



1 IN THE CIRCUIT COURT OF THE STATE OF OREGON

2 FOR THE COUNTY OF MULTNOMAH

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

16 Plaintiffs,

17 and

18 MULTNOMAH COUNTY,

19 Intervenor-Plaintiff,

20 v.

21 STATE OF OREGON; THEODORE
22 KULONGOSKI, in his official capacity as
23 Governor of the State of Oregon; HARDY
24 MYERS, in his official capacity as Attorney
25 General of the State of Oregon; GARY
26 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,

Defendants,

and

DEFENSE OF MARRIAGE COALITION;
CECIL MICHAEL THOMAS; NANCY JO
THOMAS; DAN MATES and DICK
OSBORNE,

Intervenor-Defendants.

Civil No. 0403-03057

INTERVENOR- PLAINTIFF
MULTNOMAH COUNTY'S REPLY IN
SUPPORT OF MOTION FOR PARTIAL
SUMMARY JUDGMENT

Page 1 – INTERVENOR-PLAINTIFF MULTNOMAH COUNTY'S REPLY IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT

1 In accordance with this Court's April 13, 2004, letter, and the agreement between the
2 parties, Intervenor-plaintiff Multnomah County (hereinafter "Multnomah County") will limit its
3 reply to issues related to the constitutionality of denying marriage licenses to applicants who
4 wish to marry their same sex partners pursuant to ORS Chapter 106. Defendants' failed to
5 demonstrate that there are any genuine issues of material fact in dispute or that plaintiffs are not
6 entitled to judgment as a matter of law.
7

8 Multnomah County relies on its arguments previously submitted in its memorandum in
9 support of summary judgment, and responses to defendants' motions for summary judgment.
10 The County offers the following additional points:

11 **I. MARRIAGE IS A "BENEFIT" FOR THE PURPOSES OF ARTICLE I, SECTION**
12 **20, OF THE OREGON CONSTITUTION**

13 Defendants concede that marriage is a civil contract that provides benefits and protections
14 to married individuals. (Intervenor-defendants' Response Memorandum to plaintiffs' motions
15 for summary judgment at 10 (marriage is a civil contract and plaintiffs have a "right to this
16 contract to the same extent as all other Oregonians"); defendants' Memorandum in support of
17 summary judgment at 4 (parties to a civil marriage contract receive "secular benefits and
18 protections" under Oregon law)). The fact that marriage confers a benefit is sufficient to
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24 ¹ Multnomah County reserves its right to address the standing and merits of intervenor-
25 defendants' counterclaims. The County also reserves its right to Answer and address the State
26 defendants' affirmative defenses and counterclaim as alleged in defendants' Answer, Affirmative
Defenses, and Counterclaim (In Response to Intervenor-Plaintiff Multnomah County's Claims in
Intervention).

1 implicate Article I, section 20. *City of Salem v. Bruner*, 299 Or 262, 268-69 (Or S Ct
2 1985)(denial of “some advantage” is sufficient to implicate Article I, section 20); *State ex. rel*
3 *Peterson v. Martin*, 180 Or 459, 474 (1947)(“the term ‘license’ refers to the right or privilege
4 conferred”).

5 **II. THE HISTORICAL EXCEPTION DOCTRINE HAS NEVER BEEN APPLIED TO** 6 **ARTICLE I, SECTION 20, OF THE OREGON CONSTITUTION**

7 Intervenor-defendants strenuously argue that the historical exception doctrine applies to
8 Article I, section 20, of the Oregon constitution. However, intervenor-defendants fail to provide
9 any authority that recognizes the applicability of the clear historical exception doctrine to Article
10 I, section 20. Instead, intervenor-defendants rely on a long and substantial history of applying
11 the doctrine to speech and jury rights. (Intervenor-defendants’ response to plaintiffs’ motion for
12 summary judgment at 2-6.)² Intervenor-defendants fail to provide any authority or argument to
13 justify extension of the doctrine to Article I, section 20, analysis. This Court should decline to
14 distinguish itself as the first Oregon court to apply the clear historical exception doctrine to the
15 provision of governmental privileges.
16

17 **III. RESOLUTION OF THE FIRST CLAIM FOR RELIEF WILL RESULT IN A** 18 **FINAL AND APPEALABLE JUDGMENT**

19 Plaintiffs and Multnomah County both request this court to grant summary judgment on
20 the First Claim for Relief and declare that “the failure of the Oregon statutory code to permit
21 marriages of same-sex couples violates Article I, section 20 of the Oregon constitution.” (First
22 Amended Complaint ¶ 135). The State argues that the Court should expand its consideration to
23

24 ² Intervenor-defendants do not explain why this doctrine has never been applied in a Article I,
25 section 20, setting other than by referencing the Civil War and hundreds of years of oppressive
26 racial and gender struggles. It would seem that if the state and federal constitutional
amendments regarding race and gender were the true reason for avoiding application of the
doctrine, an Oregon court would have mentioned it some time in the last one hundred years.

1 each of plaintiffs' four claims, defendants' affirmative defenses, and intervenor-defendants
2 affirmative defenses/counterclaims. (Defendants' response to cross-motions for partial summary
3 judgment at 3-6).

4 Defendants' position is in clear violation of the agreement between the parties to limit
5 briefing to the constitutional issues. (Stipulated Facts, Exhibit 13). In addition, issuance of a
6 declaration as requested in the First Claim would terminate the controversy and remove the
7 uncertainty that gave rise to the case, thereby creating a certifiable and appealable interlocutory
8 ruling. This is true regardless of the declaration issued or the remedy ordered because *all* of the
9 parties to this case will be bound by the decision of this court. *Boyd v. Olcott, et al*, 102 Or 327,
10 358-59 (Or S Ct 1921)(Oregon is governed by law, and the constitution is the "fundamental law
11 of the land"); *see Alto v. State Fire Marshal*, 319 Or 382, 395 (1994)(court assumed "that the
12 defendant state agency will, in the absence of an injunction, follow the law as a court decides
13 it"). Just as the State defendants presume that Multnomah County would follow this Court's
14 ruling, it may be presumed that the State and all of its agencies would do so as well. (*See*
15 defendants' response to cross-motions for partial summary judgment at 4 fnt 6).

16 Multnomah County is entitled to an Order granting the First Claim for relief and
17 declaring that the failure of the Oregon statutory code to permit marriages of same-sex couples
18 violates Article I, section 20 of the Oregon constitution.

19 **IV. MULTNOMAH COUNTY HAS STANDING TO SEEK A DECLARATORY**
20 **JUDGMENT REGARDING THE CONSTITUTIONALITY OF ORS CHAPTER**
21 **106**

22 To establish standing in Oregon, there are two constitutional requirements: (1) the parties
23 must be adverse, and (2) "*the person invoking the jurisdiction of the courts* must establish that a
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25 /// /// ///

1 decision would have a practical effect on him or her.” *Utsey v. Coos County*, 176 Or App 524,
2 543 (2001)(emphasis in original); *see also McIntire v. Forbes*, 322 Or 426, 433 (1996), *Barcick*
3 *v. Kubiacyk*, 321 Or 174, 182 (1995), and *Brumnett v. PSRB*, 315 Or 402 (1993).

4 Intervenor-defendants argue that Multnomah County does not have standing to request
5 declaratory relief regarding the constitutionality of ORS Chapter 106. Intervenor-defendants’
6 argument fails because a court declaration will have a practical effect on Multnomah County
7 operations.
8

9 Multnomah County is required to provide marriage licenses to qualified applicants under
10 ORS Chapter 106. ORS 106.041 The Court’s ruling in this case will not only affect future
11 County operations, but will affect the County’s ability to defend past actions. Additionally, the
12 ruling in this case will affect the County’s distribution of funds generated from the issuance of
13 marriage licenses.³ Because Multnomah County has issued approximately 2960 licenses to
14 same-sex couples, the determination of the constitutionality of ORS Chapter 106 will have a
15 substantial practical effect on the rights and duties of Multnomah County. (Affidavit of Kathleen
16 Tuneberg ¶ 3).
17

18 Multnomah County has standing to bring the First Claim for Relief because County
19 operations will be significantly affected by determination of the constitutionality of ORS Chapter
20 106. *Utsey*, 176 Or App at 543.
21

22
23 ³ The County is required to properly distribute funds generated by the marriage licensure fee.
24 ORS 106.045. The County collects \$60.00 for each license issued. The County distributes
25 \$25.00 from each license to the State of Oregon, Children Services for the Domestic Violence
26 Fund, and \$10 from each license to the Multnomah County Family Court Services Conciliation
Fund. The County retains \$25.00 from each marriage license to defer its expenses for issuing
licenses. The County currently maintains a trust account to hold the fees it has retained from
same-sex marriage licenses in a trust account pending resolution of this lawsuit. (Affidavit of
Kathleen Tuneberg ¶ 4).

1 **V. CONCLUSION**

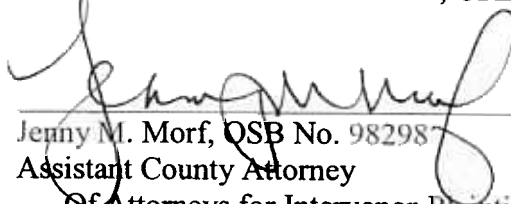
2 Defendants and intervenor-defendants failed to present any genuine issues of material
3 fact in dispute regarding the First Claim for Relief. Statutory provisions that limit marriage to
4 unions between one man and one woman deprive plaintiffs of their legal rights, benefits, and
5 obligations that married heterosexual individuals are entitled to as a matter of course. Therefore,
6
7 ORS Chapter 106 violates Article I, section 20, of the Oregon Constitution as a matter of law

8 Accordingly, Intervenor-plaintiff Multnomah County is entitled to an Order granting
9 plaintiffs' First Claim for Relief, and entry of a judgment declaring that the failure of ORS
10 Chapter 106 to permit marriages of the same-sex violates Article I, section 20, of the Oregon
11 Constitution

12 DATED this 14th day of April, 2004.

13
14 Respectfully submitted,

15 AGNES SOWLE, COUNTY ATTORNEY
16 FOR MULTNOMAH COUNTY, OREGON

17 
18 Jenny M. Morf, OSB No. 982987
19 Assistant County Attorney
20 Of Attorneys for Intervenor-Plaintiff
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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2004, I served the foregoing **INTERVENOR-
PLAINTIFF MULTNOMAH COUNTY'S REPLY IN SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGMENT** on:

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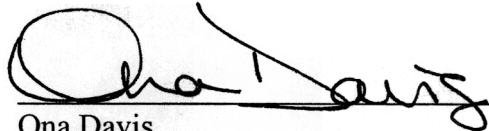
Raymond M. Cihak
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745 NW Van Buren St.
Corvallis, OR 97339

by the following method or methods as indicated:

- (X) by **mailing** to said party(s), a true copy thereof, said copy placed in a sealed envelope, postage prepaid and addressed to said person(s) at the last known address for said person(s) as shown above, and deposited in the post office at Portland, Oregon, on the date set forth above.
- () by causing a true copy thereof to be **hand delivered** to said party(s) at the last known address for said person(s) as shown above, on the date set forth above.
- () by mailing via **certified mail, return receipt requested**, to said person(s) a true copy thereof, said copy placed in a sealed envelope, postage prepaid and addressed to said person(s) at the last known address for said person(s) as shown above, and deposited in the post office at Portland, Oregon, on the date set forth above.

1 by **facsimile** to said person(s) a true copy thereof at the facsimile number shown above,
2 which is the last known facsimile number for said person(s) on the date set forth above.
3 A copy of the confirmation report is attached hereto.

4 (X by **email** to each person listed above at kellyc@oandc.com; ksr@oandc.com;
5 lynnnakamoto@markowitzherbold.com; kchoe@aclu.org;
6 stephen.bushong@doj.state.or.us; kford.law@gte.net; hgrey.law@gte.net;
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