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Of Attorneys for Proposed Intervenor-Defendants
Basic Rights Oregon, Jeana Frazzini, Sally Sparks
& Erin Sexton-Saylor

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PHILLIP LEMONS et al,

Plaintiffs,

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

v.

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

**MEMORANDUM IN SUPPORT
OF APPLICANTS' MOTION TO
INTERVENE**

Defendants.

I. INTRODUCTION

On December 28, 2007, this court temporarily enjoined implementation of HB 2007, Oregon's landmark law giving committed same-sex couples the ability to have their relationship legally recognized, thus entitling them to similar rights and

responsibilities as opposite sex married couples under state law. The court took this action based upon its provisional conclusion that plaintiffs would likely prevail on the merits, and a determination that a short delay in implementation would cause little harm to the interests of same-sex couples. The court then set a hearing for a final determination in this matter for February 1, 2008.

Applicants strenuously disagree with both of these conclusions and seek to intervene in order to protect their interests. They seek leave to intervene as a matter of right pursuant to Fed. R. Civ. Pr. 24(a) or, in the alternative, permissively, as authorized by Fed. R. Civ. Pr. 24(b).

A. Proposed Intervenors

1. Basic Rights Oregon

Basic Rights Oregon (BRO) is the state's largest grassroots organization working to end discrimination on the basis of sexual orientation and gender identity. It represents the interests of thousand of Oregonians who are harmed by any delay in implementation of HB 2007. Frazzini Decl., ¶12.

BRO led the effort to enact HB 2007 and has expended considerable resources to ensure its smooth implementation. Those efforts have been substantially nullified by this litigation. Frazzini Decl., ¶19.

In addition, BRO was actively involved in monitoring the signature gathering and verification process for the referendum at issue here. As expressly authorized by the Secretary of State, representatives from BRO observed the signature

verification process in a large number of counties. Its representatives are thus in a position to aid in the development of a factual record regarding the signature verification process for this referendum and plaintiffs' failure to demonstrate sufficient support to qualify for the ballot. Frazzini Decl., ¶¶ 5, 6, 7.

Basic Rights Oregon also will be harmed if plaintiffs prevail in this litigation and the referendum qualifies for the ballot. BRO will be required to spend millions of dollars on the ballot measure campaign, at the expense of other organizational priorities and those of its funders. Organizationally, these include BRO's youth education and leadership development program, efforts to effectively implement the Oregon Equality Act (SB 2 (2007)), and ongoing public education initiatives. In addition, money raised for the ballot measure campaign will be diverted from candidate races, legislative advocacy and the movement's ongoing legal strategy. Frazzini Decl., ¶10.

2. Jeana Frazzini

Jeana Frazzini is the Executive Director of Basic Rights of Oregon (BRO). In addition to her organizational interest as Executive Director of BRO, Frazzini has a personal interest in the litigation. She has been in a committed same-sex relationship for ten years, and has two children with her partner. Frazzini Decl., ¶11. She intended to register her domestic partnership on January 2, 2008 and looked forward to the added security it would provide her family in times of crisis. Frazzini Decl., ¶14. More specifically, Frazzini had previously challenged the

state's refusal to issue birth certificates that included the name of a same-sex second parent, as violating Article I, section 20 of the Oregon Constitution, Oregon's equal privileges and immunities clause. Frazzini prevailed, with the court stating that HB 2007 would provide the remedy. Frazzini Decl., ¶¶12, 13. In addition, just like other Oregon families who planned on registering their domestic partnership, Frazzini and her family stands to lose the added security provided by HB 2007.

3. Erin Sexton-Saylor

Erin Sexton-Saylor is an Oregon citizen. She is in a committed same-sex relationship with another woman with whom she has one child. She is currently pregnant with their second child. Under HB 2007, Ms. Sexton-Saylor would be able to name her partner as the child's parent on the birth certificate, thus protecting the rights of both her partner and her baby, should anything happen to her. Without HB 2007, she and her partner will have to complete a second parent adoption. That process takes a significant amount of time, during which time the baby would only have one legal parent. If Ms. Sexton-Saylor were to die during that time, then her partner would have minimal – if any – legal rights to keep the baby. Sexton-Saylor Decl., ¶¶ 1, 2.

4. Sally Sparks

Sally Sparks is an Oregon citizen who is in a committed same-sex relationship of five years. She and her partner have one child and are expecting their second in February. Ms. Sparks and her partner intended to register as

domestic partners in January, prior to the birth of their second child. If HB 2007 continues to be enjoined, they will be unable to name Ms. Spark's partner as the child's second parent on the child's birth certificate. Ms. Spark's partner will also not have the automatic right to make health care decisions on her behalf during the birth. Sparks Decl., ¶¶1, 2.

Plaintiffs oppose this motion; the Secretary of State has no objection.

II. ARGUMENT

A. **Basic Rights Oregon, Jeana Frazzini, Sally Sparks and Erin Sexton-Saylor Are Entitled to Intervention as a Matter of Right**

1. **Legal Standard**

Under Federal Rule of Civil Procedure 24(a), an applicant is entitled to intervene as a matter of right if four conditions are met: (1) the application is timely; (2) the applicant has a significant protectable interest in the action; (3) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the existing parties may not adequately represent the applicant's interest. *Prete v. Bradbury*, 438 F3d 949 (2006); *Donnelly v. Glickman*, 159 F3d 405, 409 (9th Cir. 1998). In evaluating whether those requirements are met, courts "are guided primarily by practical and equitable considerations." *Donnelly*, *supra*. In addition, courts generally "construe [FRCP 24(a)] broadly in favor of proposed intervenors." *United States v. Alisa Water Corp.*, 370 F3d 915, 918 (9th Cir. 2004). As explained by the Court in

Forest Conservation Council v. U.S. Forest Serv., 66 F3d 1489, 1496 (9th Cir. 1995):

“A liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts. By allowing parties with a practical interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues; at the same time, we allow an additional interested party to express its views before the court.” (Internal quotations omitted).

2. The Motion to Intervene is Timely

This motion will not cause any delay or prejudice to the parties. Applicants have moved to intervene less than one week after the court issued its temporary restraining order, and less than a month after the original complaint was filed. They are willing to abide by the briefing and hearing schedule ordered by the court and will cooperate fully with the parties to efficiently prepare the case for consideration. Their motion is timely. See, *Kootenai Tribe of Idaho v. U.S. Forest Service*, 313 F3d 1094, 1111 n. 10 (9th Cir. 2002) (“[B]ecause the intervention motions were filed near the case outset and the defendant-intervenors said they could abide the court’s briefing and procedural scheduling orders, there was no issue whatsoever of undue delay.”)

3. Applicants have a “Significant Protectable Interest” in the Subject Matter of the Litigation

The second factor to be considered is whether applicants have a sufficient interest in the litigation to intervene pursuant to Fed. R. Civ. Pr. 24(a). This test is

interpreted flexibly and “broadly, in favor of the applicants for intervention.” *Sierra Club v. EPA*, 995 F2d 1478, 1481 (9th Cir. 1993).

Here, all applicants have a significant interest in the outcome of this litigation that is distinct from that of the state. If the court were to grant plaintiffs’ request for a permanent injunction, applicant Erin Sexton-Saylor and her family would be without the basic protections that are provided by HB 2007. For Sexton-Saylor, the most obvious benefit of HB 2007 is the ability for her partner to be the presumed parent of her child – due to be born in May, 2008. If HB 2007 is not in effect, then Sexton-Saylor will be required to undertake the expensive and time consuming process of a second parent adoption. Moreover, while that adoption is pending, she and her family will be forced to live with the anxiety of not having clearly defined and recognized legal relationships between her partner and her child. This interest is significant and direct.

The same analysis is true for applicant Sally Sparks. Sparks is due to give birth in early February. For her, therefore, the court’s prompt resolution of this case and lifting of the injunction on February 1, 2008 is of utmost importance.

Similarly, applicant Jeana Frazzini has a direct and significant interest in this litigation. She too intended to register her domestic partnership on January 2, 2007 and thereby receive the protections afforded by HB 2007. As a result of this injunction, she is unable to do so. More specifically, Ms. Frazzini has a Multnomah County Circuit Court Order finding that the state’s birth certificate

laws are unlawful. But the remedy provided by the court is implementation of HB 2007. She will lose that remedy if HB 2007 is enjoined or put at risk.

In sum, all of the individual applicants have a specific and direct interest in the outcome of this litigation for purposes of the intervention analysis.

Basic Rights Oregon has a significant and direct interest in the litigation on two fronts. First, it represents the interests of thousands of Oregonians who would benefit from HB 2007. The harms that those individuals and families would experience as a result of enjoining HB 2007 are outlined in the amicus submitted in opposition to the motion for a temporary restraining order.

In addition, Basic Rights Oregon has an organizational interest in the outcome of this litigation. One possible outcome of this case is that the referendum would be placed on the November 2008 ballot. In that event, BRO would be required to spend significant resources on a ballot measure campaign. Those are resources that would be diverted from other activities, including other political advocacy.

The interests of applicants in this litigation are similar to those identified by proposed intervenors in California and *Lockyer v. United States*, 450 F3d 436 (9th Cir. 2006). There, the State of California, through Attorney General Bill Lockyer, sought to declare unconstitutional a federal law prohibiting state and local governments from receiving federal funds if they discriminate against health care providers who refuse to perform abortions (the “Weldon Amendment”). A non-

profit organization representing the interests of Catholic health care providers and a coalition of pro-life health care providers sought to intervene. Both the State of California and the United States opposed intervention, claiming that the Weldon Amendment did not give them any enforceable rights. The court disagreed, emphasizing that an applicant establishes a sufficient interest for intervention purposes “if it will suffer a practical impairment of its interests as a result of the pending litigation.” 450 F3d at 441. Because California law required proposed intervenors to provide abortion services in certain emergencies, they would be harmed if the Weldon Amendment were declared unconstitutional. Stated differently, because the intervenors were beneficiaries of the law which the lawsuit sought to set aside, they had a protectable interest in the litigation. Lockyer, 450 F3d at 441-42.

Similarly, proposed intervenors in this case are the beneficiaries of the law that plaintiffs seek to stop from taking effect and put to a vote. Like the applicants in Lockyer, the individual intervenors stand to lose significant rights and benefits by not being able to register as domestic partners – benefits to which there is no other equivalent remedy. And, like the non-profit organization in Lockyer, Basic Rights Oregon will be substantially harmed by both a permanent injunction or the possibility of the referendum being on the ballot in November 2008. This is a harm it suffers in both its representational and organizational capacity.

4. Applicants' Rights May, as a Practical Matter, be Impaired by the Outcome of this Case.

This factor speaks to the question of whether the outcome of this case will impact applicants' rights in other litigation. The answer is obviously "yes." Plaintiffs raise a federal constitutional challenge to Oregon's signature verification process. If the court finds that the process is unconstitutional as alleged by plaintiffs, and plaintiffs are allowed to rehabilitate certain signatures as requested (thus potentially resulting in having the referendum qualify for the ballot), then HB 2007 will not go into effect unless approved by the voters in the November 2008 election. Simply put, applicants would not receive the protections afforded by HB 2007, at least until November 2008. In addition, BRO would be forced to spend significant resources on a ballot measure campaign. Their interests would be impaired.

5. Applicants' Interests May Not Be Adequately Represented by Defendant Secretary of State

The final factor to be considered is whether applicants' interests "may be" inadequately represented by the parties. Applicants acknowledge that this is a closer question. In *Prete v. Bradbury*, 438 F3d 949 (9th Cir. 2006), the Ninth Circuit overturned the District Court's order allowing intervention, finding that intervenors had failed to provide compelling evidence to overcome the presumption that the state was adequately representing intervenor's interests. 438 F3d at 957.

Here, while the ultimate outcome sought by the state and proposed

intervenors is the same – a finding that the signature verification procedures are constitutional – the underlying interests differ greatly. The Secretary of State is focused on defending its content neutral election laws surrounding the signature verification process. If plaintiffs prevail, the result will cause extraordinary disruption in the system, possible chaos and an enormous drain of resources. In contrast, proposed intervenors are focused on ensuring that HB 2007 takes effect as soon as possible, as the legislature intended. They have a personal and direct stake in the outcome of the litigation which is not shared by the state. Compare, *Prete*, supra at 58, n. 11 (noting that because intervenors had not provided sufficient basis to support contention that “there are ‘union interests’ separate and distinct from the prevention of fraudulent signatures, we see no basis for intervention on this score.”)

This difference in interests becomes significant when considering plaintiffs’ requested relief. That is, Proposed Intervenor-Defendants may raise arguments that the State cannot. Specifically, while applicants agree with the Secretary of State that plaintiffs do not have a constitutional right to rehabilitate their signatures once election officials have made their final determination, if the court were to grant that right, then Proposed Intervenor-Defendants would argue that they have a right to challenge other signatures. Interested parties – typically the Chief Petitioners and groups opposing a measure – already have the right to monitor the process while it is ongoing and identify errors in the elections officials process. Sometimes the elections officials correct the problem; other times they do not. BRO carefully

monitored the signature verification process and identified other potential errors. If the court were to allow some post-determination process comparable to that afforded ballots in the vote-by-mail system, then BRO would challenge other determinations made by elections officials in an effort to demonstrate that the referendum for HB 2007 did not have sufficient public support to be placed on the ballot. Because the Secretary of State may not agree with applicants that they have a right to make such challenges once the process is opened up to plaintiffs, he may not adequately represent applicants' interests. Moreover, even assuming the Secretary of State agrees in the abstract, he does not have the same interest or ability to challenge specific signatures. In sum, the Secretary of State does not adequately represent the interests of Proposed Intervenors in this matter.

B. Applicants Should Be Permitted to Intervene

If the court determines that applicants are not entitled to intervene as a matter of right, then it should nonetheless allow permissive intervention. Federal Rule of Civil Procedure 24(b) authorizes the court to consider permissive intervention, where an applicant is not entitled to intervene as a matter of right. As a threshold matter, applicants must show that they have a "claim or defense in common" and that intervention will not "unduly delay or prejudice the adjudication of the rights of the original parties."

Here, applicants seek to intervene in order to respond to Plaintiffs' legal and factual allegations. Plaintiffs claim that the state's signature verification process is

unconstitutional and that they have enough valid signatures for the referendum to qualify for the ballot. Proposed Intervenor-Defendants disagree with both claims. Not only is the state's signature verification process constitutionally sound, Proposed Intervenor-Defendants believe that the Chief Petitioners do not have sufficient valid signatures to qualify for the ballot. In short, the defenses that Proposed Intervenor-Defendants intend to assert are common to those of the Defendant. They have thus met the first requirement for permissive intervention. Compare *Donnelly v. Glickman*, 159 F3d 405, 412 (9th Cir. 1998) (Court properly exercised its discretion to deny permissive intervention where proposed intervenors' and plaintiffs' claims share no common factual proof and are, in fact, in direct opposition.)

Second, applicants' motion to intervene has been filed in a timely fashion designed to minimize any delay in the action or prejudice to the rights of the original parties. Intervenors will also cooperate with all parties to ensure the efficient and prompt resolution of the case.

Most importantly, if allowed to intervene, applicants will "significantly contribute to [the] full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented." *Spangler v. Pasadena Board of Education*, 552 F2d 1326 (9th Cir. 1977). Simply put, it is in the interest of justice to allow applicants to intervene.

III. CONCLUSION

For the reasons stated above, Basic Rights Oregon, Jeana Frazzini, Erin Sexton-Saylor and Sally Sparks request that the Court allow them to intervene in this action.

DATED: January 2, 2008

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