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

6 MARY LI and REBECCA KENNEDY;
7 STEPHEN KNOX, M.D., and ERIC
8 WARSHAW, M.D.; KELLY BURKE and
9 DOLORES DOYLE; DONNA POTTER and
10 PAMELA MOEN; DOMINICK VETRI and
11 DOUGLAS DEWITT; SALLY SHEKLOW and
ENID LEFTON; IRENE FARRERA and NINA
KORICAN; WALTER FRANKEL and
CURTIS KIEFER; JULIE WILLIAMS and
COLEEN BELISLE; BASIC RIGHTS
OREGON; and AMERICAN CIVIL
LIBERTIES UNION OF OREGON,

12 Plaintiffs,

13 and

14 MULTNOMAH COUNTY,

15 Intervenor-Plaintiff,

16 vs.

17 STATE OF OREGON; THEODORE
18 KULONGOSKI, in his official capacity as
19 Governor of the State of Oregon, HARDY
20 MYERS, in his official capacity as Attorney
21 General of the State of Oregon; GARY
WEEKS, in his official capacity as Director of
the Department of Human Services of the State
of Oregon; and JENNIFER WOODWARD, in
her official capacity as State Registrar of the
State of Oregon,

22 Defendants,

23 and

24 DEFENSE OF MARRIAGE COALITION,
25 CECIL MICHAEL THOMAS, NANCY JO
26 THOMAS, DAN MATES, and DICK
OSBORNE,

Intervenors-Defendants.

No. 0403-03057

**PLAINTIFFS' MEMORANDUM
IN SUPPORT OF MOTION TO
STRIKE AND ALTERNATIVE
MOTIONS FOR STAY OR
EXTENSION AND
CONTINUANCE**

1 INTRODUCTION

2 Plaintiffs' motions to strike and for a stay of proceedings, or else an extension of
3 time and continuance, are being brought now because of the defendants' (hereinafter,
4 "State") position regarding the scope of the current cross-motions for summary judgment.
5 The parties have an agreement regarding the procedure and timelines in this case. In
6 derogation of that agreement, the State now asserts its First Affirmative Defense in the
7 briefing in support of its motion for summary judgment. In further derogation of the
8 agreement, the State also seeks summary judgment on all of plaintiffs' claims, even those
9 that necessarily raise the question of the authority of Multnomah County to act in a
10 constitutional manner by issuing marriage licenses to same-sex and different-sex couples
11 on equal terms, despite a statute that prohibits issuance of such licenses. Tagging along,
12 defendants-intervenors also breach the agreement by moving for summary judgment on
13 plaintiffs' second claim and on defendants-intervenors' fourth affirmative defense and
14 counterclaim, both of which implicate Multnomah County's authority to issue marriage
15 licenses in the face of the marriage statutes. Plaintiffs relied on the settlement and
16 agreement of the parties, and they should not be required at this juncture to brief all
17 claims and all issues.

18 FACTUAL AND PROCEDURAL BACKGROUND

19 As the Court is aware, the first two actions filed in this court regarding
20 Multnomah County's issuance of marriage licenses to same-sex couples were filed by
21 intervenor-defendant Defense of Marriage Coalition and others, including those who are
22 intervenors-defendants in this case. See Defense of Marriage Coalition v. Multnomah
23 County, No. 0403- 02362 (Public Meetings Law and declaratory relief action); Defense
24 of Marriage Coalition v. Linn, No. 0403-02568 (mandamus action). The married couples
25 in this case who had obtained licenses from Multnomah County, and two organizations,
26 the ACLU of Oregon and Basic Rights Oregon, intervened in those cases. Both the

1 defendants and the intervenors filed motions to dismiss based on the plaintiffs' or
2 relators' lack of standing. (Nakamoto Decl ¶ 3.)

3 The parties to those cases then entered into settlement negotiations at the
4 suggestion of the Court and the urging of the Department of Justice. Those negotiations
5 included the Department of Justice, given that the Attorney General would be involved in
6 any challenge to the constitutionality of the Oregon marriage statute. The discussions
7 were facilitated by Judge Kantor. Thereafter, the parties announced a settlement
8 agreement that would result in dismissal of the first two actions by Defense of Marriage
9 Coalition, the filing of an action by plaintiffs, and immediate cross-motions for summary
10 judgment directed to the constitutionality of the marriage statute so as to speed a trial
11 court ruling to an appeal and, ultimately, to the Oregon Supreme Court. (Stip Facts
12 ¶¶ 15, 22; Ex 13 to Stip Facts; Nakamoto Decl ¶¶ 4-5.)

13 Plaintiffs relied upon the agreement to limit the cross-motions for summary
14 judgment to the constitutionality of the statute, and not in addition whether Multnomah
15 County has the legal authority to issue licenses to same-sex couples despite the existing
16 statute, which it determined was unconstitutional. (Nakamoto Decl ¶ 6.) Plaintiffs
17 agreed to the procedure and timelines given the limited scope of summary judgment
18 motions to be filed on April 5, 2004. (Nakamoto Decl ¶ 7.) Now the State and
19 intervenors-defendants have attempted to raise in the first instance issues of County
20 authority, in derogation of the agreement. (See motions for summary judgment filed by
21 intervenors-defendants and State.)

22 ARGUMENT

23 I. The State's first affirmative defense should be stricken pursuant to ORCP 21 E.

24 Under ORCP 21 E(1), upon a motion made prior to responding to a pleading or
25 upon the court's own initiative, a court may strike any "sham, frivolous, or irrelevant
26 pleading" or "more than one claim or defense not separately stated." Under ORCP 21

1 E(2), the court may strike “any insufficient defense” or any “sham, frivolous, irrelevant
2 or redundant matter” in a pleading. Pursuant to ORCP 21 E(1), plaintiffs move to strike
3 the State’s first affirmative defense because it is actually a claim for affirmative relief that
4 is not separately stated. Pursuant to ORCP 21 E(2), plaintiffs move to strike the State’s
5 first affirmative defense as insufficient and “irrelevant.”

6 **Not a separately stated claim.** The State’s first affirmative defense is asserted,
7 by its terms, in the event that the Court rules that the marriage statute excluding same-sex
8 couples from marriage is unconstitutional. In that event, the State asks the Court to
9 “declare that Multnomah County must comply with current statutes governing civil
10 marriage until the Oregon legislature has had an opportunity in its next regular session to
11 fashion appropriate remedial legislation, or until another remedy is ordered by the court.”
12 In no uncertain terms, then, the State is seeking declaratory relief regarding the County’s
13 authority to issue licenses. By asking for affirmative relief, the State should have
14 asserted a separately stated counterclaim. The State having failed to do so, the
15 “affirmative defense” should be stricken under ORCP 21 E(1).

16 **Insufficient defense.** The affirmative defense is also defective and should be
17 stricken under ORCP 21 E(2) because it is insufficient. It does not state a defense at all.
18 It seeks a declaration, which is affirmative relief. Thus, it must be asserted as a
19 counterclaim. The affirmative defense should be stricken.

20 **Irrelevant defense.** In addition, the “defense” is irrelevant to the constitutional
21 issue before the Court on plaintiffs’ first claim for relief. That is so because of the
22 limited remedies under Oregon law in the event a statute is found unconstitutional under
23 Article I, section 20 (plaintiffs incorporate by reference their opposition to the State’s
24 motion for summary judgment). The permissible remedies for the constitutional violation
25 suffered by plaintiffs, such as extension of the privilege of marriage, do not cover
26 declarations as to the County’s authority.

1 Should the Court rule that the marriage statute is unconstitutional under Article I,
2 section 20, the County might continue to issue marriage licenses to lesbian and gay
3 couples. If that were the case, the State could challenge the authority of the County to do
4 so even as the parties to this action pursue an interlocutory appeal of the decision on the
5 constitutional question (including the remedy for the constitutional violation) pursuant to
6 ORCP 67 B. In fact, the Department of Justice has indicated to counsel for plaintiffs and
7 the other parties that the State will seek expedited consideration on the County authority
8 issue or else an order regarding the same, such as a rapid briefing schedule. (Nakamoto
9 Decl ¶ 8.) Because the County's authority to issue licenses in the event the Court rules
10 that the marriage statute is unconstitutional is separable from and irrelevant to the
11 constitutional question before the Court, the "defense" should be stricken as irrelevant
12 under ORCP 21 E(2).

13 **II. The Court should order a stay of proceedings outside the constitutionality of**
14 **the marriage statute pursuant to the agreement.**

15 It is within the Court's equity powers to grant a stay of the judicial proceedings
16 over which it has jurisdiction. See Helms Groover & Dubber Co. v. Copenhagen, 93 Or
17 410, 416, 177 P 935 (1919) (even without a statute, circuit and appellate courts may grant
18 a stay of proceedings pending appeal); Northwestern Title Loans, LLC v. Division of Fin.
19 & Corporate Securities, 180 Or App 1, 5, 42 P3d 313 (2002) (citing Helms Groover with
20 approval for inherent authority of Court of Appeals to grant provisional relief). Plaintiffs
21 move for a stay of proceedings regarding defendants' motion for summary judgment on
22 all claims, except as to plaintiffs' first claim seeking a declaration as to the
23 unconstitutionality of the marriage statute, and regarding defendants-intervenors' motion
24 for summary judgment on plaintiffs' second claim and on defendants-intervenors' fourth
25 affirmative defense and counterclaim. Plaintiffs request the Court's assistance in equity
26 given the parties' agreement concerning this litigation.

1 The bargain was that plaintiffs and all parties would focus their resources on
2 immediately litigating the constitutional question, and only the constitutional question.
3 By having that focus, plaintiffs (and, plaintiffs believe, the intervenors) were able to
4 commit to a procedure and time frame that required the plaintiffs to file an action
5 immediately and then all parties to file a motion for summary judgment on plaintiffs'
6 constitutional claim immediately (less than two weeks after the filing of the complaint).

7 The State and defendants-intervenors, however, now interpose the County
8 authority question through their motions for summary judgment. To explain, the State
9 moves against all of plaintiffs' claims for relief. Plaintiffs' second through fourth claims
10 for relief implicate County authority to issue marriage licenses to same-sex couples.

11 Plaintiffs' second claim for relief challenges the State's non-recognition of the
12 married plaintiffs' marriages at the State Registrar's office. The State Registrar contends
13 that the same-sex couples do not have marriage records from Multnomah County that
14 must be registered because the statutes do not allow issuance of marriage licenses to
15 same-sex couples. The State's position is that, regardless of the unconstitutionality of the
16 statutes, by virtue of the existence of state statutes requiring marriages between a man
17 and a woman, Multnomah County was not entitled to issue licenses to same-sex couples.

18 Plaintiffs' third claim for relief makes the same challenge under the
19 Administrative Procedures Act, except couching it in terms of review of administrative
20 orders. The orders challenged are the State Registrar's March 23, 2004 letters to the
21 married couples stating her reasons for refusing to register their marriage records.
22 Likewise, the County's authority to issue licenses when a statute regarding marriage
23 between men and women was still in effect comes into play.

24 Plaintiffs' fourth claim for relief makes the same challenge to the State Registrar's
25 refusal to perform a duty to register marriage records, but in the alternative to all other
26 claims. The relief sought in that claim is an alternative writ of mandamus and,

ultimately, a judgment that would require registration of the marriages of same-sex couples, including the married plaintiffs. Once again, the County's authority to act in the face of a statute defining marriages to be between men and women comes to the fore.

The State's omnibus motion for summary judgment is one that plaintiffs need not and cannot respond to in total given the parties' agreement and their reliance. Likewise, plaintiffs should not be required to respond to defendants-intervenors' motion for summary judgment directed against plaintiffs' second claim for relief. For the same reasons, defendants- intervenors' motion as to their fourth affirmative defense and counterclaim should be stayed. Although the defense and counterclaim in part dovetails with the constitutional question, where defendants-intervenors seek a declaration that the marriage statutes require marriages to be between a man and a woman (Am Answer of Defendants-Intervenors ¶ 59), it too interposes the County authority issue because defendants-intervenors allege that by virtue of the marriage statutes in ORS chapter 106, the County could not issue marriage licenses and should be enjoined from doing so in the future. (Am Answer of Defendants-Intervenors ¶ 60.) Indeed, the fourth affirmative defense and counterclaim is functionally identical to claims made in the original declaratory relief action, Defense of Marriage Coalition v. Multnomah County, that hid from the constitutional issue.

Accordingly, plaintiffs' motion for a stay of other proceedings until the Court has ruled on the constitutionality of the statute and allowed that issue to go up on appeal should be granted.

III. Alternatively, plaintiffs seek an extension of time under ORCP 15 D and a continuance under ORCP 47 F.

As an alternative to the motion for a stay of proceedings, plaintiffs move under ORCP 15 D for an extension of time and under ORCP 47 F for a continuance of the State's motion for summary judgment on all claims, except as to plaintiffs' first claim

1 seeking a declaration as to the unconstitutionality of the marriage statute, and on
2 defendants-intervenors' motion directed to plaintiffs' second claim for relief and
3 defendants-intervenors' fourth affirmative defense and counterclaim.

4 Under ORCP 15 D, the court "may, in its discretion, and upon such terms as may
5 be just, allow an answer or reply to be made, or allow any other pleading or motion after
6 the time limited by the procedural rules, or by an order enlarging such time." Under
7 ORCP 47 F, "[s]hould a party file for summary judgment prematurely, the trial court has
8 discretion to deny the motion or postpone its determination until discovery is more
9 thoroughly conducted." Robinson v. Lamb's Wilsonville Thriftway, 162 Or App 632,
10 639, 986 P2d 661 (1999), rev'd on other grounds, 332 Or 453, 31 P3d 421 (2001).
11 Because plaintiffs have relied on the parties' agreement, plaintiffs should be permitted a
12 continuance of and an extension of time to respond to the State's motion for summary
13 judgment on all other claims besides plaintiffs' first claim for relief until a reasonable
14 period after the Court has decided the constitutional question and permitted an
15 interlocutory appeal.

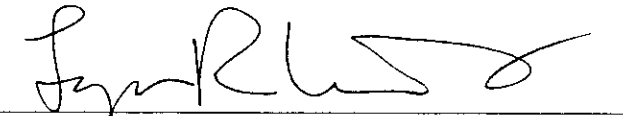
16 CONCLUSION

17 For all of the above reasons, plaintiffs respectfully request that the Court strike the
18 State's first affirmative defense and stay the proceedings on the State's motion for
19 summary judgment except as to plaintiffs' first claim for relief and the intervenors-
20 defendants' motion for summary judgment directed to plaintiffs' second claim for relief
21 and to the intervenors-defendants' fourth affirmative defense and counterclaim seeking
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1 injunctive relief, or, alternatively, grant a continuance on such proceedings and an
2 extension of time for plaintiffs to respond.

3 DATED this 12th day of April, 2004.

4
5 By:



6 Lynn R. Nakamoto

7 OSB #88087

8 (503) 295-3085

9 Cooperating Counsel for the ACLU

Foundation of Oregon

Of Attorneys for Plaintiffs

10 Kenneth Y. Choe, *Pro Hac Vice*

11 AMERICAN CIVIL LIBERTIES UNION

FOUNDATION

12 Lesbian and Gay Rights and AIDS Projects

13 125 Broad Street

14 New York, NY 10004

15 (212) 549-2553

16 Of Attorneys for Plaintiffs

17 70832

ATTORNEY CERTIFICATE OF SERVICE

I hereby certify that I have made service of the foregoing **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO STRIKE AND ALTERNATIVE MOTIONS FOR STAY OR EXTENSION AND CONTINUANCE** on the party/ies listed below in the manner indicated:

Stephen K. Bushong
Oregon Department of Justice
DOJ Trial Division
1162 Court Street NE
Salem, OR 97301-4096

☒ U.S. Mail
☐ Facsimile
☐ Hand Delivery
☐ Overnight Courier
☒ Email

Kelly W. G. Clark
Kristian Roggendorf
O'Donnell & Clark LLP
1706 NW Glisan, #6
Portland, OR 97209

☒ U.S. Mail
☐ Facsimile
☐ Hand Delivery
☐ Overnight Courier
☒ Email

Herbert G. Grey
Kelly E. Ford
Kelly E. Ford, P.C.
4800 SW Griffith Drive, #320
Beaverton, OR 97005

☒ U.S. Mail
☐ Facsimile
☐ Hand Delivery
☐ Overnight Courier
☒ Email

Agnes Sowle
Jenny Morf
Multnomah County Attorney
501 SE Hawthorne Blvd., Suite 500
Portland, OR 97214

☒ U.S. Mail
☐ Facsimile
☐ Hand Delivery
☐ Overnight Courier
☒ Email

Jordan Lorence
Benjamin W. Bull
Alliance Defense Fund
15333 N. Pima Road, Suite 165
Scottsdale, AZ 85260

☒ U.S. Mail
☐ Facsimile
☐ Hand Delivery
☐ Overnight Courier
☒ Email

Raymond M. Cihak
Pamela Hediger
Evashevski Elliott Cihak & Hediger, PC
PO Box 781
Corvallis, OR 97339

☒ U.S. Mail
☐ Facsimile
☐ Hand Delivery
☐ Overnight Courier
☒ Email

Kevin Clarkson
Brena Bell & Clarkson
310 K Street, Suite 601
Anchorage, AK 99501

☒ U.S. Mail
☐ Facsimile
☐ Hand Delivery
☐ Overnight Courier
☒ Email

DATED this 12th day of April, 2004.



Lynn R. Nakamoto
OSB #88087
Attorney for Plaintiffs

CERTIFICATE OF SERVICE