating even male sperm donors and female
23 egg donors identically:

24 SB 512 . . . modernized Oregon’s outdated paternity and artificial insemination
25 statutes, making them inclusive and gender neutral. . . . It treats male and female
26 gamete donors the same with respect to children born using donated reproductive cells.
Moreover, **SB 512 accomplishes by its express terms what Section 46 already
required—equal treatment of male and female gamete donors under the law.** In
other words, SB 512 made clear what the Oregon Constitution already required in the
context of [assisted reproduction technology].

In re Parentage of Schnitzer, 312 Or. App. 71, 108 (2021) (Mooney, J., concurring) (emphasis added), *aff'd in part, rev'd in part sub nom. In re Parentage of S.D.S.*, 371 Or. 573 (2023); *see S.D.S.*, 371 Or. at 599 n.6 (leaving the Section 46 point undisturbed). The State resorts to Washington case law when *Schnitzer* is persuasive in this jurisdiction—and has already been cited by Plaintiffs in this very litigation. 2d Am. Compl. at 53–55.

Because Section 46 apparently requires equal treatment of sperm and egg donors, notwithstanding their vast biological distinctions, it must require equal treatment of boys' and girls' homologous prepuces because both are just as vulnerable to medically unnecessary cutting. That development also strips the State of its lynchpin analogy: *McIntyre*, the State's paradigm of a sufficient "biological difference," construed the very sperm-donor statute Oregon has since made sex-neutral with S.B. 512. Or. Laws 2017, ch. 651, § 4 (amending ORS 109.239). Even if the difference between sperm and egg is sufficient under Section 20, *Schnitzer* shows that Section 46 provides broader protection.

3. This Court has the power to extend the underinclusive statutes but cannot decide that issue on summary judgment.

The State adopts a confusing position on remedy. Rather than advocate for a regime protecting both boys and girls from medically unnecessary genital cutting, it scrambles to take the extension remedy off the table at this early stage—arguing that, if Plaintiffs prevail, no child should receive the statutes' special protection. It is wrong on both the propriety of extension and the impact of nullification.

The stakes of nullification are lower than the State lets on: girls would remain protected regardless because FGC "is already prosecutable under various statutes," Or. Legis. Fiscal Off., Fiscal Analysis of HB 3608, 1999 Leg., 70th Sess. (June 14, 1999) [Clopper Decl. ¶ 8, Ex. 7], as a form of battery and child abuse, and independently under federal law, 18 U.S.C. § 116. The anti-FGC statutes' distinct contribution is expressive: proponents explained that the bill's purpose was "less . . . in the punishment aspect than . . .

in sending the message that [child FGC] is not acceptable in Oregon.” Testimony of Lynn D. Partin, Women’s Rights Coalition, H. Judiciary-Crim. Comm., H.B. 3608, Apr. 28, 1999 [Clopper Decl. ¶ 9, Ex. 8]. So the operative question is not whether Oregon can prosecute female-genital-cutters at all, but rather whether Oregon may place official state backing and education efforts behind an anti-genital cutting program for only one sex of children. The State accuses Plaintiffs of a “male-centered legal theory” that “seeks to erase females by eliminating protections for female-specific experiences.”²¹ MSJ at 35. But it is the State that would sooner see those protections erased for girls than extended to boys. Despite the State’s urging, there is nothing “female-specific” about medically unnecessary genital cutting. MSJ at 37. In any event, this Court has the power to extend the statutes, but it cannot resolve that issue on summary judgment without issuing an advisory opinion.

(a) Oregon courts may extend underinclusive statutes so long as doing so does not do violence to the legislature’s intentions.

Despite the State’s separation-of-powers lecture, MSJ at 37–38, Oregon courts have long recognized and exercised the power to cure an unconstitutionally underinclusive statute by extending its protections to the excluded class. *See, e.g., Hewitt*, 294 Or. at 53–54; *Li v. State*, 338 Or. 376, 397 (2005); *In re Madrone*, 271 Or. App. 116, 126 (2015); *Shineovich v. Shineovich*, 229 Or. App. 670, 686–87 (2009); *English v. Pub. Emps. Ret. Bd.*, 230 Or. App. 506, 514 (2009). That is not an “invitation to rewrite” the statute, MSJ at 39—it is the remedy the Supreme Court of Oregon *prefers*. *Hewitt*, 294 Or. at 53 (“[W]e are reluctant to adopt a

²¹ The State lacks a good-faith basis to accuse Plaintiffs of sexist motives: Throughout this litigation, Plaintiffs and counsel have been perfectly candid that they prefer extension to nullification. *See* Pls.’ Resp. to Mot. to Dismiss at ii (“Plaintiffs prefer the Court ‘level-up’ female minors’ existing statutory protections from genital cutting so that every child is equally protected under the law.”); Moody Dep. 20:7–9 (“Hoping to achieve equal protection for both genders.”); *id.* 20:12–16 (“[W]e are asking Oregon to extend the law . . . [a]nd for men and women to be treated equally—or nullify the law, although that would not be ideal.”); Hellewell Dep. 41:1–4 (“[I]t needs to apply to both genders equally. It needs to protect both genders.”); Hadachek Dep. 22:4–7 (seeking “general protection all around for newborns, infants, kids, and anyone under the age of 18”); Mot. to Dismiss Hr’g Tr. [00:44:30] (statement of Mr. Clopper) (emphasizing “Plaintiff[s]’ desire to equally protect every child from the harm of genital cutting”).

policy of per se invalidation of statutes containing discriminatory classifications.”); *see also id.* at 53 n.18 (expressly rejecting the “dissent[’s] critici[sm] [that] the majority [is] ‘legislating’ by extending the statute.”). Accepting the State’s separation-of-powers argument would require this Court to flout binding Oregon precedent embracing the extension remedy. Contrary to the State’s argument, Oregon trial courts are “bound by the precedent of the Supreme Court.” *State v. Portulano*, 320 Or. App. 335, 355 (2022).

In *Hewitt* itself, after holding a sex-based benefits statute unconstitutional, the Court confronted the remedial choice between nullification and extension. It chose extension, finding “equally strong support for the proposition that courts are empowered to extend underinclusive statutes from the United States Supreme Court” and other states’ courts, 294 Or. at 51–52, and it extended the statute’s benefits to men because the contrary course “would thwart the overall legislative purpose behind the underinclusive statute.” *Li*, 338 Or. at 397 (describing *Hewitt*, 294 Or. at 53). *Li* confirms that the authority to fashion such a remedy “indisputably lies with the judiciary in cases properly before it.” *Id.* Indeed, in cases of unconstitutional sex classifications, the Supreme Court of Oregon considers extension preferable to nullification. *Hewitt*, 294 Or. at 53. Extension is proper where it “advance[s] the purpose of the legislation and comport[s] with the overall statutory scheme.” MSJ at 40 (quoting *Madrone*, 271 Or. App. at 126). Extension, in short, is a traditional exercise of judicial power—not the usurpation the State argues.

(b) Extending the challenged statutes is appropriate because doing so coheres with the legislature’s purpose to protect children against medically unnecessary genital cutting.

Extension is appropriate because “extending the statute’s coverage to include [males] advances the legislative objective by providing the same protection for a greater number of children.” *Shineovich*, 229 Or. App. at 686–87. The legislative history contains no indication that the legislature considered male circumcision and chose to preserve it. By the State’s own

1
2 account, “[a]t no point during any committee meeting or floor speech did legislators discuss
3 genital cutting generally, protecting all children, male circumcision, or male genital
4 anatomy.” MSJ at 28–29. So extension contradicts no legislative choice.

5 What the legislative history does contain is a set of concerns about medically
6 unnecessary genital cutting of girls which apply with equal force to boys. The legislature
7 heard that genital cutting inflicts severe “immediate and long-term health complications,”
8 including infection, hemorrhage, and death; is performed on children who cannot consent, to
9 conform their bodies to community expectations; and that Oregon should send “a strong
10 message” that such cutting is not acceptable here. MSJ at 4–5. Each of those concerns applies
11 equally to the medically unnecessary cutting of boys: the same homologous tissues, the same
12 immediate and long-term health complications, the same absence of consent, and the same
13 conformity-driven motives. *See supra* Subsection IV.A.1 (citing declarations of Plaintiffs’
14 medical experts Cold, Masem, and Van Howe). Just as extending the female-specific benefits
15 statute to male survivors cohered with the legislature’s purpose to provide for widowed
16 spouses in *Hewitt*, extending Oregon’s anti-FGC laws coheres with the legislature’s purpose
17 to protect children from the harms of genital cutting.

18 The possibility that extending ORS 163.207 could create new criminal liability does
19 not mean that extension violates the separation of powers. Rather, it raises constitutional
20 notice and due process questions that a criminal defendant might raise in a future case. *See*
21 MSJ at 39 n.19 (invoking the vagueness doctrine). Moreover, the fact that extending ORS
22 431A.600 “would require Oregon Health Authority, a state agency, to engage in education
23 and outreach about male circumcision that the legislature has not required it to engage in,”
24 MSJ at 38, does not make extension inappropriate. Extending the statute in *Hewitt* required
25 the State Accident Insurance Fund Corporation, “a state agency,” to “make payments to [a
26 male] which he would have been qualified to receive but for the unconstitutional

1
2 discrimination,” *Hewitt*, 54 Or. App. at 404—benefits “that the legislature ha[d] not required
3 it to” pay out. MSJ at 38.

4
5 **(c) Whether extension is available is immaterial on summary**
6 **judgment and should be decided at the remedy stage.**

7 In addition to being wrong on the merits, the State’s request that the Court find “the
8 ‘extension’ remedy . . . not available as a matter of law,” MSJ at 38, is irrelevant to each of
9 Plaintiffs’ claims and improperly asks this Court to issue an advisory opinion. Even if this
10 Court found that it lacked the power to extend the statutes, that would not entitle the State to
11 summary judgment Plaintiffs’ Section 20 or Section 46 claim. That is because the Court
12 concededly has the power to nullify the statutes, MSJ at 37 (admitting argument “focuses
13 [only] on the remedy seeking to ‘extend’ the anti-FGM laws”), and nullification would
14 remedy Plaintiffs’ harms. *Heckler v. Mathews*, 465 U.S. 728, 740 (1984) (finding that when
15 “the right invoked is that to equal treatment,” the injury is redressable *either* by “extension
16 of benefits to the excluded class” or “withdrawal of benefits from the favored class”).

17 Deferring the remedial question is not merely permissible; it is the only course
18 consistent with the State’s own justiciability arguments. The State devotes pages to warning
19 this Court against advisory opinions, MSJ at 17–18, yet it asks the Court to issue an opinion
20 stating that a particular remedy would not be available for a constitutional violation that has
21 not yet been decided. Only after the Court concludes that the statutes are unconstitutional
22 will it have occasion to opine on the proper remedy. A decision on remedy at this stage would
23 rest on speculation.

24 The State’s remaining objections go to tailoring a remedy, not to judgment on the
25 claims. That the legislature “would have said so expressly” had it intended to criminalize
26 male circumcision, MSJ at 39, confuses statutory interpretation with constitutional remedy:
Plaintiffs do not contend that the statutes already reach male circumcision; they contend that
the failure to reach it is unconstitutional, and the remedial question is what follows from *that*

1
2 holding. That Plaintiffs have not specified the precise language of an extended statute, MSJ
3 at 39, is the work of the remedy stage, not the pleading or motions stage. The fair-notice
4 concern, MSJ at 39 n.19, concerns the implementation of any extension remedy, which could
5 be made prospective, and has no bearing on nullification.

6 The Court should decline the State’s invitation to issue an advisory opinion about the
7 available remedy before deciding liability. Once liability is established, the State may argue
8 for its preferred remedy, which is to withdraw protection from girls rather than extend it to
9 boys. Until then, whether extension is available makes no material difference to any claim
10 so it supplies no basis for summary judgment.

11 **C. Even if the Court revisited standing, Plaintiffs have established a**
12 **redressable stigmatic injury.**

13 This Court already ruled that Plaintiffs Hadachek and Moody alleged facts sufficient
14 to confer standing because each is a male who was circumcised as a minor in Oregon after the
15 anti-FGC laws were implemented.²² Discovery confirmed every allegation material to
16 standing, and the State’s Motion nowhere controverts them. *See* Morrow Decl. Exs. 1–3. The
17 State nevertheless argues that Plaintiffs have not established a legally cognizable and
18 redressable injury required for standing. It acknowledges that the controlling question at this
19 stage is whether Plaintiffs have demonstrated “a concrete injury in fact in connection with
20 stigmatic harm.” MSJ at 13 n.8. Plaintiffs have done so.

21 Plaintiffs’ injuries are legally cognizable. Plaintiffs have suffered a “stigmatizing
22 injury,” which is “one of the most serious consequences of discriminatory government action,”
23 and “accords a basis for standing” only to “those persons who are personally denied equal
24 treatment” by the challenged conduct. *Allen v. Wright*, 468 U.S. 737, 755 (1984).
25 Discrimination itself can “cause serious non-economic injuries to those persons who are
26

²² Plaintiff Hellewell joined the lawsuit after that Order, but he nevertheless has standing because he meets all standing criteria the Court identified as necessary at oral argument.

personally denied equal treatment solely because of their membership in a disfavored group.” *Mathews*, 465 U.S. at 739–40. Stigmatic standing is widely recognized by state courts,²³ federal circuit courts,²⁴ and the U.S. Supreme Court. Tellingly, the State cites neither *Allen* nor *Mathews* anywhere in its Motion. Instead, the State recapitulates its motion-to-dismiss argument that Plaintiffs lack the injury and redressability elements of standing under Oregon’s Uniform Declaratory Judgments Act (“UDJA”), which is “to be liberally construed and administered.” ORS 28.120. Construing the evidence and all reasonable inferences in Plaintiffs’ favor, *Bergmann*, 337 Or. at 599, each Plaintiff satisfies both the injury and redressability requirements.

The State’s insistence that Plaintiffs must show a tangible deprivation beyond the denial of equal treatment itself flies in the face of seventy years of equal protection law. In *Brown v. Board of Education*, 347 U.S. 483 (1954), the lower courts found that the segregated schools at issue “have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other ‘tangible’ factors.” *Id.* at 492. The Supreme Court nevertheless found that the *Brown* plaintiffs suffered a constitutional injury because the separation itself “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” *Id.* at 494. The injury was the message of inferiority that a facially unequal legal

²³ See, e.g., *Stewart v. Heineman*, 296 Neb. 262, 291–95 (2017) (recognizing stigmatic injury as basis for standing to challenge equal protection violation); *Gryczan v. State*, 283 Mont. 433, 446 (1997) (similar); *Rutan-Ram v. Tennessee Dep’t of Children’s Servs.*, 698 S.W.3d 540, 555 (Tenn. Ct. App. 2023) (similar).

²⁴ See, e.g., *Carello v. Aurora Policemen Credit Union*, 930 F.3d 830, 833–34 (7th Cir. 2019) (“There is no doubt that dignitary harm is cognizable; stigmatic injury is ‘one of the most serious consequences’ of discrimination.”); *Parsons v. U.S. Dep’t of Just.*, 801 F.3d 701, 712 (6th Cir. 2015) (“Stigmatization also constitutes an injury in fact for standing purposes.”); *Laufer v. Acheson Hotels, LLC*, 50 F.4th 259, 274 (1st Cir. 2022), *vacated and remanded on other grounds*, 601 U.S. 1 (2023) (“Dignitary harm or stigmatic injuries caused by discrimination have long been held a concrete injury in fact.”); *Griffin v. Dep’t of Lab. Fed. Credit Union*, 912 F.3d 649, 653 (4th Cir. 2019); see also *Hunter v. U.S. Dep’t of Educ.*, 650 F. Supp. 3d 1104, 1120 (D. Or. 2023) (“The Court finds that Plaintiffs’ [Complaint] adequately alleges a stigmatic injury for purposes of their Equal Protection claim.”).

regime stamps on the disfavored class—the injury *Allen* and *Mathews* later distilled into the rule that stigmatic harm “accords a basis for standing” only to “those persons who are personally denied equal treatment.” *Allen*, 468 U.S. at 755.

The State’s theory would have also doomed the landmark civil-rights case *Romer v. Evans*, 517 U.S. 620 (1996). Colorado’s Amendment 2 created a constitutional provision barring state and local governments from granting special anti-discrimination protections to homosexual, lesbian, and bisexual persons. *Id.* at 624. Under the State’s theory, the *Romer* plaintiffs’ injury would have been merely “abstract.” Yet the Supreme Court had no difficulty identifying the injury as the plaintiffs’ own: Amendment 2 “withdraws from homosexuals, but no others, specific legal protection,” “imposes a special disability upon those persons alone,” and makes the class “a stranger to its laws.” *Romer*, 517 U.S. at 628, 631, 635. Exclusion from the law’s protective structure is itself the injury, whether or not any additional deprivation occurs. Oregon’s anti-FGC laws share that same structure—Oregon’s protection against medically unnecessary genital cutting exists, and boys are ineligible for it because of their sex. If disfavored legal status alone injured the *Romer* and *Brown* plaintiffs, it injures Plaintiffs here for the same reasons.

1. The State’s attempt to relitigate standing is strongly disfavored by the law-of-the-case doctrine.

This Court already ruled that Plaintiffs Hadachek and Moody alleged facts sufficient for standing, and discovery has confirmed each necessary fact. The State identifies no material factual development undermining the factual predicates for the Court’s prior ruling. Instead, it asks the Court to reformulate its test for stigmatic standing to take account of factors the Court has not deemed relevant.

The Court should decline to change its standing test because the law-of-the-case doctrine generally “precludes relitigation or reconsideration of a point of law decided at an earlier stage of the same case.” *Koch v. Southern Pacific Transportation Co.*, 274 Or. 499, 512

(1976). As the Supreme Court of Oregon explained, “[t]he policies underlying the doctrine of the ‘law of the case’ essentially parallel those served by the doctrines of [stare] decisis and res judicata/preclusion, i.e., consistency of judicial decision, putting an end to litigation of matters once determined, and preserving the court’s prestige.” *Id.* at 511–12. Regardless, Plaintiffs have standing to bring this challenge.

2. Plaintiffs satisfy each element of stigmatic standing.

Under this Court’s rulings on the Motion to Dismiss, each Plaintiff must establish three facts to demonstrate stigmatic injury: (a) that he is male, (b) that he was circumcised as a minor, and (c) that the circumcision occurred in Oregon after the anti-FGC laws were implemented—i.e., that he was personally denied equal treatment and concretely harmed. The Court described plaintiffs who met these criteria as the “easy cases,” finding standing for Hadachek and Moody “given the allegations about the years that they were born,” Mot. to Dismiss Hr’g Tr. [00:47:30]–[00:48:00] (Oct. 23, 2025) (“Hr’g Tr.”), and dismissing the remaining plaintiffs for the mirror-image reason: their circumcisions pre-dated the statutes or they were never circumcised. *Id.* [00:48:30]–[00:49:30]. The State failed to show through discovery that any remaining Plaintiff is not male or was not circumcised in Oregon after the anti-FGC laws were implemented.

Instead, the State tries to modify the Court’s legal test by pointing to factors the Court never identified as relevant to Plaintiffs’ standing. The Court did not condition standing on subjective emotions, motives for suing, awareness of the statutes, or any physical or emotional manifestation of stigma. The State nevertheless argues that Plaintiffs lack standing because they candidly acknowledge that no court can undo their physical injuries and hope to protect other boys. The State’s reliance on *Foote v. State*, 364 Or. 558, 565 (2019), is misplaced: *Foote* held that “strong feelings” cannot *substitute* for a cognizable injury, not that they defeat an otherwise valid injury. Plaintiffs rest their standing not on feelings but on stigma—the fact that Oregon law denies each of them the protection it extends to female minors, and that each was

Summary Judgment Opposition – Page 34 of 42

1
2 personally denied equal treatment when they were circumcised. The humiliations they describe
3 are manifestations of their ongoing stigmatic injury.

4 Plaintiffs suffer ongoing stigmatic injuries because the anti-FGC statutes signal that
5 male minors and their bodies are less deserving of protection against medically unnecessary
6 genital cutting. In the State’s own words, the laws place Oregon’s backing behind “a larger
7 advocacy movement to end FGM by condemning FGM,” making it “a less taboo topic” and
8 “educat[ing]” about its effects. MSJ at 5. The State thus acknowledges that the content of
9 Oregon’s criminal law shapes society’s views of child genital cutting.²⁵ MSJ at 5. By
10 condemning every form of FGC and no analogous form of MGC, the State “stigmatiz[es]”
11 boys as less deserving of legal protection, thereby “perpetuating ‘archaic and stereotypic
12 notions’” of male resilience. *Mathews*, 465 U.S. at 739–40. The laws “leave the plaintiffs . . .
13 feeling degraded, humiliated, and stigmatized” under “a tiered system of recognition” with “no
14 rationale for such treatment.” *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1136 (D. Or. 2014).

15
16 **(a) Plaintiff Dane Hadachek**

17 Hadachek’s stigmatic injury goes well beyond an abstract interest in the law. The law
18 actively stigmatizes him, which in turn leads to social shame and humiliation. Oregon’s
19 protection of one sex but not the other, he testified, is “a double standard completely.”
20 Hadachek Dep. 22:17–24. A coworker taunts him—“at least I’m not circumcised”—and “it
21 hurts my ego and hurts my feelings generally.” *Id.* 18:21–19:4. The jokes have followed him
22 from job to job; he has “left work early a few times” because of them, and they “hinder the
23 amount of work [he is] doing.” *Id.* 19:23–20:13. He first felt that humiliation at 16, when
24 complications from his circumcision left him “humiliated and hurt my ego and generally hurt
25 me.” *Id.* 19:8–15.

26

²⁵ See, e.g., Thomas Healy, *Stigmatic Harm and Standing*, 92 IOWA L. REV. 417, 452 (2007) (“Law contributes to stigma [by] signal[ing] what behavior is appropriate toward certain groups.”).

The State argues that those experiences relate to “the fact that he is circumcised,” “not to any ongoing stigma imposed by the State.” MSJ at 14. The record shows the opposite: Hadachek testified that the law’s one-sided protection is what makes his body a fit subject for ridicule: Because Oregon reserves protection from genital cutting to girls, the cutting of boys “feels almost normalized,” with “no normalized safe point.” Hadachek Dep. 17:1–24.

The State’s remaining arguments fail as well. Harassment is not an element of stigmatic injury, so it is beside the point that Hadachek was “never . . . harassed or threatened.” MSJ at 13. Nor does his “double standard” testimony describe “the abstract interest in the law that any Oregonian has,” MSJ at 14. Any Oregonian may observe that the law is one-sided, but only Plaintiffs were personally cut under it—which is why this Court held that Hadachek and Moody have standing while dismissing the intact and pre-enactment plaintiffs.

(b) Plaintiff Nathaniel Hellewell

Hellewell suffers the same ongoing stigmatic injury, and his current residence does not erase it. He was born and circumcised in an Oregon hospital after the anti-FGC laws took effect. Hellewell Dep. 8:16; 3d Am. Compl. ¶ 18. Asked whether he experiences stigma, he answered: “I believe I do. I believe that, just because of my sex, I was protected differently than other children who were born at the same time, in the same place, in the same circumstances as me.” Hellewell Dep. 26:25–27:4. The stigma is ongoing: it “affects me every day” and is “the reason why I’m in pain regularly and . . . why I keep having to go to the doctor.” *Id.* 27:16–21. A botched circumcision and its revisions left him with recurring, “extremely painful” testicular torsions—roughly eight to date—that an emergency-room urologist attributed to his circumcision. *Id.* 22:23–23:25, 29:10–21. And prospective partners have “suddenly become uninterested” upon learning he is circumcised, which “definitely felt like a stigma.” *Id.* 27:5–13.

The State’s contrary reading depends on truncation. It asserts that “the only harm he claims to have experienced from the anti-FGM laws was being circumcised,” MSJ at 14, but Summary Judgment Opposition – Page 36 of 42

1
2 the cited answer, read in full, says the opposite: the law “affects my daily life because I am
3 circumcised because of that. . . . I was not protected by a law that should have fairly protected
4 me.” Hellewell Dep. 34:17–23. The State quotes “[c]urrently, it doesn’t really affect me too
5 much because I’m in a relationship,” MSJ at 15, but omits his very next answer limiting that
6 statement to the “second half” of his stigma—dating—while the first half persists: “at birth, I
7 was not protected the same,” and “as an adult, I am not treated the same.” Hellewell Dep. 28:5–
8 15. The dormancy of one manifestation of stigma does not extinguish the underlying stigmatic
9 injury; each manifestation is simply a window into the ongoing stigmatic injury.

10 The State’s remaining points—that Hellewell found this suit through Foregen, is
11 “passionate,” and thinks the laws “unfair”—describe his motives for suing, not the injury. MSJ
12 at 14–15. Nor does blaming the “private conduct” of his partners help the State. As with
13 Hadachek, the two-tiered regime supplies the meaning those private actors enforce. The State’s
14 territorial-jurisdiction argument, MSJ at 10–12, also fails. Oregon inflicted the unequal
15 treatment within its own borders. At Hellewell’s birth, Oregon law made the cutting he
16 underwent a felony for female infants in the same hospital and left him unprotected because
17 he is male. The State relies on *Berry v. State Tax Commission*, 241 Or. 580 (1964), which
18 speaks to persons who “at all material times were residents of California.” *Id.* at 582. By
19 contrast, Hellewell was residing in Oregon at the most material time: the moment of his
20 concrete injury. And because his stigmatic harm is ongoing wherever he lives, a declaration
21 redressing it operates in the present. In any event, Hellewell testified that it is “likely that I
22 move back to Oregon in the next five years” because “most of my family lives in Oregon.”
23 Hellewell Dep. 41:5–13. The State calls that “speculative,” MSJ at 12, but on summary
24 judgment his testimony must be credited. At a minimum, his likely return presents a genuine
25 issue of fact.
26

(c) Plaintiff Landon Moody

Moody’s testimony, read as a whole, establishes the same stigmatic injury. Moody testified that the stigma he personally experiences is “[t]hat I’m treated differently compared to females” “because I’m not protected by the State of Oregon currently.” Moody Dep. 22:16–23. He clarified that the statutes “did, in fact, harm me in the stigmatic way—and that I was not protected.” *Id.* 24:13–25:5. And when the State’s counsel pressed—“the statute does not directly harm you?”—he answered: “It does directly harm me because it does not protect males. . . . It discriminates against me . . . therefore stigmatically harming me.” *Id.* 26:1–8.

That is not a “conclusory legal concept.” MSJ at 21. It is testimony about his lived experience of unequal treatment, and it is an accurate description of the injury *Allen* and *Mathews* recognize: being “personally denied equal treatment solely because of [his] membership in a disfavored group.” *Allen*, 468 U.S. at 755; *Mathews*, 465 U.S. at 739–40. The State insists on an added requirement of physical or emotional manifestations of stigma, but neither this Court nor any case requires one to establish stigmatic standing. The test is membership in the excluded class (male minors in Oregon after the anti-FGC laws were implemented) plus a concrete injury (circumcision).

That Moody was never “harassed or threatened,” MSJ at 17, proves nothing—those are not elements—and the State’s own questioning conceded the presence of stigmatic harm: The State asked Moody whether anything bad had happened to him “aside from the harm that you already told me about, the stigma.” Moody Dep. 26:17–21. His answer—“I was circumcised”—identifies the concrete harm itself, completing the stigmatic standing claim. Nor does his recent awareness of the law matter: surely the African-American schoolchildren in *Allen* did not need to know that the IRS gave tax exemptions to segregated private schools to suffer stigmatic injury.

3. A favorable decision would redress Plaintiffs' stigmatic injuries.

The State's redressability argument rests on a false premise: that a decision has no practical effect unless it can physically undo Plaintiffs' circumcisions. *See, e.g.*, MSJ at 20 (emphasizing that "a favorable decision . . . *does not* affect [Hellewell's] circumcision and its injuries"). But the UDJA requires only that a decision "in some sense rectify the injury," *MT & M Gaming, Inc. v. City of Portland*, 360 Or. 544, 555 (2016). The injury to be rectified here is the ongoing stigmatic injury of living under a legal regime that treats males as unworthy of the protection Oregon extends to females.

Mathews rejected the precise argument that the State makes here. There, a severability clause guaranteed that the plaintiff could never receive the Social Security benefits whose sex-based denial he challenged. Even if he prevailed, he would gain nothing tangible. But his injury was redressable anyway, because when the "right invoked is that of equal treatment," the appropriate remedy is "a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." 465 U.S. at 740; *accord Hewitt*, 294 Or. at 52 (quoting *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring)). Plaintiffs' requested relief—extension of the anti-FGC laws' protections to male minors or nullification of the discriminatory classification, 3d Am. Compl. at 15—maps exactly onto *Mathews*: either decree mandates equal treatment, so either redresses the stigmatic injury.

The State's contrary theory—that because Plaintiffs hope the remedy will also protect other children, it has no practical effect on them—is meritless. Motives are irrelevant to standing, which turns on a redressable injury, not on whether a lay plaintiff can "articulate" justiciability doctrine in a deposition. MSJ at 21. A desire to benefit others does not preclude a desire to benefit oneself—to say you like pancakes doesn't mean you hate waffles—and the Court cannot infer, least of all on summary judgment, that Plaintiffs disclaimed any desire to rectify their own stigmatic injuries by also expressing selfless motives. And as detailed below, Summary Judgment Opposition – Page 39 of 42

the State omits testimony in which each Plaintiff expressly states that equalizing the statutes would redress his personal stigmatic injury.

(a) Plaintiff Dane Hadachek

The State asked Hadachek directly whether “striking down these laws [will] change the harms that you feel.” “Yes.” Hadachek Dep. 24:5–11. Would a decision affect his day-to-day life? “Yes”—it would allow him to “live with” what was done to him. *Id.* 25:1–11. The State’s rejoinder—that a decision “would not change the facts” that Hadachek is circumcised and “made fun of,” MSJ at 19—misses the point. A favorable judgment would realize the “mandate of equal treatment,” *Mathews*, 465 U.S. at 740, and it would change the social meaning of Hadachek’s ridicule: Ridicule enforced against a backdrop of state-sanctioned inequality carries a different social meaning from ridicule aimed at a trait the law protects evenhandedly.

(b) Plaintiff Nathaniel Hellewell

Hellewell answered just as directly. Asked whether striking down the statutes “is going to fix the harm that you specifically have experienced”: “I do,” because the decision “will signify that the Court believes it was unequally protecting.” Hellewell Dep. 42:3–12. The State omits that answer, quoting instead his acknowledgment that a decision “doesn’t solve my personal circumcision.” MSJ at 20 (quoting Hellewell Dep. 44:7–10). Of course not—the Court cannot replace his foreskin. But he immediately continued that: “[i]t solves some of the mental trauma that surrounds my circumcision.” *Id.* 44:7–10. Partial redress is still redress, *MT & M Gaming*, 360 Or. at 555, and the decree would in any event realize the “mandate of equal treatment,” which suffices for redressability. *Mathews*, 465 U.S. at 740.

(c) Plaintiff Landon Moody

Moody likewise testified that if this Court declared the statutes unconstitutional, “I would be treated equally and protected by the State just as they protect females,” and “I would no longer be discriminated against by the State of Oregon.” Moody Dep. 21:15–22:1. That is

not the effect on “any other Oregonian,” MSJ at 21. Only a person actually denied the statutes’ protection can be relieved of that stigma. A female Oregonian, by contrast, is not stigmatized by the challenged laws so would not gain relief by the Court’s declaration.

4. The Oregon Constitution does not bar Plaintiffs’ standing.

Finally, the State concedes that its constitutional-justiciability argument rises and falls with its UDJA argument. MSJ at 17 n.10. Because each Plaintiff has established a concrete stigmatic injury that a favorable decision would redress, both fail together. In any event, the Oregon Constitution imposes “no justiciability limitations on the exercise of judicial power in public actions or cases involving matters of public interest,” including “such justiciability doctrines as mootness and standing.” *Couey v. Atkins*, 357 Or. 460, 520–21 (2015); *see also Marteeny v. Brown*, 321 Or. App. 250, 273 (2022). This case—challenging “the lawfulness of an action, policy, or practice of a public body” with implications for thousands of Oregon boys—is such a public action. *Couey*, 357 Or. at 522; *see Marteeny*, 321 Or. App. at 273 n.10; Pls.’ Resp. to Mot. to Dismiss 12–13 & n.30.

V. CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court deny Defendant’s Motion for Summary Judgment in its entirety.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Dated: August 4, 2026

Respectfully submitted,

LAW WORKS LLC

By: /s/ Lake Perriguet

Lake James H. Perriguet, Esquire
(OSB 983213)
Attorney for Plaintiffs Dane Hadachek,
Nathaniel Hellewell, and Landon Moody

THE CLOPPER LAW FIRM PC

By: 
ATTORNEY AT LAW

Eric Clopper, Esquire (CA SBN 346031)
Attorney for Plaintiffs Dane Hadachek,
Nathaniel Hellewell, and Landon Moody
Admitted *Pro Hac Vice*