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3
4 IN THE CIRCUIT COURT OF THE STATE OF OREGON
5 FOR THE COUNTY OF MULTNOMAH

6 DANE HADACHEK; NATHANIEL
7 HELLEWELL & LANDON MOODY,

8 Plaintiffs,

9 v.

10 THE STATE OF OREGON,

11 Defendant.

Case No. 25CV18224

DEFENDANT'S REPLY IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT

ORS 20.140 - State fees deferred at filing

12 The State is defending its statutes that ban female genital mutilation (FGM) from a
13 challenge by Plaintiffs who claim that the legislature cannot ban female genital mutilation
14 without also banning male circumcision. This case undisputedly involves a facial challenge to
15 the validity of the laws at issue, ORS 163.207 and ORS 431A.600. It is black letter law that such
16 challenges turn only on legal issues—facts are immaterial to facial constitutional challenges to
17 statutes. That legal framework is undisputed. Accordingly, this case can and should be resolved
18 on summary judgment as a matter of law.

19 The Court should reject Plaintiffs' attempt to distract from the purely legal issues that this
20 case turns on. Owing to the weakness of their novel legal theory, Plaintiffs try to persuade the
21 Court that there is a material factual dispute that requires a trial regarding the degree of
22 difference between female and male external genitalia. Plaintiffs spend much of their response
23 brief trying to convince the Court that male and female external genitalia should be treated the
24 same under the challenged statutes. In particular, Plaintiffs erroneously conflate female genital
25 mutilation and male circumcision by utilizing a generic, non-sex-specific term that has no
26 meaning with respect to the statutes at issue—"genital cutting." They also frame their argument

1 in terms of similarities between the female and male *prepuce*, despite the fact that the statute
2 addresses the clitoris, the labia majora, and the labia minora, and does not mention the female
3 prepuce. Nowhere in the statute or the legislative history do the statutes refer to the prepuce or
4 the generic term “genital cutting,” and thus, any facts relating to those terms are immaterial to
5 the legal question of whether the anti-FGM statutes are based on specific biological differences.

6 Notably, Plaintiffs do not appear to dispute that the clitoris, labia majora, and labia
7 minora are biologically different from male external genitalia. Instead, their argument rests
8 entirely on assertions that those differences are *insufficient* to justify differential treatment. But
9 the constitutional tests do not look to the degree or sufficiency of any biological difference.
10 Rather, the legal tests look only to whether biological differences *exist*. The fact that biological
11 differences exist is established as a matter of basic statutory interpretation and through judicially
12 noticeable sources. The legal question of whether a statutory classification is based on specific
13 biological differences can be decided purely as a matter of law. This is not a factual question.
14 Even if it were, Plaintiffs do not dispute that biological differences between female and male
15 genitalia exist. The only dispute is the degree of those differences, which is immaterial to the
16 constitutional questions before this Court. Thus, there is no material factual dispute that
17 precludes summary judgment.

18 Plaintiffs’ response brief, advocating for a major statewide policy change based on an
19 ethical and cultural debate about male circumcision, also illustrates their problems with standing.
20 The record demonstrates that Plaintiffs are not impacted by the challenged anti-FGM statutes,
21 notwithstanding their personal interest in the policy issues relating to male circumcision.
22 Plaintiffs’ abstract interest in advocating for one side of a policy debate does not give them
23 standing in a declaratory judgment action.

24 Ultimately, this case is quite simple. The anti-FGM statutes are a constitutional sex-based
25 classification because the classification in the statutes is based on specific biological differences
26 between females and males because they only address the clitoris, labia majora, and labia

1 minora—body parts that only females have—and because FGM is a harmful practice that only
2 females are subjected to. That classification is rationally related to the purpose of the statutes: to
3 deter FGM. That is all that is required under the Oregon Constitution, and this Court should grant
4 summary judgment for the State.

5 **A. Plaintiffs lack standing to bring their claims in this Court.**

6 First, statutory standing under Oregon’s Uniform Declaratory Judgments Act (UDJA) is
7 governed by well-developed tests under state law. Despite that, Plaintiffs rely on federal equal
8 protection case law. *See* Pls’ Opp’n at 31–33 (citing various federal cases). Those cases are
9 inapposite for two reasons. First, standing under the state declaratory judgment statute is a matter
10 of state law, not federal law. Second, most of the federal equal protection cases that Plaintiffs
11 cite do not address the issue of standing. The one federal case that does address standing, *Allen v.*
12 *Wright*, 468 US 737 (1984), does not help Plaintiffs. The alleged injury in *Allen* was caused by
13 government conduct. *Id.* at 755. Plaintiffs in this case do not assert that any government conduct
14 caused their alleged injuries. Moreover, the injury in *Allen* was specific to stigmatizing injuries
15 caused by racial discrimination, not stigmatizing injuries generally. *Id.* This Court should reject
16 Plaintiffs’ attempt to equate the alleged stigma associated with being a circumcised male to the
17 stigma that Black students and families experience from school segregation.

18 Second, Plaintiffs’ response does not provide any legal authority or evidence that
19 overcomes their problems with standing. Defendant raises a *factual* challenge to Plaintiffs’
20 standing under the UDJA, and Plaintiffs have not met their burden under ORCP 47 to rebut the
21 evidence in the record demonstrating that Plaintiffs lack standing. Plaintiffs describe their injury
22 in two ways. First, they claim injury based on upon “the fact that Oregon law denies each of
23 them the protection it extends to female minors, and that each was personally denied equal
24 treatment when they were circumcised.” Pls’ Opp’n at 34–35. Second, they assert “ongoing
25 stigmatic injuries because the anti-FGC statutes signal that male minors and their bodies are less
26 deserving of protection[.]” Pls’ Opp’n at 34–35. Although, as previously addressed in its motion

1 to dismiss, the State does not concede that an alleged “stigmatic injury” is sufficient to establish
2 standing under the UJDA, Defendant does not ask the Court to revisit that ruling. Rather,
3 Defendant asks this Court to determine, as it is required to do on summary judgment, whether
4 Plaintiffs have introduced facts that prove their standing. *See* ORCP 47 C. They have not, and
5 they cannot.

6 If Plaintiffs are relying on the first claimed injury to establish standing—their allegation
7 that they were personally circumcised while their female peers were not—they do not have
8 standing to bring this suit against the State for lack of causation. The State did not choose to
9 circumcise them, nor did it require them to be circumcised—Plaintiffs admit that their parents
10 made that decision.¹ *See Advocates for School Trust Lands v. State*, 346 Or App 668, 687 (2026)
11 (requiring that the challenged law “causes” the injury alleged). Because Plaintiffs cannot
12 establish causation as required for standing under the UDJA, they do not have standing to seek
13 relief against the State for their claimed injury of being circumcised.²

14 As for Plaintiffs’ allegation that they experience “ongoing stigmatic injuries”—which
15 their case now rests upon— they lack standing for the reasons described in the State’s Motion for
16 Summary Judgment, namely because Plaintiff Hellewell lives outside the territorial jurisdiction
17 of Oregon courts and thus a decision from this Court will have no practical effect on him,
18 Plaintiffs Hadachek and Moody claim injuries that are nothing more than an abstract interest in
19 the validity of the laws, and no Plaintiff has, or can, identify a practical effect from this Court’s
20 decision that is specific to him. Mot for Summ J at 9–21. Plaintiffs’ arguments in response only
21 underscore their lack of standing. They describe feelings of humiliation without any evidence

22
23 ¹ Plaintiffs admitted in their original complaint, filed March 27, 2025, that their parents elected
24 for them to be circumcised, not that the State or the challenged laws required their circumcision.
Orig. Compl. ¶ 28 (noting that all Plaintiffs’ parents assented to their circumcision); *id.* ¶ 115
(Hadachek).

25 ² Additionally, if this case were about only Plaintiffs’ alleged physical injury and any effects
26 from that injury, it would fall within the scope of the Oregon Tort Claims Act. At no point has
Defendant understood Plaintiffs to be raising a tort claim, and they cannot seek relief on a claim
that has not been properly pleaded.

1 that shows they have experienced more than having their feelings hurt, and no “legally
2 recognized interest” protects against a person being humiliated. *See MT & M Gaming, Inc. v. City*
3 *of Portland*, 360 Or 544, 554–55 (2016). Nor do Plaintiffs’ conclusory statements of being
4 treated unequally, without descriptions to support them, suffice to meet their evidentiary burden.
5 If Plaintiffs have in fact suffered an injury to a legally protected interest beyond a feeling that the
6 law should be different than it is, they would be able to identify that injury concretely. They have
7 not.

8 Plaintiffs have also failed to demonstrate that their claimed injuries are redressable under
9 the UDJA. The parties agree that a decision from this Court cannot fix the claimed physical
10 injury of being circumcised. Pls’ Opp’n at 40 (“Of course not—the Court cannot replace his
11 foreskin.”). The only dispute on redressability, then, is whether a declaration from this Court will
12 constitute a “practical effect”—that is, “specific relief through a decree of conclusive character”
13 as to Plaintiffs’ claimed stigmatic injury. *Morgan v. Sisters School District #6*, 353 Or 189, 194–
14 95 (2013).

15 Plaintiffs have not met that burden because they identify only abstract, not practical,
16 ways in which they will be affected by a favorable decision from this Court. For instance,
17 Plaintiff Hadachek stated that a decision from this Court that criminalizes male circumcision will
18 make him feel better:

19 “[It will] bring[] me up generally as a person and allows me to kind of live with—I did
20 something—even though I went through something, I did something that’s morally and
21 ethically positive and normalizes it and makes me feel better as a person. And I feel like I
can live with that—it is—it outweighs what I’ve been through as a person.”

22 Morrow Decl in support of Def’s Mot for Summ J (“Morrow Decl”) Ex 1, at 14 (Tr 25:4–11).
23 Feeling good about one’s activism for a cause through a “win” in court is not a practical effect
24 for purposes of the UDJA, and no Plaintiff has identified something concrete that will change in
25 their own lives if they prevail. For example, Plaintiff Hadachek never stated that being ridiculed
26 at work after prevailing in this case would have a different “social meaning” from being

1 ridiculed at work previously—and his attorneys make that assertion with no citation to
2 deposition testimony to support it. *See* Pls’ Opp’n at 40. Attorney assertions about how a
3 Plaintiff will feel after prevailing in a lawsuit are irrelevant—and improper—to proving that
4 Plaintiffs’ claimed injuries are redressable. Similarly, Plaintiff Moody stated that he “would be
5 treated equally” and “would no longer be discriminated against by the State.” Morrow Decl Ex 3,
6 at 7–8 (Tr 21:18–22:1). But he could not identify any practical way in which this Court’s
7 decision would affect his day-to-day life. *Id.* at 8 (Tr 22:2–4) (“I don’t know.”). He could only
8 restate legal conclusions, and legal conclusions are not facts supporting standing. With Plaintiffs
9 unable to provide any evidence that they will experience a practical effect from this Court’s
10 decision, there is no statutory standing under the UDJA.

11 Third, Plaintiff Hellewell should be dismissed from this case because the Oregon
12 Constitution “does not purport to deal with the rights of nonresidents.” *Berry v. State Tax*
13 *Commission*, 241 Or 580, 584–85 (1964). Plaintiffs respond to that argument by asserting that
14 Plaintiff Hellewell “was residing in Oregon at the most material time: the moment of his
15 concrete injury.” Pls’ Opp’n at 37. But that unsupported statement is contradicted by Hellewell’s
16 own testimony, and Plaintiffs cite no evidence to show that Plaintiff Hellewell resided in Oregon
17 when he was born and cannot do so. *See* Morrow Decl Ex 2, at 5–6 (Tr 8:20–9:15) (“We lived in
18 Washington when I was born.”). Even crediting Plaintiff Hellewell’s speculative testimony that
19 “it’s probably likely that I move back to Oregon in the next five years or so,” *id.* at 25 (Tr 41:11–
20 13), that possibility is too remote to subject Plaintiff Hellewell to the protection of the Oregon
21 Constitution at this time. He is currently a non-resident who cannot identify any practical effect
22 specific to himself from an Oregon Court decision. *Id.*; *id.* at 25–26 (Tr 41:14–42:2) (“[I]t is a
23 step forward in protecting the people that I want to protect.”). As a matter of law, Plaintiff
24 Hellewell is not subject to the laws and constitution of Oregon and thus cannot avail himself of
25 this Court’s jurisdiction.

1 Finally, Plaintiffs’ law of the case argument fails. In Oregon, the law of the case doctrine
2 governs “identical” issues. *Koch v. Southern Pac. Transp. Co.*, 274 Or 499, 512 (1976). The
3 questions of whether a party has sufficiently *alleged* standing at the motion to dismiss stage and
4 whether a party has *proven* standing at the summary judgment stage are subject to different legal
5 standards and thus, are not identical. Moreover, “[t]he Supreme Court has cautioned, ‘[t]he term
6 “law of the case” is best reserved for use in the context in which a party seeks to relitigate an
7 appellate decision.’” *Miller v. State ex rel. Oregon Racing Comm’n*, 298 Or App 70, 85 (2019).
8 Although this Court may give preclusive effect to its prior ruling “on an identical matter,” to
9 advance the policies underlying the law of the case doctrine, *id.*, it cannot do so here because (1)
10 the issue of standing is not identical at different stages of litigation because the burden of proof is
11 different and (2) it is axiomatic that courts must determine jurisdiction at every stage of
12 litigation. *See Dreyer v. Portland General Electric Co.*, 300 Or App 414, 424 (2019). Thus, this
13 Court should reject Plaintiffs law of the case argument.

14 **B. The State is entitled to prevail on the merits as a matter of law.**

15 Facial challenges to statutes, which is what this case is, must be decided based on
16 statutory and constitutional interpretation—any adjudicative facts are immaterial to the merits
17 question of whether the anti-FGM statutes are facially unconstitutional. *Payless Drug Stores*
18 *Northwest v. Brown*, 300 Or 243, 247 (1985). The Oregon Supreme Court has explained that
19 “[w]hen a constitutional attack rests on showing facts surrounding the enactment of a law . . . in
20 an Oregon court these are not ‘adjudicative facts’ dependent on evidence introduced into a trial
21 record.” *Id.* Moreover, it has “reject[ed] the notion that a party has a burden of proof or
22 persuasion with respect to the facial constitutionality of a law[.]” *Arnold v. Kotek*, 338 Or App
23 556, *rev allowed*, 373 Or 738 (2025). Plaintiffs, who claim that there is a factual dispute over the
24 degree of biological difference between female and male genitalia, cannot circumvent this
25 analytical framework, which renders their evidence immaterial and irrelevant.

1 **1. The anti-FGM statutes are constitutional under the applicable constitutional**
2 **test under Article I, section 20, of the Oregon Constitution (Privileges and**
3 **Immunities Clause).**

4 Plaintiffs’ arguments under the Privileges and Immunities Clause, Article I, section 20, of
5 the Oregon Constitution, are without merit. This case presents a facial constitutional challenge
6 that is properly resolved on summary judgment as a purely legal question. Tellingly, Plaintiffs
7 have not responded with a contradictory legal standard for analyzing facial constitutional
8 challenges—and as discussed above, the law on that is clear. Plaintiffs also appear to concede
9 that under the applicable constitutional test, the question for this Court is whether the anti-FGM
10 statutes are (1) “based on specific biological differences between” males and females and are (2)
11 “rationally related to the purposes of the statute.” *McIntyre v. Crouch*, 98 Or App 462, 469
12 (1989). Both of those are purely legal questions that should be resolved as a matter of statutory
13 interpretation. The first asks what the basis of the differential treatment is, and the second asks
14 what the purpose of the statute is. The “evidence” addressing those questions is found in the
15 legislative history and dictionaries, which are tools of statutory interpretation under *State v.*
16 *Gaines*, 346 Or 160, 175 (2009). Accordingly, medical evidence that “specific biological
17 differences” between the clitoris, labia majora, and labia minora and the male external genitalia
18 exist or do not exist is not necessary for this Court to consider in resolving the purely legal
19 questions at issue in this case. Rather, that question can, and should, be answered as a matter of
20 statutory interpretation, including the plain text, context, and legislative history. Any facts
21 provided by Plaintiffs’ witnesses are immaterial to those legal questions. For that reason, there is
22 no dispute over any *material* fact, and this case should be resolved at summary judgment as a
23 matter of law.

24 But even if this Court were to consider the question of whether specific biological
25 differences exist as a factual issue, rather than a legal one, there is no dispute that the female
26 anatomical structures referenced in the statute—the clitoris, the labia majora, and the labia
27 minora—are different than the foreskin and the penis. Plaintiffs attempt to gloss over that

1 judicially noticeable fact by focusing their argument on similarities between the male and female
2 prepuce. *See* Pls’ Opp’n at 5 (describing the applicable test as “whether any differences between
3 the male and female prepuce” are real). But nowhere in the anti-FGM statutes or legislative
4 history does the word prepuce appear—so any similarities between the male and female prepuce
5 are therefore immaterial to the legal question in this case. Moreover, the expert declarations that
6 Plaintiffs rely on further demonstrate that the parties agree that there *are* biological differences
7 between the penile and clitoral anatomical structures.³ *See* Masem Decl in support of Pls’ Opp’n
8 to Def’s Mot for Summ J ¶ 16 (“The penile prepuce and clitoral prepuce, also called the clitoral
9 hood, are not identical in size, configuration, or relationship to surrounding structures.”); Van
10 Howe Decl in support of Pls’ Opp’n to Def’s Mot for Summ J ¶ 8 (describing the “biological
11 differences” between the male and female prepuce). Plaintiffs heavily rely on, without defining,
12 the medical term “homologous” as being dispositive for their argument. But that term means
13 simply that an anatomical structure has the same origin as another structure—but not necessarily
14 the same function. *Stedman’s Medical Dictionary* 805 (26th ed 1995). Thus, homology between
15 two anatomical structures does not necessarily mean that biological differences do not exist.

16 And, more to the point, the fact that there are specific biological differences between the
17 male and female external genitalia is clear as a matter of statutory interpretation. The dictionary
18 definitions cited in the State’s Motion for Summary Judgment are more than sufficient to
19 establish the judicially noticeable fact that the clitoris, the labia majora, and the labia minora are
20 a part of the vulva—the female external genitalia—and the penis, male foreskin, and scrotum are
21 part of the male external genitalia.⁴ *See* Mot for Summ J at 25–27. The female external genitalia

22 ³ The State does not concede the truth of any fact provided in the declarations supporting
23 Plaintiffs’ Opposition. If this Court determines that a material factual dispute exists regarding the
24 biological differences between the female and male genitalia and the differences between female
25 genital mutilation and male circumcision, the State will rebut Plaintiffs’ experts at trial. *See*
26 Forzley Decl in support of Def’s Mot for Summ J ¶ 2.

⁴ This Court “shall take judicial notice if requested by a party and supplied with the necessary
information.” OEC 201(c) and (d). The State requests that this Court take judicial notice of the
fact, to the extent it is an adjudicative fact, that specific biological differences exist between the
clitoris, labia majora, and labia minora and the penis and male foreskin. That is a definitional

1 and the male external genitalia are biologically different. *See id.* Plaintiffs do not dispute that
2 there are differences between the male and female external genitalia, and thus, this Court should
3 reject their attempt to manufacture a factual dispute by focusing generally on the similarities
4 between the male and female prepuce. Those facts are immaterial to the question before this
5 Court. The Oregon Constitution requires only that the sex-based classification be based on a
6 specific biological difference, and as a matter of statutory interpretation, or at most, based on
7 judicially noticeable facts, the sex-based classification in the anti-FGM statutes is based on
8 biological differences, and those biological differences are the reason for enacting the statute—to
9 deter the practice of FGM.

10 This Court should reject Plaintiffs’ attempt to insert federal equal protection principles
11 into the well-established methodology for analyzing statutes under the state constitution. *See* Pls’
12 Opp’n at 17–18. The Oregon Supreme Court has made it clear that federal equal protection
13 doctrine does not apply to state constitutional provisions. *Hewitt v. SAIF*, 294 Or 33, 42 (1982).
14 The test under state law is clear: a law that includes a sex-based classification is inherently
15 suspect. *Id.* at 46. But that “suspicion may be overcome if the reason for the classification
16 reflects specific biological differences between men and women.” *Id.*; *see also Tanner v. Oregon*
17 *Health Sciences University*, 157 Or App 502, 522 (1998). The “particularly exacting scrutiny”
18 that the courts apply to laws that classify on the basis of sex is that those laws are
19 unconstitutional *unless* “the failure to make the privileges or immunities available to that class
20 can be justified by genuine differences between” males and females. *Tanner*, 157 Or App at 523.
21 The Court of Appeals applied that test, as described in *Hewitt* and *Tanner*, in *McIntyre*, 98 Or
22 App at 469. Specifically, it stated that “[a] statute that gives a privilege to women while denying
23 it to men is inherently suspect and subject to strict scrutiny, *unless* the classification (1) is based
24 _____
25 question that is “[c]apable of accurate and ready determination by resort to sources whose
26 accuracy cannot reasonably be questioned” because dictionaries that Oregon courts regularly rely
on—Black’s, Stedman’s, and Webster’s—provide different definitions for those anatomical
structures.

1 on specific biological differences between men and women and (2) is rationally related to the
2 purposes of the statute.” *McIntyre*, 98 Or App at 469 (citing *Hewitt*, 294 Or at 46) (emphasis
3 added). That is the constitutional test that applies to the anti-FGM statutes in this case, and this
4 Court should reject Plaintiffs’ argument to the contrary.

5 Moreover, no Oregon court has changed that test, and no case examines the degree of
6 difference between the disparately treated classes. *See Delta Air Lines, Inc. v. Dept of Revenue*,
7 374 Or 58, 86 (2025) (“If there are differences between the classes that are rationally related to a
8 legitimate governmental purpose, then those differences are ‘genuine differences.’”). Plaintiffs
9 rely on *Delta Air Lines* to assert that some showing of “substantial difference” is required for a
10 statute to be constitutional under the Privileges and Immunities Clause. That is incorrect. First,
11 *Delta Air Lines* is not a sex discrimination case, and, as just explained, Oregon law has a clear
12 test for analyzing the constitutionality of statutes that include a sex-based classification. Second,
13 the discussions of “substantial difference” in *Delta Air Lines* relate to explanations of federal
14 equal protection law, which does not apply to sex-based classifications under Oregon law, and
15 Plaintiffs cite *Delta Air Lines* only for its references to federal law. Moreover, the Oregon
16 Supreme Court made it clear that “this [C]ourt’s references to ‘genuine differences’ were not
17 intended as an independently meaningful concept”: “A classification is not valid merely because
18 some difference between the classes exists; those differences must somehow relate to the
19 governmental purpose.” *Delta Air Lines*, 374 Or at 83. Thus, this Court should reject Plaintiffs’
20 argument that a showing of substantial similarity can overcome the undisputed fact that some
21 difference exists between the clitoris, labia majora, and labia minora and the male external
22 genitalia, and that that difference is rationally related to the purpose of the anti-FGM statutes.

23 **2. The anti-FGM statutes are constitutional under the applicable constitutional**
24 **test under Article I, section 46, of the Oregon Constitution (Equal Rights**
Amendment).

25 Plaintiffs do not propose a legal test for analyzing whether a law violates Article I,
26 section 46, of the Oregon Constitution. Instead, they appear to argue that the Equal Rights

1 Amendment (ERA) analysis is identical and coextensive to that of the Privilege and Immunities
2 Clause. *See* Pls’ Opp’n at 23 (arguing that Article I, section 46 codified “the judicial rule
3 developed under Section 20 into the Oregon Constitution”). Assuming, for the sake of argument,
4 that the legal tests are the same, then their Article I, section 46, claim fails for the same reasons
5 that their Article I, section 20, claim fails.

6 Additionally, Plaintiffs’ argument that these two constitutional provisions are co-
7 extensive is incorrect. By its very terms, the ERA provides that equality of rights under the law
8 “shall not be denied or abridged.” Or Const, Art I, § 46. The anti-FGM laws provide a privilege
9 to females—legal protection from FGM. They do not deny or abridge the rights of males.

10 Plaintiffs’ ERA claim also fails for that reason.

11 The Court should reject Plaintiffs’ attempt to read a first-of-its-kind prohibition on laws
12 that apply to only one sex based on a sex-specific characteristic into the ERA. If you follow
13 Plaintiffs’ attack on sex-specific legislation to its logical conclusion, no sex-specific law could
14 stand. The Oregon voters did not intend such an absurd result when they voted for the ERA. It is
15 perfectly reasonable—and constitutional—for the State to ban female genital mutilation without
16 also banning male circumcision.

17 **3. This Court should reject Plaintiffs’ additional arguments.**

18 Plaintiffs attempt to dispute the legislative history by citing numerous academic and news
19 articles and asserting that FGM and male circumcision are essentially the same. *See* Pls’ Opp’n
20 at 9–13. But Plaintiffs have introduced no contrary legislative history materials that call into
21 question the legislative history presented in the State’s opening brief. Nor could they—the
22 legislative history is what it is, and it is properly before this Court as part of this Court’s statutory
23 interpretation analysis under *Gaines*, 346 Or at 175. Importantly, Plaintiffs do not dispute the
24 State’s interpretation of the anti-FGM statutes. This Court should reject their attempt to create a
25 factual dispute about the legislature’s intent by introducing evidence that is not part of the
26

1 legislative materials. Discerning the intent of the legislature is a purely legal question based on
2 the text, context, and legislative history of the anti-FGM statutes. *Id.*⁵

3 This Court should also reject Plaintiffs' attempt to equate the State's argument with the
4 logic of *Geduldig v. Aiello*, 417 US 484 (1974). *See* Pls' Opp'n at 15. Plaintiffs are wrong.
5 *Geduldig*, a federal case that is known for its reasoning that pregnancy-based distinctions are not
6 sex discrimination for purposes of federal equal protection analysis, is inapposite. The issue in
7 *Geduldig* was whether an employment insurance program that did not cover absence from
8 employment related to normal pregnancy and childbirth constituted a sex-based classification;
9 the U.S. Supreme Court reasoned that there was no sex-based classification in that program. 417
10 U.S. at 496, 496 n 20. In this case, the Court's analysis must be conducted according to state law,
11 not federal law. Furthermore, here, unlike in *Geduldig*, there is no dispute that the anti-FGM
12 laws constitute a sex-based classification under the test articulated by the Oregon Supreme Court
13 in *Hewitt*.

14 **C. The remedy issues are properly before this Court on summary judgment.**

15 This Court can, and must, decide the issue of what remedies are available to Plaintiffs as
16 a matter of law on summary judgment. That is because it is appropriate at summary judgment to
17 decide purely legal questions, and whether a remedy is available to a plaintiff as a matter of law
18 is a purely legal question. *See* ORCP 47 C; *e.g.*, *Reddy v. Cascade General, Inc.*, 227 Or App
19 559, 566 (2009) (resolving question regarding available remedies on summary judgment). Here,

20 ⁵ Additionally, much of the evidence that Plaintiffs rely on would not be admissible at trial
21 because it is either from a learned treatise, which is only admissible as impeachment evidence,
22 OEC 706, or hearsay, OEC 802. Furthermore, two of Plaintiffs' claimed experts, a pathologist
23 and an orthopedic surgeon, are not qualified to testify about topics that have nothing to do with
24 their medical practices. *See generally* Cold & Van Howe Decls. Medical testimony should come
25 from practitioners in the relevant specialty or with relevant professional experience. However,
26 there is no need for the Court to decide those issues now, because this evidence is all immaterial
and irrelevant to the Court's decision on the State's summary judgment motion.

The State also objects to Attorney Clopper's introduction of attorney emails and
Plaintiffs' proposed stipulated facts into evidence. *See* Clopper Decl., Exs. 1 and 2. These
exhibits are hearsay and attorney testimony and they do not belong in the summary judgment
record, nor do they have any relevance to the issues before the Court.

1 whether the remedy of “extending” the anti-FGM statutes is available to Plaintiffs is a legal
2 question about the separation of powers principle in Article III, section 1, of the Oregon
3 Constitution. Plaintiffs do not assert any argument to the contrary. In fact, a ruling that a type of
4 relief sought is unavailable as a matter of law would resolve that claim to relief entirely in
5 Defendant’s favor, and thus, squarely falls within ORCP 47 C’s mandate that a court “shall grant
6 the motion” if there is no dispute of material fact and the moving party is entitled to prevail as a
7 matter of law.

8 Additionally, Plaintiffs’ suggestion that Court need not be concerned about the remedy
9 Plaintiffs are seeking because the anti-FGM laws are of no consequence, or are redundant, is
10 meritless. *See* Pls’ Opp’n at 26–27. The gravity of what Plaintiffs are asking for—requesting that
11 the judicial branch either extend an existing criminal law to a completely new topic never
12 contemplated by the legislature or to nullify it entirely—must not be ignored. And because the
13 extension remedy that Plaintiffs seek is unavailable to them, invalidating the anti-FGM laws is
14 the only available remedy.

15 **D. Conclusion**

16 This Court should grant the State’s Motion for Summary Judgment. On the jurisdictional
17 issues, Plaintiffs have not met their burden to establish standing under the UDJA because their
18 own testimony demonstrates that they have no injury beyond an abstract interest in the law. Nor
19 have they shown that any injury is caused by the State, or that a favorable decision from this
20 Court will have a practical effect on them. Thus, they have failed to meet their burden to prove
21 standing on summary judgment.

22 On the merits, whether a statute is constitutional on its face is a purely legal question that
23 this Court can, and must, decide at summary judgment under ORCP 47 C. Plaintiffs have not
24 created a dispute of material fact that precludes summary judgment because they do not dispute,
25 and in fact, they appear to agree, that specific biological differences exist between the female and
26 male external genitalia. Because those differences are rationally related to the purpose of the

1 statute—to deter FGM—the State is entitled to prevail as a matter of law. Thus, this Court should
2 grant the State’s Motion for Summary Judgment.

3
4 DATED August 18, 2026.

5 Respectfully submitted,

6 DAN RAYFIELD
7 Attorney General

8
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1 **CERTIFICATE OF SERVICE**

2 I certify that on August 18, 2026, I served the foregoing DEFENDANT'S REPLY IN
3 SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT upon the parties hereto by the
4 method indicated below, and addressed to the following:

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