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4 IN THE CIRCUIT COURT OF THE STATE OF OREGON  
5 FOR THE COUNTY OF MULTNOMAH  
6

7 MARY LI and REBECCA KENNEDY;  
8 STEPHEN KNOX, M.D., and ERIC  
9 WARSHAW, M.D.; KELLY BURKE and  
10 DOLORES DOYLE; DONNA POTTER and  
11 PAMELA MOEN; DOMINICK VETRI and  
12 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,

13 Plaintiffs,

14 and

15 MULTNOMAH COUNTY,

16 Intervenor-Plaintiff,

17 v.

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

24 Defendants,

25 and  
26

Case No. 0403-03057

DEFENDANTS' MEMORANDUM IN SUPPORT  
OF MOTION FOR PARTIAL STAY OF  
JUDGMENT

1 DEFENSE OF MARRIAGE COALITION,  
2 CECIL MICHAEL THOMAS, NANCY JO  
3 THOMAS, DAN MATES and DICK  
4 OSBORNE,

Intervenor-Defendants.

## 5 INTRODUCTION

6 The Limited Judgment entered by the court requires the State Registrar to register  
7 approximately 3,000 marriage licenses that Multnomah County issued to same-sex couples from  
8 March 3 to April 20, 2004. That portion of the judgment should be stayed pending resolution of  
9 this case on appeal. Without a stay, the licenses will be registered while the appeals proceed,  
10 leading to confusion and uncertainty as to the validity and legal effect of those licenses. The  
11 court gave the legislature the first opportunity to craft remedial legislation that gives same-sex  
12 couples the same legal privileges that Oregon law currently provides married couples of the  
13 opposite sex. Although the court recognized that registering a marriage record is essentially an  
14 administrative act that carries with it few attendant legal rights, the recipients of those licenses—  
15 and private employers, insurance companies, local governments and others—could believe that  
16 the act of registration itself confers some specific legal rights and benefits even before the  
17 legislature acts.

18 A stay would eliminate this uncertainty, and avoid the potential difficulty of  
19 “un-registering” the licenses if that portion of this court’s order is reversed on appeal. Moreover,  
20 the licenses at issue are not the type of “marriage records” that the State Registrar must register  
21 under ORS 432.405 because Multnomah County had no authority to issue them. Staying that  
22 portion of the judgment pending appeal is appropriate.

1 **ARGUMENT**

2 **I. The court has broad authority to enter a partial stay of the judgment.**

3 ORS 19.350 authorizes the court, in its discretion, to stay all or part of a judgment  
4 pending appeal.<sup>1</sup> In deciding whether to grant a stay, the court is required to consider, “in  
5 addition to such other factors as the trial court considers important,”<sup>2</sup> the following:

- 6 (1) The likely result on appeal;
- 7 (2) Whether appeals are taken in good faith and not for the purpose of delay;
- 8 (3) Whether the appeal has any support in law or fact; and
- 9 (4) The nature of any harm to the parties, to other persons, and to the public that will  
10 likely result from the grant or denial of a stay.<sup>3</sup>

11 Those factors support granting a partial stay in this case. The results on appeal are  
12 uncertain, and all appeals will be taken in good faith and not for the purpose of delay. And as  
13 explained below, the balancing of harms and other factors support staying that portion of the  
14 judgment pending appeal.

15 **II. A partial stay should be granted to avoid uncertainty as to the legal effect of the**  
16 **licenses and maintain the status quo pending appeal.**

17 This court’s Limited Judgment gave the Legislative Assembly the first opportunity to  
18 adopt remedial legislation to ensure that same-sex couples receive the same legal privileges  
19 provided to married persons of the opposite sex. The array of possible legislative approaches  
20 that could be taken to ensure that same-sex couples receive the same legal benefits as opposite-  
21 sex couples is broad. As the State noted in earlier briefing in this case, the legislature could  
22 choose simply to extend the same set of benefits currently available to opposite-sex couples to  
23 same-sex couples. The legislature, however, could also consider altering the benefits now

24 <sup>1</sup> Under ORS 19.350(2), the State “must first request a stay from the trial court” before seeking a  
25 stay from an appellate court.

26 <sup>2</sup> ORS 19.350(3).

<sup>3</sup> *Id.*

1 provided to opposite-sex couples and then provide that new set of benefits to same-sex couples.  
2 As this court expressly determined, “the court is not extending ORS Chapter 106 to same-sex  
3 couples’ right to marriage.”<sup>4</sup> Yet, that is the arguable effect of this court’s order to the State  
4 Registrar requiring registration of those marriage licenses previously issued to same-sex couples  
5 by Multnomah County. Granting the State’s requested stay of that portion of the court’s  
6 judgment requiring the State to register those licenses would conform that part of the court’s  
7 decision to the court’s express determination to not extend to same-sex couples the right to  
8 marriage. And it would allow the legislature the opportunity to determine how to address the  
9 current disparity in benefits between same-sex couples and opposite-sex couples.

10 Moreover, the validity and legal effect of the 3,000 licenses at issue has been challenged  
11 by intervenor-defendants Defense of Marriage Coalition, *et al.* (DOMC). Registering those  
12 licenses *before* the legislature acts, and *before* DOMC’s challenge and the appeals from the  
13 Limited Judgment entered by the court are resolved would add to the confusion and uncertainty  
14 regarding the validity and legal effect of those licenses. For example, are the same-sex couples  
15 who received those licenses subject to the divorce laws? If they obtain an official record from  
16 the State, are private employers, insurance companies, and other states required to give those  
17 licenses legal effect? In addition, if the licenses are registered and the courts ultimately find that  
18 they are invalid or otherwise of no legal effect, then the State Registrar would have to “un-  
19 register” them and attempt to untangle any legal consequences attributed to registering those  
20 licenses. A better result would be to stay that portion of the judgment and maintain the status  
21 quo as it existed before March 3, 2004, pending resolution of this case on appeal.

22 The 3,000 same-sex couples who received marriage licenses from Multnomah County  
23 between March 3 and April 20 would not suffer any legal harm if that portion of the judgment is  
24 stayed. The Limited Judgment was not designed to provide legal rights to those couples upon  
25 entry of judgment, before the legislature acts. As the court acknowledged in its opinion, the act

26 <sup>4</sup> Opinion and Order, at 11.

1 of registering the licenses may be “strictly a statistical function with little or no attendant  
2 rights.”<sup>5</sup> Indeed, a stay would ensure that those couples remain on the same legal footing as  
3 every other same-sex couple in Oregon and across the nation. All same-sex couples are currently  
4 awaiting further action by state legislatures and the courts. The 3,000 couples that received  
5 marriage licenses from Multnomah County between March 3 and April 20 should not receive  
6 any different legal treatment pending final resolution of this case.

7 **III. The State Registrar should not have to register marriage records that were not**  
8 **properly issued by the County.**

9 From March 3 to April 20, 2004, Multnomah County issued marriage licenses to same-  
10 sex couples based on a belief that it had a constitutional obligation to ignore the statutory  
11 requirements even before a court ruled on the constitutional validity of those statutes. That belief  
12 was mistaken. Declaring a statute enacted by the legislature to be “unconstitutional” is a power  
13 that is ordinarily conferred on the courts.<sup>6</sup> For that reason, it is generally accepted that public  
14 officials, state agencies, and local governments do not have the authority to decide for  
15 themselves that a statute is unconstitutional.<sup>7</sup> That is consistent with the general principle that a  
16 statute “is presumed to be constitutional” until declared invalid by a court.<sup>8</sup>

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<sup>5</sup> April 20, 2004 Opinion at 14.

19 <sup>6</sup> See Or. Const., Art. III, § 1 (separation of powers); Art. VII (Amended) (judicial power). See  
20 also, *Wallace v. International Ass’n*, 155 Or. 652, 662, 62 P.2d 1090 (1937) (courts have  
authority to declare statute invalid “if the act is clearly unconstitutional”).

21 <sup>7</sup> See *Johnson v. Robison*, 415 U.S. 361, 368 (1974) (Harlan, J., concurring) (“Adjudication of  
22 the constitutionality of congressional enactments has generally been thought beyond the  
jurisdiction of administrative agencies”); *Oestereich v. Selective Service Bd.*, 393 U.S. 233, 242  
23 (1968) (same); *Hoh Corp. v. Motor Vehicle Ind. Lic. Bd.*, 736 P.2d 1271, 1275 (Hawaii 1987)  
(agency “generally lacks power to pass upon constitutionality of a statute. The law has been  
24 clear that agencies may not nullify statutes”); *Bare v. Gorton*, 526 P.2d 379, 381 (Wash. 1974)  
(en banc) (“An administrative body does not have authority to determine the constitutionality of  
the law it administers; only the courts have that power”).

25 <sup>8</sup> *Tompkins v. District Boundary Board*, 180 Or. 339, 350, 177 P.2d 416 (1947). See also, *Miles*  
26 *v. Veatch*, 189 Or. 506, 528, 220 P.2d 511, 221 P.2d 905 (1950) (“There is a presumption that  
every legislative act is constitutional”).

1 Oregon courts have recognized a limited exception to this general rule. In *Cooper v.*  
2 *Eugene Sch. Dist. No. 4J*,<sup>9</sup> the Superintendent of Public Instruction revoked the teaching  
3 certificate of a teacher who violated a state statute that prohibited public school teachers from  
4 wearing religious dress at work. The teacher contended that the statute violated her  
5 constitutional right to freely exercise her religion. The Superintendent argued on appeal that he  
6 had no choice but to revoke the certificate because he lacked the authority to decide the  
7 constitutional question. The Oregon Supreme Court disagreed, explaining that the  
8 Superintendent's view was based on a "misconception that constitutional law is exclusively a  
9 matter for the courts."<sup>10</sup> As the court noted, the Superintendent "himself holds a constitutional  
10 office \* \* \* and must satisfy himself that he conducts it in accordance with the Constitution."<sup>11</sup>  
11 Those statements, however, were made only in the context of addressing three jurisdictional  
12 issues that "the Court of Appeals passed over in silence"<sup>12</sup> Those issues were, "first, why the  
13 school district is a party to this proceeding; second, what was before the Superintendent for  
14 decision in a contested case; and third, whether the case is moot."<sup>13</sup> The court decided those  
15 jurisdictional issues before reaching the merits, ultimately finding that the statute, properly  
16 interpreted, did not violate either the Oregon or the United States constitutions.

17 In *Employment Div. v. Rogue Valley Youth for Christ*,<sup>14</sup> the Employment Division  
18 assessed unemployment compensation taxes against Rogue Valley Youth for Christ (Rogue  
19 Valley), a religious youth organization. Rogue Valley contended that it was exempt from taxes  
20 because it was no different from a church. The Employment Division contended on appeal that  
21 the legislature could not constitutionally grant a tax exemption to a "church" but deny it to other

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22 <sup>9</sup> *Cooper v. Eugene Sch. Dist. No. 4J*, 301 Or. 358, 723 P.2d 298 (1986).

23 <sup>10</sup> 301 Or. at 364.

24 <sup>11</sup> *Id.* at 364, n. 7.

25 <sup>12</sup> *Id.* at 360.

26 <sup>13</sup> *Id.* at 361.

<sup>14</sup> 307 Or. 490.

1 religious organizations that did not meet the statutory definition of a “church.” The Court of  
2 Appeals dismissed on jurisdictional grounds, finding that the Employment Division was seeking  
3 “a purely advisory opinion concerning the constitutionality of the statute.”<sup>15</sup>

4 The Oregon Supreme Court disagreed, finding that, even though the Employment  
5 Division may have believed that the statute was unconstitutional, the agency had nevertheless  
6 “attempted to force Rogue Valley to pay taxes which Rogue Valley denies owing. This is an  
7 ‘actual controversy.’”<sup>16</sup> The court stated—citing *Cooper*—that the Employment Division “must  
8 administer the law in accordance with constitutional principles, and must enforce its statutory  
9 obligations. If a statute tells an agency to do something that a constitution forbids, the agency  
10 should not do it.”<sup>17</sup> As in *Cooper*, that statement was made in the context of deciding whether  
11 the case presented a justiciable controversy.

12 *Cooper* and its progeny do not mean that all public officials in Oregon are free to ignore  
13 statutes that they believe may subsequently be declared unconstitutional. The issue arose in  
14 *Cooper* and *Rogue Valley Youth for Christ* in the context of deciding whether a controversy over  
15 the constitutionality of the statute at issue was justiciable in the Supreme Court. Moreover, the  
16 issue arose in both cases in the context of adjudicatory proceedings before a state agency. Those  
17 cases—properly construed—mean that state agencies acting in a quasi-judicial adjudicatory role  
18 have the authority to decide constitutional questions.

19 In other contexts, there is a tension between a public official’s duty to enforce the policy  
20 choices made by the legislative branch or the people, and the official’s duty to comply with the  
21 state and federal constitutions. In cases where the resolution of that conflict is clear—where a  
22 prior court decision has made it indisputably clear that the statute requires the official to “do

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23 <sup>15</sup> *Id.* at 495 (citing Court of Appeals’ opinion, 87 Or. App. at 576).

24 <sup>16</sup> *Id.* at 496.

25 <sup>17</sup> *Id.* at 495. See also, *Nutbrown v. Munn*, 311 Or. 328, 346, 811 P.2d 131 (1991) (“Although it  
26 is an authority to be exercised infrequently, and always with care, Oregon administrative  
agencies have the power to declare statutes and rules unconstitutional.”); *Outdoor Media  
Dimensions, Inc. v. State of Oregon*, 331 Or. 634, 662, 20 P.3d 180 (2001) (same).

1 something that the constitution forbids,” for example—the official’s duty to comply with the  
2 constitution is paramount. That does not mean that public officials are free to ignore a statute  
3 where, as here, there are multiple uncertainties about the constitutional validity of the statute.  
4 With all due respect to county counsel’s opinion, the Court of Appeals’ decision in *Tanner v.*  
5 *OHSU*<sup>18</sup> does not make it indisputably clear that Oregon’s marriage license statute is  
6 unconstitutional. The Court of Appeals expressly declined to address that issue in *Tanner*, and  
7 the Oregon Supreme Court has never addressed that issue. Nor has the Oregon Supreme Court  
8 approved the *Tanner* analysis. The courts in other states that *have* addressed the issue have  
9 arrived at different conclusions. Finally, it is possible that the legislature could remedy any  
10 constitutional infirmity without extending ORS 106.010 to include same-sex couples, or  
11 requiring the State Registrar to register the marriage records issued to same-sex couples.

12 Thus, a finding on appeal that ORS 106.010 is unconstitutional is not a certainty, and the  
13 remedy for any constitutional violation is a policy choice reserved to the legislature in the first  
14 instance. How the legislature will choose to address this situation is unclear. Given this  
15 uncertainty, public officials in Oregon should follow existing statutory requirements, as this  
16 court’s April 20 opinion recognizes. It follows that a marriage license issued by Multnomah  
17 County contrary to existing statutory requirements is not legally a marriage “record” that the  
18 State Registrar must file under ORS 432.405.

## 19 CONCLUSION

20 For all the foregoing reasons, the State’s motion for a partial stay pending appeal should  
21 be granted. Alternatively, if a stay pending final resolution of this case on appeal is not granted,  
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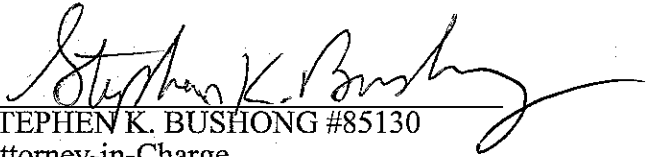
26 <sup>18</sup> *Tanner v. OHSU*, 157 Or. App. 502, 971 P.2d 435 (1998).

1 the court should enter a temporary stay lasting only until an appellate court rules on the State's  
2 motion for partial stay pending appeal.

3 DATED this 4~~th~~ day of May, 2004.

4 Respectfully submitted,

5 HARDY MYERS  
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**CERTIFICATE OF SERVICE**

I certify that on May 5, 2004, I served the foregoing DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL STAY OF JUDGMENT upon the parties hereto by the method indicated below, and addressed to the following:

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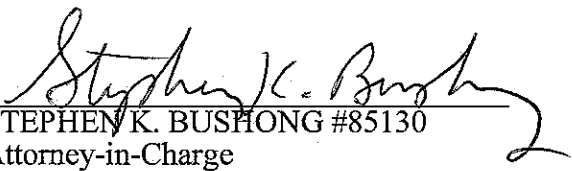
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