

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

**MARY LI and REBECCA KENNEDY;
STEPHEN KNOX, M.D. and ERIC
WARSHAW, M.D.; KELLY BURKE and
DOLORES DOYLE; DONNA POTTER and
PAMELA MOEN; DOMINICK VETRI and
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,**

Plaintiffs,

and

MULTNOMAH COUNTY,

Intervenor-Plaintiff,

v.

**STATE OF OREGON; THEODORE
KULONGOSKI, in his official capacity as
Governor of the State of Oregon; HARDY
MYERS, in his official capacity as Attorney
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,**

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 RESPONSE
TO STATE DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

INTERVENOR-PLAINTIFF MULTNOMAH COUNTY'S RESPONSE TO STATE
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Intervenor-plaintiff Multnomah County submits the following memorandum in response to the defendants’ motion for summary judgment. In support of this response Multnomah County relies on the provisions of ORCP 47 and the pleadings and file in this action.

I. INTRODUCTION

The State of Oregon, Governor Kulongoski, Attorney General Myers, Gary Weeks, and Jennifer Woodward (hereinafter “State”) filed a motion for summary judgment against plaintiffs’ First Amended Complaint (hereinafter “Complaint”) in its entirety. The State also appears to request that the court grant summary judgment on their First Affirmative defense entitled “Legislative Remedy” and to grant an injunction prohibiting Multnomah County from issuing marriage licenses to same-sex couples.¹ (*See* Defendants’ Answer and Affirmative Defenses ¶ 20 (“Defendants’ Answer”)).

The State’s motion of summary judgment fails because they do not to demonstrate that: (1) plaintiffs’ claims fail as a matter of law, (2) the State is entitled to a “legislative remedy” as a matter of law, and (3) the State is entitled to an injunction against Multnomah County.

II. THE STATE’S MOTION AGAINST PLAINTIFFS’ CONSTITUTIONAL CLAIMS FAILS AS A MATTER OF LAW

Plaintiffs generally allege that the Oregon statutory code’s failure to permit marriages of same-sex couples violates Article I, section 20, of the Oregon constitution. (Complaint ¶ 11 114, 120, 126, 133). The State argues that plaintiffs’ claims should be dismissed because a marriage license is not a privilege under Article I, section 20, and because plaintiffs’ homosexuality

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¹ Defendants’ do not request an order granting summary judgment on defendants’ Second Affirmative Defense.

1 justifies denial of a marriage licenses. (Defendants’ memorandum in support of motion for
2 summary judgment (“Memo”) at 13-14). The State’s motion against plaintiffs’ claims for relief
3 fails as a matter of law.
4

5 **A. Marriage is a privilege under Oregon law.**

6 The State concedes that parties to a civil marriage contract receive “secular benefits and
7 protections” under Oregon law. (Memo ¶ 4). These benefits are provided to married individuals
8 as a matter of course and without further action by the married individual. For example, a
9 married person need not apply for the spousal privilege; instead, that protection is conferred
10 immediately upon marriage.
11

12 After admitting that Oregon law clearly provides benefits and privileges to married
13 individuals, the State proposes that this court “could” follow Arizona case law found in
14 *Strandhardt v. Superior court*, 77 P3d 451 (Az App 2003). (Memo at 4 and 13). The State does
15 not cite a single Oregon decision to support this recommendation. The rulings of Arizona courts
16 are not binding on this court and would only be instructive if Oregon law was unsettled.
17

18 For the purposes of Article I, section 20, a recognized marriage clearly confers an
19 advantage to married individuals. *City of Salem v. Bruner*, 299 Or 262, 268-69 (Or S Ct
20 1985)(denial of “some advantage” is sufficient to implicate Article I, section 20 of the Oregon
21 constitution); *see also* 49 Or Op Att’y Gen 112, No. 8260 (“even a slight advantage might
22 constitute a ‘privilege’ or ‘immunity’ under Article I, section 20”). The advantages of marriage
23 spring directly from the marriage itself. The State did not offer any Oregon case law to support
24 its argument that the benefits of the license can be separated from the benefits of a recognized
25 marriage.
26

1 **B. The failure of Oregon statutory code to permit marriages of same-sex**
2 **couples does not withstand strict scrutiny.**

3 In order to prevail in its motion for summary judgment, the State must demonstrate that
4 Oregon’s statutory code withstands strict scrutiny as a matter of law. They fail to do so.

5 The State admits that plaintiffs cannot be denied benefits based on their sexual
6 orientation, but then suggest that an Oregon court “could” justify denial of a “marriage license
7 itself” like the Arizona Court of Appeals did in *Stranhardt v. Superior Court*, 77 P3d 451 (Az
8 App 2000). (Memo at 14). This court should decline to adopt the Arizona court’s reasoning or
9 holding in *Stranhardt* because (1) Arizona law is neither binding nor instructive to this court, and
10 (2) because the interests considered in *Stranhardt* do not withstand strict scrutiny.

11 **1. Arizona law is neither binding nor instructive to this court’s analysis of**
12 **the Oregon constitution**

13 Oregon law clearly establishes that strict scrutiny must be applied where statutory
14 provisions subject individuals to disparate treatment on the basis of gender or sexual orientation.
15 See *Hewitt v. SAIF Corp*, 294 OR 33, 46 (1982); *Tanner v. OHSU*, 157 Or App 502, 522 (1998).

16 In *Stranhardt*, the Arizona Court of Appeals considered that historical discrimination
17 against same-sex marriage, procreation, and childrearing provided a “rational basis” for denial of
18 same-sex marriages in Arizona. See generally *Stranhardt*, 77 P3d 451. The State’s reliance on
19 *Stranhardt* is misplaced because Arizona jurisprudence is not binding on this court. Nor is
20 *Stranhardt* instructive to this court because Oregon law clearly requires a strict scrutiny review
21 while the Arizona law requires only a rational basis review. *Id.* at 460-61; see *Hewitt*, 294 at 46;
22 *Tanner*, 157 Or App at 522.

23 /// /// ///

24 /// /// ///

1 **2. The State fails to set forth any interest that justifies disparate treatment**
2 **of plaintiffs on the basis of their gender or sexual orientation.**

3 Disparate treatment is permitted under Article I, section 20, only upon a showing that
4 there is a “genuine difference” between men and women, or between heterosexual and
5 homosexual individuals. *Hewitt*, 294 Or at 46-47, 49-50; *Tanner*, 157 Or App at 522. The State
6 argues that historical discrimination against same-sex marriage, procreation, and childrearing
7 justify denying licenses to same-sex couples. The State’s motion for summary judgment fails
8 because they failed to articulate any “genuine difference” that justifies disparate treatment.
9

10 **a) Historical discrimination does not justify disparate treatment on the**
11 **basis of gender or sexual orientation.**

12 Historical discrimination does not justify the State’s refusal to recognize plaintiffs’
13 marriages because such discrimination is undeniably rooted in stereotypes. Article I, section 20,
14 does not permit the State’s justification to be premised upon social roles or stereotypes because
15 “[t]hat is exactly the kind of stereotyping which renders the classification suspect in the first
16 place.” *Hewitt*, 294 Or at 46-47, 49-50.

17 **b) Procreation does not justify disparate treatment on the basis of**
18 **gender or sexual orientation.**

19 Procreation does not justify the State’s refusal to recognize plaintiffs’ marriages because
20 Oregon law does not predicate marriage on procreation. Oregon law recognizes marriages of
21 individuals who are unable or uninterested in having children to the same extent that it
22 recognizes the marriages of individuals with children.² Further, couples who intend to wed are
23 not required to promise to have children.
24

25 /// /// ///

26 ² The majority of the plaintiffs in this action have children; however, the State still refuses to
recognize their marriages.

1 c) **Childrearing does not justify disparate treatment on the basis of**
2 **gender or sexual orientation.**

3 An interest in childrearing does not justify the State's refusal to recognize plaintiffs'
4 marriages because Oregon law has long prohibited consideration of gender and sexual
5 orientation in childrearing, adoption, and custody disputes. *Collins and Collins*, 183 Or App 354,
6 359 (2002)(court cannot consider parent's sexual orientation when deciding custody
7 arrangement); *Ashling v. Ashling*, 42 Or App 47, 50 (1979)(heterosexuals and homosexuals held
8 to the same standard of behavior in custody and visitation determinations); ORS
9 109.309(1)("[a]ny person may petition the circuit court for leave to adopt")(amended in 1953);
10 OAR 413-120-0200(adoption open to unmarried and married couples)(adopted in 1995 and
11 amended in 2001).³

12
13 The State failed to demonstrate that discrimination against plaintiffs on the basis of their
14 gender or sexual orientation is permissible under the Oregon constitution. Therefore, the State's
15 motion for summary judgment fails as a matter of law.

16 **III. THE STATE'S MOTION FOR SUMMARY JUDGMENT ON ITS FIRST**
17 **AFFIRMATIVE DEFENSE FAILS AS A MATTER OF LAW**

18 The State also seeks summary judgment on its First Affirmative Defense which sets out
19 an alternative remedy:

20 If this court determines that Oregon's current statutory provisions governing civil
21 marriage violate Article I, section 20 in any respect, the court's judgment should
22 maintain the present statutory provisions for civil marriage and declare that
23 Multnomah County must comply with current statutes governing civil marriage
24 until the Oregon legislature has had an opportunity in its next regular session to
fashion appropriate remedial legislation, or until another remedy is ordered by the
court.

25
26 ³ Massachusetts adopted this approach, *see Goodridge v. Department of Public Health*, 440 Mass
309, 333 (2003)(rejecting "the destructive stereotype that same-sex relationships are inherently
unstable and inferior to opposite-sex relationships and not worthy of respect."

1 (Defendants' Answer ¶ 20). The State's motion for alternative relief should be denied because:
2
3 (1) the requested relief is not available under Oregon law, and (2) the State is not entitled to an
4 injunction against Multnomah County.

5 **A. Oregon law provides two remedial alternatives upon a determination that a**
6 **statutory provision violates Article I, section 20 of the Oregon constitution.**

7 The State acknowledges that Oregon law provides for two remedial alternatives when a
8 statute conferring benefits is declared unconstitutional: extension or nullification. *See Hale v.*
9 *Port of Portland*, 308 Or 508, 525 (1989); *Hewitt v. SAIF*, 294 Or 33, 51 (Or S Ct 1982)(Memo
10 at 16-19). Nonetheless, the State urges this court to abandon Oregon's established remedial
11 alternatives and adopt the "Vermont approach" instead. *Citing Baker v. State*, 744 A2d 864, 866
12 (Vt 1999)(Memo at 20). Under the proposed scheme, this court would preserve the
13 unconstitutional status quo and defer to the legislature to craft a legislative remedy within a
14 "reasonable time."⁴
15

16 The State fails to cite, and Multnomah County is unable to find, any Oregon case
17 supporting adoption of the "Vermont approach." Nor do any cases even suggest that Oregon's
18 established remedial alternatives are deficient or impractical. No reported case was found in
19 which the court found an act to be discriminatory or unconstitutional, but allowed the
20 discrimination to continue pending legislative action. The State presents no support for rejecting
21 Oregon's clearly established law, particularly at the trial court level.
22

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24 /// /// ///

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⁴ The State suggests that July 1, 2005, is a "reasonable time." (Memo at 20 fnt 101).

1 **B. The State’s request for injunction against Multnomah County’s issuance of**
2 **marriage licenses to same-sex couples fails**

3 The State also requests an “order” prohibiting Multnomah County from issuing licenses
4 to same-sex couples on the grounds that the County did not have authority to interpret the
5 constitutionality of Oregon’s marriage statutes. (Memo at 21-24; Defendants’ Answer ¶ 21).

6 The State’s arguments in section IV of the brief should be stricken because the parties’
7 specifically agreed that expedited briefing scheduled would be limited to the constitutionality of
8 the Oregon statutory scheme under Article I, section 20. (Stipulated Facts Exhibit 13).⁵

9 Notwithstanding the appropriateness of the State’s argument at this stage in the litigation,
10 the requested relief should be denied or dismissed because: (1) the relief requested is not
11 properly pled, and (2) the State cannot demonstrate that it is entitled to an injunction against
12 Multnomah County.
13

14 **1. The State’s request for injunction against Multnomah County should**
15 **be denied because defendants fail to state a claim upon which relief**
16 **can be granted.**

17 The State’s Answer does not include any claim against Multnomah County to which
18 injunctive relief attaches. Instead, the State seeks to enjoin the County from issuing marriage
19 licenses by including it in its First Affirmative defense. (Defendants’ Answer ¶ 21).

20 The State’s pleading is clearly not an affirmative defense because it does not seek to
21 defeat plaintiffs’ claims. *See* ORCP 19(B). Assuming the pleading is mislabeled, the court may
22 treat the First Affirmative defense as a counterclaim. *Federal Savings and Loan Ins. Corp v.*
23 *Johnson*, 97 Or App 250, 253 (1989)(court considered mislabeled affirmative defense as a
24

25 _____
26 ⁵ Inclusion of this argument is a breach of the letter and intent of the agreement. A court ruling
on the County authority argument will create an appealable issue that may detract from an
expedited resolution of the constitutional claims.

1 counterclaim); ORCP 19(B). However, the State’s pleading is not properly pled even if it were
2 considered a counterclaim. A counterclaim must include a “plain and concise statement of the
3 ultimate facts constituting a claim for relief” as well as a “demand for relief.” ORCP 18(A-B).

4 Here, the State’s pleading only contains a demand for relief and fails to allege any claim
5 or facts supporting a claim. Therefore, the pleading is insufficient as a matter of law. The State’s
6 First Affirmative Defense should be dismissed for failure to state a claim.
7

8 **2. The State is not entitled to an Order enjoining Multnomah County**
9 **from issuing marriage licenses to same-sex couples**

10 An injunction is an extraordinary remedy, to be granted only on clear and convincing
11 proof of irreparable harm when there is no adequate legal remedy. *Gildow v. Smith*, 155 Or App
12 648, 653 (1998). The State makes no attempt to demonstrate that it is entitled to injunctive relief
13 against the County. Instead, the State argues that County officials do not have authority the to
14 interpret the constitutionality of statutes that the County is charged with implementing. The
15 County is entitled to an order dismissing the State’s requested relief because: (1) the County’s
16 authority to interpret the constitutionality of statutory provision is not relevant to the issue before
17 this Court, and (2) the County has a duty to administration County business within the
18 requirements of the constitution.
19

20 **a) The issue of County authority is not relevant to this Court’s analysis**
21 **of the constitutionality of the Oregon statutory code.**

22 The State argues that Multnomah County should be enjoined from issuing marriage
23 licenses to same-sex couples because the County did not have authority to begin issuing in the
24 first place. (Memo at 21-24). The court need not address the merits of the State’s arguments at
25 this point in the litigation because the issue of County authority is completely irrelevant to this
26 court’s analysis of the constitutionality of Oregon’s marriage statutes. Further, if this Court finds

1 that the current statutory code violates Article I, section 20, then the State is not entitled to any
2 remedy whatsoever. The State would only be entitled to a remedy upon demonstrating that they
3 *prevail* on the issue presented.

4 The issue of County authority does not play any role in this Court's determination of the
5 constitutionality of denying plaintiffs marriages because of their gender or sexual orientation.
6 Multnomah County is entitled to an Order denying the State's requested relief.
7

8 **b) The County is required to interpret the constitution in order to assure**
9 **compliance therewith.**

10 The State's requested relief must also be denied because Multnomah County officials are
11 required to interpret the constitutionality of statutes that they are charged with implementing.
12 Oregon law clearly establishes that government officials must comply with the constitution and a
13 statute tells an agency to do something that a constitution forbids, the agency should not do it."
14 *Employment Div. v. Rogue Valley Youth for Christ*, 307 Or 490, 495 (Or S Ct
15 1989)(Employment Division must administer the law in accordance with constitutional
16 principals); *Cooper v. Eugene Sch. Dist. No. 4J*, 301 Or 358, 364 (Or S Ct 1986)(school
17 official's must interpret the constitution in order to assure that official business is conducted in
18 accordance with the constitution). Furthermore, elected County officials take an oath to uphold
19 the Oregon constitution upon being sworn into office.
20

21 The State concedes that a government "official's duty to comply with the constitution is
22 paramount." (Memo at 23). Notwithstanding this duty to interpret and act in compliance with the
23 constitution, the State argues that the County should have done nothing to protect the
24 constitutional rights of individuals requesting marriage licenses. In fact, the State argues that the
25 County should be prohibited from issuing marriage licenses to same-sex couples even if this
26

1 Court finds the Oregon statutory code unconstitutional. Such a prohibition would itself be
2 unconstitutional. The State fails to cite any case law supporting the conclusion that Multnomah
3 County is prohibited from interpreting the constitutionality of statutes that it is charged with
4 implementing.

5 The State failed to demonstrate that they are entitled to any relief against Multnomah
6 County. Therefore, Multnomah County is entitled to an Order denying the State's motion for
7 summary judgment.
8

9 **IV. CONCLUSION**

10 The State failed to demonstrate that Article I, section 20, of the Oregon constitution
11 allows plaintiffs to be excluded from marriage on the basis of their gender or sexual orientation.
12 In addition, the State failed to demonstrate that they are entitled to the relief requested in their
13 First Affirmative Defense. As such, defendants' motion for summary judgment fails as a matter
14 of law and plaintiff-intervenor Multnomah County is entitled to an Order dismissing defendants'
15 First Affirmative Defense and motion for summary judgment.
16

17 DATED this 12th day of April, 2004.

18 Respectfully submitted,

19 AGNES SOWLE, COUNTY ATTORNEY
20 FOR MULTNOMAH COUNTY, OREGON

21
22 _____
23 Jenny M. Morf, OSB No. 98298
24 Assistant County Attorney
25 Of Attorneys for Intervenor-Plaintif
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