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Of Attorneys for Amici Curiae
Basic Rights Oregon

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PHILLIP LEMONS et al,

Civil No. 3:07-CV-01782-MO

Plaintiffs,

v.

**BILL BRADBURY, Secretary of the
State of Oregon, in his official capacity,
et al,**

**MEMORANDUM OF AMICUS
CURIAE IN OPPOSITION TO
MOTION FOR TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

Defendants.

I. INTRODUCTION

Plaintiffs in this case are individuals who seek to have their signatures counted on Referendum Petition 303. That referendum sought to place before the voters the question of whether to enact HB 2007, a law allowing same-sex couples to register as

domestic partners, and thereby be subject to comparable rights, responsibilities and benefits of the marital contract under state law. On October 8, 2007, the Secretary of State determined that Chief Petitioners had failed to submit enough valid signatures for the referendum to be placed on the ballot. Accordingly, HB 2007 is set to take effect on January 1, 2008 as provided by the Oregon legislature.

Now, less than two weeks before the law takes effect, Plaintiffs have filed a Motion for a Temporary Restraining Order and Preliminary Injunction seeking to enjoin implementation of HB 2007. Amicus join the Secretary of State in opposing such a motion. Neither side of the sliding scale that governs preliminary injunction determinations tips in favor of Plaintiffs. On the one hand, Plaintiffs have demonstrated no likelihood of success on the merits. Their basic assertion that a signature on a referendum petition is the same as a vote is simply wrong. The initiative and referendum process is a creature of the state. State laws regulating that process, including the qualifications of signers and the requirements for signature verification, are permissible content-neutral election regulations.

On the other hand, whatever harm plaintiffs might claim results from implementation of HB 2007 is far outweighed by the harm caused by enjoining implementation of HB 2007. Enjoining HB 2007 will deprive committed same-sex couples of the significant rights that flow from the legislation. In addition, an injunction at this late date will cause substantial disruption in a myriad of sectors – both private and public – that have already developed rules, policies and procedures

implementing HB 2007. In contrast, even if Plaintiffs were to ultimately win on the merits – which is highly unlikely – the matter could still be put before the voters in November 2008. Plaintiffs have identified no harm – nor can they – in having HB 2007 take effect on January 1, 2008.

In this memorandum, Amicus will address the balance of harms issue exclusively. Amicus will not repeat the legal arguments ably set out by the state.

II. ARGUMENT: The Balance of Harms and the Public Interest Favor Denial of a Preliminary Injunction

A. If HB 2007 were enjoined, same-sex domestic partners would be irreparably harmed

HB 2007 was passed during the 2007 legislative session. The legislative intent of the bill is obvious. Committed same-sex partners should have the opportunity to have their relationship legally recognized so that they can enjoy the same rights, responsibilities and benefits of marriage as committed opposite-sex couples.

The rights afforded by HB 2007 are not hypothetical. They have a real and immediate impact on Oregon citizens. During legislative deliberations on HB 2007, and its predecessor bills considered during the 2005 legislative session (SB 1000 and SB 1073), citizens from across the state testified about the harms they had suffered as a result of not having their relationship legally recognized. Copies of their testimony are attached to the Declaration of Maura Roche, the chief lobbyist for Basic Rights Oregon. That testimony may also be accessed from the website of the

Oregon State Legislature: www.leg.state.or.us/listn/listenset.htm.

The harms that HB 2007 address include:

1. The right to have one's partner make health care decisions

Kelly Burke testified that when her partner of 19 years was having a reaction to chemotherapy, the on-line oncology nurse would not talk to her. Roche Declaration, Ex. F. Under HB 2007, a domestic partner, like an opposite-sex spouse, would have the automatic right to be involved in health care decisions.

Casey Moffett-Chaney testified that her partner of 12 years was not allowed to give permission for doctors to administer a critically needed medication when she was unconscious. Roche Decl., Ex. H. Her partner had legal paperwork giving her power of attorney for health care decisions, but the hospital would not accept it. The hospital was finally able to reach a sister-in-law, who authorized the treatment. Under HB 2007, Ms. Moffett-Chaney's partner would not have had to rely on legal forms, which are often insufficient in times of crisis; her right to give permission would be assumed.

Daniel Beck testified about the illness and death of his partner of 8 years. Initially, his partner's siblings were willing to lie to hospital staff that he was another "brother" so that Mr. Beck could visit his partner in his isolation room. The siblings subsequently withdrew consent. Roche Decl., Ex. D. Under HB 2007, Mr. Beck would have had the right to be with his partner as he died.

Jennifer McLaughlin testified about being in the hospital after being seriously burned. During the night, her throat began to swell and she wondered who would make decisions on her behalf if she could not talk. Roche Decl., Ex. C. Her partner was not contacted. Under HB 2007, a registered domestic partner would be contacted and able to act on behalf of his or her partner.

2. The Right to Be Presumed the Parent of a Child of Your Partner

Kelly Burke testified that within three days of her son's birth, she was rushed to the hospital to be evaluated for blood clots. At that time, the second parent adoption was not yet complete. That meant, while faced with her own medical crisis, she worried that in the event she died, her son would have no parent and her partner would have no custodial rights. Ms. Burke explains: "What should have just been a medical crisis instead put our 3-day-old son's entire future and family unit in jeopardy." Roche Decl., Ex. F. Had HB 2007 been place, her partner would have been the presumed parent.

Nancy Frantz-Geddes, a registered nurse, tells of an incident involving medical treatment for her son. She and her partner of 23 years have two children. In 2000, her oldest son fell and cut his head. The family went to the local emergency room for stitches. When the child's name was called, the nurse asked "who is the mother here" and only permitted one mom to go back with the child. The event unnecessarily upset the child, who wanted both of his parents with him. Roche Decl., Ex. I. Had HB 2007 been in place, this would not have occurred.

3. Lack of Inheritance Rights and other Financial Harms

Daniel Beck testified about how, when his partner Robert died intestate, Robert's family essentially took everything that was not in Mr. Beck's name alone. Roche Decl., Ex. D. Under HB 2007, this would not occur.

Diane Groff and her long-term partner, Liz Cahill, testified about how they had all of the "expensive legal documents" they could think of and thought they were protected. However, when they attempted to purchase a family homestead from her grandmother's estate, the bank refused to give them a joint mortgage based upon the fact that there was no legal recognition of their relationship. Roche Decl, Ex. A. Under HB 2007, this would not have occurred.

Melissa Montigny testified about being denied bereavement leave to attend an out-of-state funeral for her partner's father. She was denied the leave because her partner was not her "immediate family." Ms. Montigny challenged the public employer's policy and ultimately prevailed, but not without considerable expense. Under HB 2007, there would have been no question but that Ms. Montigny could take bereavement leave upon the death of an in-law. Ex. B.

These stories are representative of the burdens committed same-sex couples and their families continue to experience, so long as their relationships are not legally recognized. For these couples, January 1, 2008, the day HB 2007 takes effect, promises real benefits. In fact, 181 couples have reported they intend to register on

January 2, 2008; another 141 report that they will register later in January. Dixon Decl., ¶12. If the law does not take effect at that time, they will be seriously harmed.

The circumstances of Erin Sexton-Sayler is illustrative. Ms. Sexton-Sayler is currently pregnant. She and her partner have another child, Vivianne, who is two years old. When Vivianne was born, Ms. Sexton-Sayler and her partner were anxious to obtain a second parent adoption as soon as possible. They called the attorney from the hospital to get the paper work going, but it was still six months before the adoption was finalized. With this child, Ms. Sexton-Sayler was counting on being able to register their domestic partnership so that her partner would be the presumed parent. If HB 2007 is enjoined, then Ms. Sexton-Sayler will be forced to use the second parent adoption proceeding once again, causing additional expense and anxiety. Sexton-Sayler Decl, ¶¶1-3.

B. An Injunction Staying Implementation of HB 2007 Just Two Weeks Before Implementation would Cause Significant Harm to Public and Private Interests That Are Poised to Implement HB 2007.

Once HB 2007 was signed into law, Basic Rights Oregon, public agencies and other stakeholders turned their attention to implementation. As set forth in the Declaration of Frank Dixon, BRO gave presentations throughout the state to explain how the law works. It prepared a Domestic Partnership Resource Guide and worked with county and state officials to implement the law. Lawyers have been advising clients about the new law; CLE's have been scheduled for January. In other words, a significant amount of resources – both private and public – have been spent to ensure

that committed same-sex couples can take advantage of HB 2007 on January 2, 2008. Moreover, changes in rules, policies and procedures have already been set in motion in anticipation of implementation. The relief that plaintiffs seek – to delay implementation of the law just two weeks before it is set to take effect – would create an enormous amount of confusion and require additional expenditures of resources in order to undo the changes that are poised to take effect on January 2, 2008. In other words, not only would individuals be harmed, but the institutional interests of BRO, private businesses and public agencies would also be harmed.

C. Plaintiffs Are Not Harmed by Implementation of HB 2007

Plaintiffs spend remarkably little time in their memorandum addressing why they would be irreparably harmed by allowing HB 2007 to take effect. That is because they cannot. The harm plaintiffs allege – a deprivation of their right to have their signatures “count” – is not ongoing. It occurred once. That harm is the same whether or not HB 2007 is implemented. In short, Plaintiffs have utterly failed to sustain their burden of demonstrating that implementation of HB 2007 would cause irreparable harm

III. CONCLUSION

Plaintiffs are asking this court to give emergency relief that will have an enormous impact on Oregon’s citizens. They have identified no harm that flows from allowing HB 2007 to go into effect as intended by the legislature. Accordingly,

Amicus Curiae, Basic Rights Oregon joins the state in asking that the Court deny plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction.

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/s/ Margaret S. Olney

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