IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JACK PIDGEON and
LARRY HICKS,
Plaintiffs,

versus

MAYOR ANNISE PARKER and
CITY OF HOUSTON,
Defendants.

NOEL FREEMAN,
YADIRA ESTRADA, and
RONALD REESER,
Movants and
Proposed Intervening Defendants.

CASE NO. 4:13-cv-03768

SUPPLEMENT TO MOTION TO INTERVENE FILED ON BEHALF OF NOEL FREEMAN, YADIRA ESTRADA AND RONALD REESER

At the Court's request, Movants[1] Noel Freeman, Yadira Estrada, and Ronald Reeser, submit this Supplement to Movants' Motion to Intervene [Dkt. No. 9].

I. Introduction

On January 2, 2014, the Court held an emergency hearing on Plaintiffs' Motion for Temporary Restraining Order [Dkt No. 13] and Motion to Expedite consideration of remand [Dkt No. 12] in this removed case from Harris County

[1] Movants are three City employees, each married to a same-sex spouse in a jurisdiction that permits it, who have enrolled for spousal benefits. At the time they filed the related case against the City, they were believed to be the only three employees who had enrolled for spousal benefits under the Mayor's revised policy. The City, however, has since indicated there are two additional employees who have enrolled. The identities of those additional employees are not known to Plaintiffs in the related case.

District Court. At the time of the hearing, Movants' Opposed Motion to Intervene was pending with a motion docket submission date of January 21, 2014. Although Movants did not participate, through counsel, as parties, they responded to the Court's specific questions concerning the pending related case (*Freeman v. Parker*, No. 4:13-cv-03755). At the end of the hearing, the Court invited Movants to supplement their intervention motion in light of the issues discussed at the hearing and, specifically, to include their position concerning consolidation.

II. Movants' Position On Consolidation

Considerations governing consolidation under Rule 42(a) of the Federal Rules of Civil Procedure are fairly summarized in *Morrison v. Amway Corp.*, 186 F.R.D. 401 (S.D. Tex. 1998):

> The Court has broad discretion to decide whether consolidation is desirable under Rule 42(a) and may even consolidate cases *sua sponte*. Actions involving the same parties are likely candidates for consolidation, but a common question of law or fact is sufficient. Thus, the proper solution to the problems created by the existence of two or more cases involving the same parties and issues simultaneously pending in the same court is to consolidate them . . . .

Id. at 402-03 (citations omitted).

The Plaintiffs in this case and the Plaintiffs in the related case seek inconsistent relief against the City of Houston arising out of the Mayor's determination that the City must, consistent with federal law, provide spousal benefits to employees who legally married their same-sex partners in jurisdictions that permit them to do so. The common legal issue, dispositive in ***both*** cases, is

whether Texas may, consistent with federal due process and equal protection jurisprudence, deny some legally-married employees of the City equal access to spousal benefits.

Actions in which different parties seek inconsistent relief from a single defendant can pose a particularly appropriate situation warranting consolidation, as long as the basic requirement of Rule 42(a) that there be a common question of law or fact is satisfied. *See, e.g., Cable Belt Conveyors, Inc. v. Alumina Partners of Jamaica*, 669 F.Supp. 577 (S.D.N.Y.1987), *aff'd* 857 F.2d 1461 (2d Cir. 1987); *Swacker v. Interstate R.R. Co.,* 32 F.R.D. 234 (W.D.Va.1962).

Accordingly, it would be appropriate to consolidate these cases, or at a minimum, coordinate the two proceedings before a single judge[2] with respect to briefing and argument on the common issues of law and fact.

III. Movants' Position on Jurisdictional Questions

The Plaintiffs have moved to remand this case to state court. The Court identified two pressing jurisdictional issues (Article III taxpayer standing and federal removal jurisdiction) related to that request and inquired of the parties about the order in which they should be addressed. Although the parties did not express a preference, Movants submit that the Article III question should be addressed irrespective of the federal question issue because resolution of the

[2] Local Rule 7.1(C) requires cases to be consolidated before the judge assigned to the "oldest" case, which is defined under Local Rule 7.1(D) as the case filed first in any court, state or federal. Thus, if consolidated, Judge Rosenthal would continue to hear both this matter and the related case. If these cases are consolidated, the pending intervention motion [Dkt. No. 9] would be moot.

standing question may determine the appropriate remedy if the Plaintiffs' Motion were to be granted, that is, whether this case should be remanded or dismissed.[3]

A. Both Texas law and federal law recognize the standing of citizen taxpayers to enjoin municipalities from expending funds on illegal activities; however, the Plaintiffs' standing cannot be determined as a matter of State or federal law by the conclusory allegations in their Petition below.

Texas law expressly authorizes a citizen taxpayer suit to enjoin a *municipality* from expending funds on illegal activities. *Williams v. Lara*, 52 S.W.3d 171 (Tex. 2001). Further, suits where citizen taxpayers challenge municipalities for illegal expenditures are an exception to the general standing prohibition under federal law, which, in most contexts, precludes attacks by taxpayers challenging federal or state appropriations. Such municipal taxpayer suits are not automatically precluded under Article III standing principles as a generalized grievance.

The standing of "resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of moneys" by officers of municipal corporations has been recognized by federal courts for more than 125 years. *Crampton v. Zabriskie*, 101 U.S. 601, 609 (1879). Since then, the "rule [has been] frequently stated by [the U.S. Supreme Court] that resident taxpayers may sue to enjoin an illegal use of the moneys of a municipal corporation." *Frothingham v. Mellon*, 262 U.S. 447, 486 (1923). Such suits "are based upon the peculiar relation of

[3] The general rule requires a district court that lacks subject-matter jurisdiction to remand the case to state court. However, the "futility exception" to this rule allows the district court to dismiss an action rather than remand it to the state court when remand would be futile because the state court also would lack jurisdiction over the matter. Although there is disagreement among circuits as to the propriety of the "futility exception," the Fifth Circuit has embraced it consistently. *See, e.g., Oviedo v. Hallbauer*, 655 F.3d 419 (5th Cir. 2011); *Nolan v. Boeing Co.*, 919 F.2d 1058 (5th Cir. 1990), *cert. denied*, 499 U.S. 962 (1991); *Dibby v. U.S. Fidelity & Guar. Co.*, 239 F.2d 569 (5th Cir. 1957); *but see Weeks v. Fidelity & Cas. Co. of N.Y.*, 218 F.2d 503, 504 (5th Cir. 1955).

the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation." *Id.* at 487. "[T]he 'peculiar relation of the corporate taxpayer to the [municipal] corporation' makes the taxpayer's interest in the application of municipal revenues 'direct and immediate.'" *ASARCO Inc. v. Kadish*, 490 U.S. 605, 613 (1989) (citing *Zabriskie* and *Mellon*). Texas carefully considered and followed this line of Supreme Court cases in establishing and limiting its taxpayer standing rules for suits against municipalities. *Lara*, 52 S.W.3d at 181.

That a citizen taxpayer action against a municipality for illegal expenditure of City money satisfies Article III standing under federal law, however, does not end the inquiry for present purposes. To meet the standing requirements, Plaintiffs must allege and prove:

- each of them is a taxpayer who owns property within the City and pays property taxes on that property;
- the City is actually expending tax money on the activity that the taxpayer challenges (and not merely demonstrate that tax dollars are spent on something related to the alleged activity); and
- the activity complained of is illegal or unconstitutional under federal, state, or local laws.

Id.

In this regard, the Plaintiffs' conclusory allegations are insufficient to establish their standing to bring this suit—either in State or federal court. They fail to allege facts to establish that they own property in Houston and pay property taxes on that property. Assuming these defects are cured, either through amended allegations by the Plaintiffs or through discovery by Defendants, the Plaintiffs

would have standing under Texas law, as well as Article III standing under federal law.

B. Notwithstanding Plaintiffs' attempt at artful pleading to avoid removal, claims created by state law "arise under" a law of the United States when they require a determination of the constitutionality of State marriage restrictions under the Fourteenth Amendment to the United States Constitution.

The embedded federal question here is both substantial and determinative of Plaintiffs' claim. Plaintiffs have challenged the Houston Mayor's decision to comply with the City Charter's mandate of providing employment benefits to all legal spouses because *federal* law now requires Houston to cover same-sex spouses of employees married in other jurisdictions. The Mayor, upon advice from the City Attorney and consistent with the Supreme Court's analysis of the federal Defense of Marriage Act in *United States v. Windsor*, — U.S. —, 133 S. Ct. 2675 (2013), has taken the position that same-sex spouses of employees can no longer be denied access to spousal benefits. The Mayor's written directive specifically references and attaches the legal reasoning for the change in policy (even though Plaintiffs omitted those pages from the memorandum attached to their Petition). In short, the ***only*** issue in this case is whether the Mayor and the City have correctly determined that federal constitutional law trumps the Texas marriage restrictions that the State imposes on Houston, as a public employer, prohibiting it from recognizing some marriages legally entered into in other jurisdictions by its employees for the purpose of determining employment benefits.

The Supreme Court has recognized that a case will arise under federal law in "certain . . . state-law claims that implicate significant federal issues." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). Under this test for arising under, "the question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Id.* at 314. Thus, removal is proper, despite Plaintiffs' attempt to plead exclusively state law causes of action, if those claims turn on a federal constitutional issue. *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 814-15 n.12 (1986). Claims created by state law should be considered to "arise under" a law of the United States when the claim turns entirely on determination of whether the controlling statute governing the claim is constitutional. *See Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 200-202 (1921).

In short, the Mayor's actions must be analyzed in factual context, including her reasoning for taking the position she did. Plaintiffs here cannot challenge her conduct in the abstract. The ***only issue*** in the removed case, as well as the related case, is whether the ***United States*** Constitution's due process and equality guarantees render the Texas marriage restrictions unconstitutional as applied to the City when attempting to carry out its obligations as a public employer under the City Charter.

IV. Other Litigation

The Court inquired about other litigation addressing substantially similar

issues concerning the constitutionality of state laws that restrict recognition of same-sex couples legal marriages from other jurisdictions and, specifically, recognition issues arising in the context of public employment benefits.

A. General overview of pending marriage litigation.

Currently there are 40 lawsuits filed in courts throughout the nation challenging state laws that restrict same-sex couples from marrying or that deny them recognition of marriages performed in other states. Of those, 27 are filed in federal courts and 21 of those 27 specifically challenge a state's refusal to recognize out-of-state marriages by same-sex couples. Of the 14 lawsuits filed in state courts, 6 of them assert federal claims and challenge the state's failure to recognize out-of-state marriages by same-sex couples. The only two federal cases currently on appeal are *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012), appeal docketed, No. 12-17668 (9th Cir. Dec. 4, 2012), and *Kitchen v. Herbert*, — F.Supp.2d —, 2013 WL 6697874 (D. Utah Dec. 20, 2013), appeal docketed, No. 13-4178 (10th Cir. Dec. 20, 2013). None of the cases filed in federal court were removed from state court. None of the state court cases listed were removed to federal court and subsequently remanded back to state court.

Pertinent specifically to the constitutionality of the Texas marriage restrictions central to this case and the related case, there are three other challenges pending in the Western District of Texas and two cases before the Texas Supreme Court. *DeLeon v. Perry*, 5:13-cv-00982, (W.D. Tex. [San Antonio Div.], filed

Oct. 28, 2013) is set for hearing on Plaintiffs' Motion for Preliminary Injunction before The Honorable Orlando L. Garcia on February 12, 2014.

A list of pending marriage cases filed in federal courts, as well as cases filed in state courts that assert federal claims for recognition of out-of-state marriages, is appended as Exhibit "A."

B. Other suits against public employers seeking benefits for same-sex spouses (or persons in a similar domestic relationship).

To Movants' knowledge, the related case they have filed against the City is the first (and only) lawsuit since *Windsor*, challenging a municipality's (or any public employer's) refusal to recognize an employee's legal marriage to a same-sex spouse to access spousal benefits.

Both the Mayor's conduct, challenged here, and the relief sought in the related case filed by Movants is narrow. There is no challenge to the requirements of the Charter amendment itself, which requires the City to provide spousal benefits to legally married employees (and no others) in accordance with federal law. This case also need not implicate whether Texas can deny same-sex couples the freedom to marry within Texas. Plaintiffs in the related case (Movants here) are already validly married in other jurisdictions. Consequently, the related case requires the Court to determine only the more limited question of whether the Texas marriage restrictions that prohibit public employers from recognizing out-of-state marriages for purposes of spousal benefits are unconstitutional under the federal due process and equality guarantees.

However, the Court raised the question whether the Mayor's decision in

complying with the Charter amendment could have broader implications or run afoul of other constitutional obstacles. *See,* Transcript of Hearing, p.14, line 13 through p. 15, line 5 (Jan. 2, 2014). Movants responded by acknowledging the Court's question, but clarifying that neither the Mayor's actions nor the Plaintiffs in the related case seek broader relief because they are already legally married. Thus, the Charter amendment itself is not implicated by these actions, but certainly is subject to challenge by other employees who cannot get married in Texas or travel to where they can. *See* Transcript of Hearing, p.16, line 14 through line 25.

Such other challenges are viable. Prior to the Supreme Court's decision in *United States v. Windsor*, there had been a handful of challenges against states and political subdivisions, as public employers, seeking equal benefits for domestic partners on theories that did not rely on marriage recognition. *See, e.g., Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011), *cert. denied sub nom.*, *Brewer v. Diaz*, 133 S. Ct. 2884 (June 27, 2013) (affirming a preliminary injunction in favor of lesbian and gay state employees with committed same-sex life partners who brought action alleging that Arizona statute limiting eligibility for family health care coverage to married heterosexual employees violated Equal Protection Clause); *Bassett v. Snyder*, — F. Supp. 2d —, 2013 WL 3285111 (E.D. Mich. 2013) (granting preliminary injunction against State enforcement of law prohibiting public employers from providing medical assistance and other fringe benefits to any person cohabiting with public employee unless that person was legally married to employee likely violation equal protection).

Respectfully submitted this 9th day of January, 2014.

LAMBDA LEGAL DEFENSE AND
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CERTIFICATE OF SERVICE

On January 9, 2014, I electronically submitted the foregoing document to the clerk of court for the U.S. District Court, Southern District of Texas, using the electronic case filing system of the Court. I hereby certify that I have served the following counsel of record electronically through the Court's ECF system.

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PENDING MARRIAGE EQUALITY CASES

As of January 8, 2014

IN FEDERAL COURTS OF APPEALS

STATE	CIRCUIT	CASE NAME	CASE NUMBER(S)	INCLUDES RECOGNITION CLAIMS?
Hawaii	9th	*Jackson v. Abercrombie*	12-16998 12-16995	N
Nevada	9th	*Sevcik v. Sandoval*	12-17668	Y
Utah	10th	*Kitchen v. Herbert*	13-4178	Y

IN FEDERAL DISTRICT COURTS

STATE	CIRCUIT	CASE NAME	COURT & CASE NUMBER(S)	
Arizona	9th	*Connolly v. Brewer*	2:14-cv-00024 (D. Ariz.)	Y
Arkansas	8th	*Jernigan v. Crane*	4:13-cv-00410 (E.D. Ark.)	Y
Idaho	9th	*Latta v. Otter*	1:13-cv-00482 (D. Idaho)	Y
Illinois	7th	*Lee v. Orr*	1:13-cv-08719 (N.D. Ill.)	N
Kentucky	6th	*Bourke v. Breshear*	3:13-cv-00750 (W.E. Ky.)	Y
Kentucky	6th	*Franklin v. Breshear*	3:13-cv-00051 (filed 8/16/2013) (E.D. Ky.) 3:13-cv-00946 (filed 10/2/2013) (E.D. Ky.)	Y
Louisiana	5th	*Robicheaux v. Caldwell*	2:13-cv-05090 (E.D. La)	Y
Michigan	6th	*DeBoer v. Snyder*	2:12-cv-10285 (E.D. Mich.)	N
North Carolina	4th	*Fisher-Borne v. Smith*	1:12-cv-00589 (M.D.N.C.)	N
Ohio	6th	*Obergefell v. Wymyslo*	1:13-cv-00501 (S.D. Ohio)	Y
Oklahoma	10th	*Bishop v. Oklahoma*	5:13-cv-00785 (W.D. Okla.)	Y
Oregon	9th	*Geiger v. Kitzhaber*	6:13-cv-01834 (D. Or.)	Y
Oregon	9th	*Rummell v. Kitzhaber*	6:13-cv-02256 (D. Or.)	N
Pennsylvania	3rd	*Whitewood v. Wolf*	1:13-cv-01861 (M.D. Pa.)	Y

Pennsylvania	3rd	*Palladino v. Corbett*	2:13-cv-05641 (E.D. Pa.)	Y
South Carolina	4th	*Bradacs v. Haley*	3:13-cv-02351 (D.S.C.)	Y
Tennessee	6th	*Tanco v. Haslam*	3:13-cv-01159 (M.D. Tenn.)	Y
Texas	5th	*DeLeon v. Perry*	5:13-cv-00982 (W.D. Tex.)	Y
Texas	5th	*Zahrn v. Perry*	1:13-cv-00955 (W.D. Tex.)	Y
Texas	5th	*McNosky v. Perry*	1:13-cv-00631 (W.D. Tex.)	N
Texas	5th	*Freeman v. Parker*	4:13-cv-03755 (S.D. Tex.)	Y
Virginia	4th	*Harris v. McDonnell*	5:13-cv-00077 (W.D. Va.)	Y
Virginia	4th	*Bostic v. Rainey*	2:13-cv-00395 (E.D. Va.)	Y
West Virginia	4th	*McGee v. Cole*	3:13-cv-24068 (S.D.W. Va.)	Y

IN STATE COURTS ASSERTING FEDERAL CLAIMS SEEKING RECOGNITION OF OUT-OF-STATE MARRIAGES

STATE	COURT LEVEL	CASE NAME	CASE NUMBER(S)
Arkansas	Trial	*Wright v. Arkansas*	60-cv-2013-2662 (Pulaski Cnty Cir. Ct.)
Kansas	Trial	*Nelson v. Kansas Dept. of Revenue*	12C1465 (Shawnee Cnty District Ct.)
Kentucky	Trial	*Kentucky Equality Federation v. Beshear*	11CR3329 (Franklin Cnty Cir. Ct.)
Pennsylvania	Trial	*In re Estate of Burgi-Rios*	No. 1310 of 2012 (Northampton Cnty Ct. of Common Pleas, Orphans' Ct. Div.)
Texas	Supreme	*J.B. v. Dallas County*	11-0024
Texas	Supreme	*Texas v. Naylor*	11-0114