No. 14-35427

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEANNA L. GEIGER, *et al.*,
Plaintiffs-Appellees

v.

JOHN KITZHABER, *et al.*
Defendants-Appellees

Appeal from the United States District Court for the District of Oregon
Civil Case Nos. 6:13-cv-01834-MC and 6:13-cv-02256-MC (Hon. Michael J. McShane)

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3

Proposed Intervenor-Appellant National Organization for Marriage, Inc.'s Emergency Motion for Stay Pending Appeal

---

Roger K. Harris (Or. Bar No. 78046)
HARRIS BERNE CHRISTENSEN LLP
5000 SW Meadows Road, Suite 400
Lake Oswego, OR 97035
(503) 968-1475
(503) 968-2003 Fax
roger@hbclawyers.com

John C. Eastman (Cal. Bar No. 193726)
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
c/o Chapman University Fowler School of Law
One University Dr.
Orange, CA 92866
(877) 855-3330
(714) 844-4817 Fax
jeastman@chapman.edu

9th Cir. R. 27-3 Certificate

Pursuant to 9th Cir. R. 27-3, Appellant respectfully certifies that its motion for a stay pending appeal is an emergency motion requiring "relief … in less than 21 days" to "avoid irreparable harm."

The underlying consolidated actions pending in the District Court for the District of Oregon challenge the constitutionality of Oregon's long-standing one-man/one woman definition of marriage, codified in the Oregon Constitution in 2004 by a voter-approved initiative, Measure 36. Appellant National Organization for Marriage, Inc. is one of the leading organizations in the country fighting to preserve the natural, one-man/one-woman definition of marriage. It sought to intervene in these consolidated cases on behalf of its Oregon members, including an Oregon county clerk (whose duties include the issuance of marriage licenses), a provider of wedding services, and a voter who voted in favor of Measure 36, the voter initiative that added Oregon's long-standing definition of marriage to the Oregon Constitution. Intervention is necessary to protect the particularized interests of those individuals because the named defendants in the cases—the Governor, the Attorney General, the State Registrar (collectively, the "state defendants"), and a county assessor (who performs marriage duties in his county)—are not defending or fully enforcing Oregon's marriage law but have instead actively sided with Plaintiffs seeking to have it declared unconstitutional.

In mid-April, Appellant learned that Defendants were not even going to appeal any judgment enjoining enforcement of Oregon's marriage law. Less than two weeks later, on April 21, 2014 (two days before a schedule hearing on the unopposed motions for summary judgment), Appellant filed its motion to intervene. That motion was denied on May 14, 2014, and a request for a stay pending appeal was also denied. *See* Dkt. # 114. On Friday, May 16, 2014, the district court issued an order announcing that it intended to issue an opinion on the pending motions for summary judgment at Noon on Monday, May 19, 2014. Dkt. #116. Because of the announced position of the named defendants not to file a notice of appeal or seek a stay pending appeal, absent participation in the case by Appellant, that judgment will likely take effect immediately, affecting the particularized interests of Appellant's members without their having had a chance to defend those interests before the district court or argue for them before an appellate tribunal. It is thus imperative that a stay pending appeal be entered forthwith, so that final judgment is not entered and given effect before this Court can determine whether Appellant's motion to intervene in order to present opposing argument to the district court was erroneously denied (or, alternatively, if judgment has already been entered by the district court adverse to Oregon's marriage law, that a stay of that judgment be granted pending appeal).

Before filing their motion, Appellant notified counsel for the other parties by

email on May 16, 2014; they oppose this motion. Appellant also served counsel for each party using the 9th Circuit's CM/ECF system. Pursuant to 9th Cir. R. 27-3(a)(3)(i), the telephone numbers, email addresses, and office addresses of the attorneys for the parties are as follows:

Attorneys for Plaintiffs Deanna L. Geiger, Janine M. Nelson, Robert Duehmig and William Griesar (Case # 6:13-cv-01834-MC):

Lake James H. Perriguey
Law Works, LLC
618 NW Glisan #203
Portland, OR 97209
(503) 227-1928
Fax: (503) 334-2340
lake@law-works.com

Lea Ann Easton
Dorsay & Easton LLP
1 SW Columbia Street, Suite 440
Portland, OR 97258
(503) 790-9060
Fax: (503) 790-9068
leaston@dorsayindianlaw.com

Attorneys for Plaintiffs Paul Rummell, Benjamin West, Lisa Chickadonz, Christine Tanner, Basic Rights Education Fund (Case # 6:13-cv-02256-MC):

Jennifer J. Middleton
Johnson, Johnson & Schaller
975 Oak Street, Suite 1050
Eugene, OR 97401
(541) 683-2506
Fax: (541) 484-0882
jmiddleton@justicelawyers.com

Kevin Diaz
American Civil Liberties Union (ACLU)
P.O. Box 40585
Portland, OR 97240
(503) 227-6928
kdiaz@aclu-or.org

Kristina J. Holm
KJHolm@perkinscoie.com
Misha A.D. Isaac
MIsaak@perkinscoie.com
Thomas R. Johnson
TRJohnson@perkinscoie.com
Perkins Coie, LLP
1120 NW Couch Street, 10th Floor
Portland, OR 97209-4128
(503) 727-2x7
Fax: (503) 346-2157

Attorneys for Defendants John Kitzhaber, Ellen Rosenblum, and Jennifer Woodward (Both Cases):

Anna M. Joyce
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301
(503) 378-4402
anna.joyce@doj.state.or.us

Sheila H. Potter
Oregon Department of Justice
Special Litigation Unit
1515 SW Fifth Avenue, Suite 410
Portland, OR 97201
(971) 673-1880
Fax: (971) 673-5000
sheila.potter@doj.state.or.us

Mary Williams
Oregon Department of Justice
5625 SW California St
Portland, OR 97219
(503) 407-9048
mary_h_williams@msn.com

Attorneys for Defendant Randy Waldruff (Both Cases):

Jenny M. Madkour, County Attorney
Katharine von Ter Stegge
Multnomah County, Oregon
501 S.E. Hawthorne Blvd., Suite 500
Portland, Oregon 97214-3587
(503) 988-3138
Fax: (503) 988-3377
jenny.m.madkour@multco.us
katevts@multco.us

Dates: May 19, 2014

s/ John C. Eastman
John C. Eastman
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Constitutional Provisions

Other Authorities

Rules

Pursuant to Fed. R. App. P. 8(a)(2), Appellant respectfully seeks a stay of further proceedings in the district court (or, if a judgment has already issued, stay of the judgment) pending resolution of Appellant's appeal of the district court's denial of Appellant's motion to intervene.

INTRODUCTION

Plaintiffs in No. 6:13-cv-01834-MC filed their suit on October 15, 2013, challenging the constitutionality of Oregon's long-standing and recently reaffirmed definition of marriage. Dkt.#1. After they filed a First Amended Complaint on December 4, 2013, Dkt.#8, the named defendants—the Governor, Attorney General, and State Registrar of Health Statistics (collectively, the "State Defendants"), and the Multnomah County Assessor—all filed answers to the complaint, declining to admit and thereby contesting Plaintiffs' constitutional challenges. Dkt.#9 (Dec. 13, 2013); Dkt.#13 (Dec. 23, 2013). Plaintiffs filed a motion for summary judgment on January 14, 2014, and the case was consolidated on January 22, 2014 with a parallel case, *Rummel v. Kitzhaber*, No. 6:13-cv-02256-MC, pressing nearly identical constitutional challenges. Only in their answer to the *Rummel* complaint, filed on February 20, 2014—a week after the close of discovery in the lead case, see Dkt.#2 (setting discovery completion date as February 13, 2014)—did the Attorney General announce that the State Defendants "will not defend the Oregon ban on same-sex marriage in this litigation" and that,

"[r]ather, they will take the position in their summary judgment briefing that the ban cannot withstand a federal constitutional challenge under any standard of review." Dkt.#58, ¶ 28.

Then, in their "oppositions" to Plaintiffs' respective summary judgment motions filed on March 18, 2014 and March 4, 2014 respectively, all Defendants affirmatively joined Plaintiffs' attacks on the constitutionality of the Oregon marriage laws, unnecessarily conceding both points of law and allegations of fact. State Defendants' Response to Mot. for Summary Judgment (Dkt.#64); Defendant Randy Waldruff's Response to Motions for Summary Judgment (Dkt.#59).

Despite the State Defendants' assertion that they have considered all justifications that might be offered in defense of Oregon's marriage law "and have found nothing to present to this Court," there are perfectly plausible, indeed persuasive, counterarguments on every single point addressed by the State Defendants. But the District Court never heard, and this Court will never have the opportunity to consider, such arguments absent intervention by someone willing and able to make them.

Then, in mid-April, Appellant learned that, contrary to the procedure employed by the U.S. Department of Justice in the *Windsor* case, the named Defendants did not intend to appeal any adverse ruling, but were instead prepared

to give it "immediate" effect. Declaration of John C. Eastman in support of Mot. to Intervene ¶ 5; Exs. A, B (Dkt. #112).

The Attorney General's decision not only to refuse to defend the long-standing and recently reaffirmed marriage laws of the State of Oregon, *see Li v. State*, 110 P.3d 91 (Ore. 2005), but also to join Plaintiffs' challenges to their constitutionality, has therefore left this case without an adversary. And the Attorney General's late-in-the-day announcement that she would not appeal an adverse ruling set up the very real prospect that a district court judgment on a major constitutional issue, one which is actively being litigated throughout the country, with every expectation of an ultimate resolution by the Supreme Court, will take effect without benefit of appellate review. Appellant, the National Organization for Marriage, Inc., sought to intervene less than two weeks later, on behalf of its Oregon members, including an Oregon County Clerk responsible for issuing marriage licenses, a provider of wedding services, and a voter who voted in support of Measure 36, all of whom have particularized interests in the subject matter of this litigation. NOM's intervention would remedy the problem of lack of adversity in the case. *See* Wright & Miller, 13 Fed. Prac. & Proc. Juris. § 3530 (3d ed.) ("a case where the parties desire the same result 'may be saved [from lack of jurisdiction because of concerns about adversity] by intervention of a genuine adversary who represents that rights that otherwise might be adversely affected'").

It would also protect the particularized interests of its own members, providing the district court with advocacy in opposition to the legal claims asserted that is critical to our adversarial system, and ensuring jurisdiction for any appeal that might become necessary.

The motion to intervene was filed on April 21, 2014, *before* the hearing on the unopposed motions for summary judgment and before any substantive rulings in the case.[1] The summary judgment hearing was held on April 23, 2014, without benefit of any opposition to Plaintiffs' constitutional challenges. After further briefing, a hearing on NOM's motion to intervene was held on May 14, 2014, and after a brief recess, the district court denied the motion as both untimely and because it was unable to confirm the protectable interests of what it characterized as NOM's "phantom" members. Transcript of May 14, 2014 hearing (Dkt. #115), at 13, 52.

Later in the day on May 14, 2014, a major newspaper in the state reported that "[t]he attorneys in the case met with [Judge] McShane in his chambers after the hearing" on the motion to intervene, "and urged him to give 24 hours' notice of his decision so the state, if given the go-ahead, would be prepared to immediately begin allowing same-sex couples to marry." Jeff Mapes, *Gay marriage: Judge*

[1] NOM also filed a motion to postpone the Summary Judgment hearing, but that was denied.

rejects attempt to intervene; ruling to overturn Oregon ban may follow, The Oregonian (May 14, 2014) (available at http://www.oregonlive.com/mapes/index.ssf/2014/05/gay_marriage_judge_rejects_att.html). Then, shortly after noon on Friday, May 16, 2014, the district order issued an order announcing that it intended on "issuing an opinion on the pending motions for summary judgment at noon on Monday, May 19, 2014." Dkt. #116.

NOM noticed its appeal shortly thereafter, and filed this emergency motion for stay the moment this Court's electronic filing system re-opened on Monday morning, May 19, 2014.

ARGUMENT

I. Denial of a Motion to Intervene as of Right is an Immediately Appealable Interlocutory Order.

On behalf of its Oregon members with protectable interests in this litigation, NOM moved to intervene both as of right under Rule 24(a) and permissively under Rule 24(b). The district denied intervention on both grounds. "The denial of a motion to intervene is appealable where the intervenor claims intervention as a matter of right," as NOM did here. *California Energy Res. Conservation & Dev. Comm'n v. Johnson*, 677 F.2d 711, 712 (9th Cir. 1982) (citing *Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Co.*, 331 U.S. 519 (1947)). It is also appealable immediately, because a "district court's denial of a motion for

intervention as of right is an appealable 'final decision,'" over which this Court has jurisdiction "pursuant to 28 U.S.C. § 1291." *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998) (quoting *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir.1997)). A district court's denial of a motion for intervention as of right is reviewed *de novo*, except that questions of timeliness are reviewed for abuse of discretion. *Id.*

II. A Stay of Procedings is Warranted to Protect the Significant Interests that NOM's Oregon Members have in this Litigation and to Preserve the Status Quo Until the Supreme Court's Ultimate Resolution of the Constitutional Issues at Stake.

This case is but one of dozens around the country challenging the constitutionality of long-standing state marriage laws in the wake of the Supreme Court's decision last June in *United States v. Windsor*, 133 S. Ct. 2675 (2013), which specifically declined to reach the issues presented here. When the first such case to proceed to judgment was decided by the District Court for the District of Utah on December 20, 2013, *Kitchen v. Herbert*, 961 F.Supp.3d 1181 (D. Utah 2013), the District Court denied the State's motion for a stay pending appeal, *Kitchen v. Herbert*, 2:13-CV-217, 2013 WL 6834634 (D. Utah Dec. 23, 2013), as did the U.S. Court of Appeals for the Tenth Circuit, Order Denying Emergency Motion for Stay, *Kitchen v. Herbert*, No. 13-4178 (9th Cir., Dec. 24, 2013). But the Supreme Court of the United States stepped in and issued a stay of its own, with no member of the Court dissenting. *Herbert v. Kitchen*, 134 S.Ct. 893 (Jan. 6,

2014). In the interim, however, a number of marriage licenses were issued to same-sex couples in violation of Utah law, creating great uncertainty and confusion about the validity of the marriage licenses that had been issued in the interim. Marissa Lang, *Same-sex couples shatter marriage records in Utah*, The Salt Lake Tribune (Dec. 26, 2013); Lyle Denniston, *Mixed signals on new Utah same-sex marriages*, SCOTUSblog (Jan. 8, 2014).

Not surprisingly, given the chaos that briefly prevailed and uncertainty that still persists in Utah, as well as the Supreme Court's clear and decisive action staying the district court's judgment in the Utah case, the district courts in all but two of the other cases that have proceeded to judgment have stayed their judgments pending resolution on appeal (and, as is expected, by the Supreme Court). *See, e.g.*, *Bishop v. United States ex rel. Holder*, 962 F.Supp.2d 1252, 1295–96 (N.D. Okla. 2014); *Bostic v. Rainey*, 970 F.Supp.2d 456, 484 (E.D. Va. 2014); *De Leon v. Perry*, SA–13–CA–00982–OLG, 2014 WL 715741, at *28 (W.D.Tex. Feb. 26, 2014); *Bourke v. Beshear*, 3:13-CV-750-H, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014); *cf. Arkansas v. Wright*, No. CV-14-427 (Ark. S.Ct. May 16, 2014) (granting stay of state circuit court decision enjoining Arkansas' marriage law).

The two exceptions are Judge Bernard Friedman in Michigan and Magistrate Judge Candy Dale in Idaho, who each declined to issue stays after rendering

judgments that the respective state marriage laws were unconstitutional. *DeBoer v. Snyder*, 12-CV-10285, 2014 WL 1100794 (E.D. Mich. Mar. 21, 2014) (holding Michigan's marriage law unconstitutional); Order of May 13, 2014, Dkt. #98 (holding Idaho's marriage law unconstitutional) and Order of May 14, 2014, Dkt. # 100 (denying stay), *Latta v. Otter*, No. 1:13-cv-00482-CWD (D. Idaho 2014). Those denials of stays were quickly remedied, by the Sixth Circuit a few hours after marriage licenses started being issued in Michigan, and by this Court a few hours before the judgment was set to take effect in Idaho. Order granting temporary stay, Dkt. #6 (March 22, 2014) and Order granting stay, Dkt. #18 (March 25, 2014), *DeBoer v. Snyder*, No. 14-1341 (6th Cir. 2014); Order (temporarily staying judgment pending disposition of emergency stay motion), *Latta v. Otter*, No. 14-35420 (9th Cir., May 15, 2014).

Unlike in all the other pending cases, however, there is no adversary to Plaintiffs' constitutional challenges in this case. No one to take an appeal. And no one to request a stay that would preserve the status quo in Oregon pending ultimate resolution by the Supreme Court of the significant constitutional issues presented.

That is why NOM sought to intervene in this litigation, on behalf of its Oregon members who have significant protectable interests that will be effected should the district court rule that Oregon's marriage law is unconstitutional. The motion to intervene was denied on May 14, 2014, and the district court denied

NOM's request for a stay pending appeal immediately thereafter. Dkt. #114. NOM noticed its appeal two days later, but on Friday afternoon, the district court announced that it would be issuing its opinion on the pending summary judgment motions on Monday, May 19, 2014, at Noon. NOM therefore seeks an emergency stay before that judgment issues, so that if this Court agrees that it should have been permitted to intervene as of right, the district court can actually have an adversary involved in the litigation before rendering judgment. Alternatively, if the judgment has already issued adverse to Oregon's marriage law before this Court can issue a stay, NOM requests a stay of that judgment pending resolution of its appeal from the denial of intervention.

Four factors guide this Court's consideration of NOM's motion for stay pending exhaustion of its appeal: (1) NOM's likelihood of success on the merits of its motion to intervene; (2) the likelihood of irreparable harm absent a stay; (3) the balance of equities; and (4) the public interest. *See Humane Soc'y of the U.S. v. Gutierrez*, 558 F.3d 896 (9th Cir. 2009) (citing *Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008)). These factors all point to the same conclusion: The proceedings below should be stayed (or, alternatively, any dispositive judgment stayed) pending resolution of NOM's appeal. *Cf. Nken v. Holder*, 129 S. Ct. 1749, 1758 (2009).

A. NOM is Likely to Succeed on the Merits of its Appeal from the Denial of Its Motion to Intervene.

Four requirements must be satisfied to intervene as a matter of right under Fed. R. Civ. P. 24(a)(2): (1) the application for intervention must be timely; (2) the applicant must have a "significantly protectable" interest relating to the subject of the action; (3) the disposition of the action might, as a practical matter, impair the applicant's ability to protect that interest; and (4) the applicant's interest might be inadequately represented by the existing parties. *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817-18 (9th Cir. 2001); *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003). Each of these requirements must be evaluated liberally in favor of intervention:

> 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, [the court] often prevent[s] or simplifies] future litigation involving related interests; at the same time, [the court] allow[s] an additional interested party to express its views ... .

United States v. City of Los Angeles, 288 F.3d 391, 398 (9th Cir. 2002). In reviewing these factors, "a district court is required to accept as true the nonconclusory allegations made in support of an intervention motion." *Southwest Ctr.*, 268 F .3d at 819.

NOM, on behalf of its members, satisfies all four requirements. The district court held that NOM had failed to meet the timeliness and protectable interest

elements of the intervention inquiry but because the district court's determination was based on erroneous applications of the law for the reasons set out below, NOM is likely to succeed on the merits of this appeal.[2] A stay of proceedings is therefore warranted pending resolution of its appeal.

1. The District Court Failed to Accept as True NOM's Non-Conclusory Factual Statements Regarding Timeliness, As Required by Governing Ninth Circuit Precedent; Its Finding that the Motion was "Untimely" is Therefore an Abuse of Discretion.

In its motion to intervene, NOM made several factual allegations, supported by sworn Declarations, including the following:

1) The Chairman of the Board of NOM learned in February or March 2014 that public policy groups in Oregon were trying to identify county clerks in Oregon who might be willing to intervene in the Oregon marriage case (Eastman Decl. ¶ 2);

[2] The district court did not consider the third and fourth elements, but NOM is also likely to succeed on those elements. Because NOM is likely to succeed on the merits of its claim that its members do have protectable interests in Oregon's current marriage law, those interests would clearly be undermined if Oregon's marriage law is overturned. Moreover, given the complete refusal of the named defendants to defend (and even partially enforce) Oregon's marriage law and announcement that it would not appeal from an adverse judgment, NOM can easily demonstrate that its members' interests are not being adequately represented. *See Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 837 (9th Cir.1996) (representation inadequate where current parties will not "undoubtedly make *all* the intervenor's arguments" (emphasis added)); *Triax Co. v. TRW, Inc.*, 724 F.2d 1224, 1228 (6th Cir. 1984) (decision not to appeal rendered representation inadequate).

2) Upon learning in March 2014 that the Attorney General of Oregon was not only not going to defend Oregon's marriage law, but was instead going to actively join Plaintiffs' constitutional challenge, the President of NOM began trying to identify someone in Oregon who might be willing and able to intervene to defend Oregon's marriage law, only to discover that many of the people who would suffer particularized harms if marriage was redefined in Oregon to encompass same-sex relationships were concerned about possible retaliation because of various forms of retaliation that had been suffered by supporters of true marriage elsewhere in the country (Brown Decl. ¶ 4);
3) In late March or early April, 2014, NOM's President inquired whether lawyers with the Center for Constitutional Jurisprudence would be willing to represent a county clerk or other entity in Oregon who had the legal standing to intervene in the case (Eastman Decl. ¶ 3);
4) During the second week of April, an attorney with the Center for Constitutional Jurisprudence had telephone conversations or in-person meetings with several individuals who had colorable claims of standing to intervene in the Oregon marriage case, either on their own behalf or on behalf of their businesses (Eastman Decl. ¶ 4);

5) Every one of the individuals expressed concern that intervening in the case might result in threats, harassment, and other forms of retaliation as has occurred elsewhere in the country (Eastman Decl. ¶ 4);

6) During one of the conversations held during the second week of April, the attorney with the Center for Constitutional Jurisprudence was informed that the State Registrar, a defendant in this action, had advised all county clerks that they should be ready to begin issuing marriage licenses to same-sex couples immediately after the summary judgment hearing on April 23, 2014, because the defendants were not going to appeal the expected ruling that Oregon's marriage law was unconstitutional (Eastman Decl. § 5);

7) The Registrar's email to county clerks dated April 8, 2014 reaffirmed that the Department of Justice "will not defend Oregon's ban on same-sex marriage that the US District Court will hear on April 23," that Oregon Vital Records had already prepared a new "Application, License and Record of Marriage" form "to account for same-sex marriages," and that "[i]f the judge rules that same-sex marriages are legal in Oregon, the state vital records office will immediately provide paper copies to county marriage offices" (Eastman Decl. ¶ 5, Ex. A);

8) The Registrar's email to county clerks dated April 18, 2014 advised county clerks that they would be notified "immediately" of the "effective date" of the new forms and that "[t]his will likely be happening on April 23" (Eastman Decl. ¶ 5, Ex. B);

9) On April 17, 2014, the attorney with the Center for Constitutional Jurisprudence was advised that the last of the potential intervenors with whom he had been in discussions had decided against intervening in the case because of the risk of threats, harassment, and retaliation (Eastman Decl. ¶ 6);

10) The next day, the attorney with the Center for Constitutional Jurisprudence advised NOM that, because of the risk of threats, harassment, and retaliation that was preventing individuals with standing from intervening in the case, NOM could likely assert third-party standing on behalf of its members, if any of them had legal standing on their own (Eastman Decl. § 7);

11) Over the weekend of April 19, 2014, counsel for NOM affiliated with Oregon counsel, prepared a motion to intervene and accompanying memorandum of law, interviewed NOM members who had a particularized stake in the outcome of the case, prepared a supporting declaration for NOM's president, prepared answers to the amended

complaints in the two consolidated cases, reviewed the transcripts of prior hearings in the case, prepared a motion for admission *pro hac vice*, began preparing a motion to postpone the April 23, 2014 hearing, began preparing a brief in opposition to the two motions for summary judgment, and, after seeing news accounts that raised potential mandatory recusal issues, researched the relevant ethics rules and case law dealing with recusal (Eastman Dec. ¶ 9);

12) NOM filed its motion to intervene on Monday, April 21, 2014, before the hearing on summary judgment was held on April 23, 2014, and before any substantive rulings had been made by the district court.

These are all nonconclusory allegations of fact, and under governing precedent of this Court, a "district court is required to accept as true the nonconclusory allegations made in support of an intervention motion." *Southwest Ctr.*, 268 F.3d at 819. Contrary to that explicit requirement, however, the district court found that NOM "provided no *credible* reason for failing to notify the court of its intent to intervene sooner than the 40-hour window prior to the dispositive motion hearing," and "submitted no *credible* reason for failing to determine whether any Oregon member of its organization had significant and protectable interests until … only days ago." Tr. at 48 (emphasis added).

In other words, the district court declined to accept as true basic nonconclusory facts on which NOM's motion to intervene was based (and which made the motion timely under the circumstances). It refused to credit that the Attorney General's decision to actively join Plaintiffs' attacks on the constitutionality of Oregon's marriage law (as opposed to merely declining to defend them) was not known by NOM until the latter part of March, 2014, when the Attorney General filed its "response" to the Plaintiffs' respective motions for summary judgment. The district court also refused to credit that NOM did not know until the second week of April that the Attorney General would not be filing an appeal from any judgment holding that Oregon's marriage laws were unconstitutional, contrary to the procedure employed by the U.S. Department of Justice in the *Windsor* case, 133 S. Ct. at 2684. The district court refused to credit the factual allegation that NOM did not know until April 17, 2014, that it would be unsuccessful in its efforts to persuade an Oregon county official to intervene in the case in order to defend Oregon's marriage law. And the district court declined to accept as true that NOM quite reasonably only began seeking to identify its own members who had protectable interests at stake in the Oregon litigation at that point, when it became clear that fears of harassment and retaliation had definitively created a barrier to others intervening on their own behalf, a necessary

precondition for NOM's ability to assert third-party standing on behalf of its members.

Although the determination of timeliness is within the discretion of the trial court, "the timeliness requirement for intervention as of right should be treated more leniently than for permissive intervention because of the likelihood of more serious harm." *United States v. State of Or.*, 745 F.2d 550, 552 (9th Cir. 1984). Even more significantly, the determination cannot be based on an erroneous application of the law, which is in and of itself an abuse of discretion. *See, e.g.*, *United States v. Sprague*, 135 F.3d 1301, 1304 (9th Cir. 1998); *Marisol A. v. Giuliani*, 126 F.3d 372, 375 (2d Cir. 1997) (failure to adhere to proper legal standards is abuse of discretion).

The district court's refusal to accept as true NOM's nonconclusory allegations of fact was an erroneous application of the law established by this Court in *Southwest Ctr.*, 268 F.3d at 819. The finding that NOM's motion was untimely was therefore an abuse of discretion.

Moreover, NOM's motion is timely "in light of all the circumstances of the case," which is the standard against which the motion's timeliness must be assessed. Wright & Miller, 7C Fed. Prac. & Proc. Civ. § 1916 (3d ed.). This is particularly true against the background principle that "Rule 24 has traditionally received a liberal construction in favor of applicants for intervention." *Washington*

State Bldg. & Const. Trades Council, AFL-CIO v. Spellman, 684 F.2d 627, 630 (9th Cir. 1982) (citing Wright & Miller, 7A Fed. Prac. and Proc. § 1904 (1972)); *see also Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) ("we normally follow 'practical and equitable considerations' and construe the Rule 'broadly in favor of proposed intervenors'") (quoting *City of Los Angeles*, 288 F.3d at 397, and citing *Southwest Ctr.*, 268 F.3d at 818). At the very least, the circumstances here, combined with the rule of liberal construction in favor of intervention, demonstrate a likelihood of success on the merits of NOM's appeal.

2. The District Court Also Erred in Rejecting NOM's Nonconclusory Factual Allegations Regarding the Significant Protectable Interests of Its Members.

The district court also determined that NOM had not demonstrated that its members had protectable interests warranting intervention as of right because it had "made the members immune from inquiry by the parties and by the court to ascertain standing on anything other than conclusory statements of the proposed intervenor." Tr. at 49. As with the factual allegations in the timeliness issue discussed above, the district court did not accept as true NOM's nonconclusory factual allegations with respect to the protectable interests of its members, as it was required to do. Those nonconclusory allegations include:

1) More than one of NOM's members are providers of wedding services who have informed NOM that they have sincerely-held religious

objections to facilitating marriage ceremonies between people of the same sex (Brown Decl. ¶ 7);

2) NOM's members who provide wedding services in Oregon have informed NOM of their concerns that, if marriage is redefined in Oregon, they would be forced by Oregon's public accommodation law to facilitate such marriages or cease providing wedding services as part of their business (Brown Decl. ¶ 7);

3) NOM's members who provide wedding services have informed NOM that they fear retaliation against their businesses if they are named as intervenors in this litigation (Brown Decl. ¶ 7);

4) Another of NOM's members is an Oregon voter who voted in favor of Measure 36 in 2004, but who also fears retaliation against him if he is named as an intervenor in this litigation (Brown Decl. ¶ 8);

5) NOM also has a member who is an elected county clerk in Oregon with responsibility for the issuance of marriage licenses in that county (Brown Decl. ¶ 6; Eastman Decl. ¶ 8);

6) NOM's county clerk member would have religious objections to issuing marriage licenses to persons of the same sex if marriage were redefined in Oregon to encompass same-sex relationships (Eastman Decl. ¶ 8);

7) NOM's county clerk member would like to intervene in the Oregon marriage case to defend Oregon's marriage law but is concerned about the risk of harassment, and would welcome NOM's intervention on behalf of its members (Eastman Decl. ¶ 8).

Instead of accepting these nonconclusory factual allegations as true, as it was required to do under *Southwest Ctr.*, 268 F.3d at 819, the district court questioned whether NOM's members even existed. It referred to them as "phantoms" and a "moving target." Tr. at 11, 13, 52. It rejected NOM's factual assertion that its county clerk member would suffer personal harms in the performance of his or her official duties because of sincerely-held religious objections to facilitating same-sex marriages. *See* Tr. at 13 (The Court: "How would I ever know that? How would I ever know that that's a personal harm? I mean, you haven't given us, even under seal, the name of the county. I mean, I imagine if we looked at the census data for someplace like Lake County …, we may find that in fact there are almost no gay families registered in Lake County, and we might be able to at least use that information to decide, you know, is this a hypothetical harm, is it a real harm, or are Lake County officials willing to make an accommodation for this particular individual."); *see also* Tr. at 50 ("The proposed intervenor has provided little information as to what the clerk's protectable interest is in this litigation other than that he or she may be required to

perform a job duty that they might have a moral or religious objection to. Such a generalized hypothetical grievance, no matter how sincere, does not confer standing"). And the court even implicitly rejected NOM's factual allegation that its county clerk member was an *elected* county clerk (who by definition has an "agency" relationship with the county government), stating instead: "I am not hearing official capacity, any agency relationship. … An agency relationship between your clerk and their local government." Tr. at 11.

That the district court failed to credit NOM's nonconclusory factual allegations as true is enough to overturn its decision denying NOM's motion to intervene. But the district court's insistence that NOM provide enough information to identify its members is particularly troubling. NOM brought this suit on behalf of its members on the authority of the Supreme Court's decision in *NAACP v. Alabama*, 357 U.S. 449, 459 (1958). As NOM alleged and the district court seemed to accept, NOM's members face a real risk of harassment and intimidation if they intervene in their own name. Declaration of Brian S. Brown ¶¶ 4, 7, 8; Declaration of John C. Eastman ¶¶4, 6, 8; Tr. at 49 ("I understand there are, I think, genuine issues of concern that the proposed intervenor may have"). Disclosing the identities of NOM's members, or other information from which their identifies could be ascertained, as the district court seemed to demand, would

expose those members to the very harassment risks that the organizational standing approved by the Supreme Court in *NAACP v. Alabama* was designed to prevent.

Thus, to the extent the district court's holding was based on lack of the additional detail that revelation of the members' identities would have provided, it was an erroneous application of the law, and NOM is therefore likely to succeed on the merits of its appeal. To the extent the district court simply rejected NOM's interest and that of its members in defending the constitutionality of Oregon's marriage law as not a "significant protectable interest," that, too, is an erroneous application of the law. *See, e.g.*, *Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006) ("a public interest group that has supported a measure (such as an initiative) has a 'significant protectable interest' in defending the legality of the measure") (quoting *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir.1983)).

B. NOM's Members Will Likely Suffer Irreparable Harm in the Absence of a Stay.

Each of NOM's members with protectable interests in this case will suffer harms that the courts have, in similar circumstances, considered "irreparable." For example, NOM alleged that its members who provide wedding services would be forced by Oregon's public accommodation law to facilitate marriage ceremonies in violation of their sincerely held religious beliefs or cease providing wedding services as part of their businesses. Brown Decl. ¶ 7. Either alternative is an irreparable harm. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of

First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"); *Florida Businessmen for Free Enter. v. City of Hollywood*, 648 F.2d 956, 958 n. 2 (5th Cir. 1981) ("a substantial loss of business may amount to irreparable injury"); *Planned Parenthood of Minnesota, Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 866 (8th Cir. 1977) (law which prevented Planned Parenthood from engaging in the abortion part of its business created "adverse effect" on the business and "incalculable loss of revenue" was "irreparable injury").

Similarly, NOM's county clerk member "would have religious objections to issuing marriage licenses to persons of the same sex if marriage were redefined in Oregon to encompass same-sex relationships." Eastman Decl. ¶ 8. Because county clerks in Oregon "are charged with the responsibility of physically issuing [marriage] licenses," *Li v. State*, 110 P.3d at 95 n.5 (citing Or. Rev. Stat. § 106.041), the conflict that will result between the county clerk's duties and his or her religious beliefs is an irreparable harm. *Elrod*, 427 U.S. at 373.

More fundamentally, the loss of the county clerk's ability to offer a defense of Oregon's marriage law is itself an irreparable harm, as is the effective nullification of the vote of NOM's voter member. "[I]t is clear that a state suffers irreparable injury whenever an enactment of its people … is enjoined." *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997); *see also New Motor*

Vehicle Bd. v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("[A]ny time a State is enjoined by a Court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."); *accord Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers); and *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 134 S. Ct. 506, 506 (2013) (Scalia, J., concurring in the denial of application to vacate stay). That same principle supports a finding of irreparable injury in this case. For Plaintiffs have requested a state-wide injunction from the district court. Such an injunction would not just enjoin the county clerk from enforcing an ordinary statute, but a constitutional provision approved by the people of the State in the core exercise of their sovereignty. *See* Measure 36, Ore. Const. Art. XV, § 5a ("It is the policy of Oregon, *and its political subdivisions*, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage").

Further, absent a stay pending appeal, same-sex couples will be permitted to marry throughout the Oregon. *See*, *e.g. Geiger* First Amended Complaint ¶ 5, Prayer for Relief ¶ 2. Genderless marriages would be licensed under a cloud of uncertainty, and should NOM ultimately succeed on appeal in this case, or should the Supreme Court uphold a state one-man/one-woman definition of marriage in one of the many other cases currently heading to that Court, any such marriages could be invalid *ab initio*. *See Li v. State*, 110 P.3d at 102 (marriage licenses

issued contrary to Oregon law "were void at the time that they were issued"). Indeed, the failures of the district courts in Utah and Michigan to grant a stay pending appeal led to chaos, confusion, and uncertainty of a kind harmful to all involved with or concerned about the ultimate marriage issue. *See, e.g.*, *Evans v. State of Utah*, No. 2:14-cv-00055-DAK, Dkt. #1, Ex. A, ¶ 2 (D. Utah 2014) (Complaint, alleging that issuance of marriage licenses before stay was issued placed same-sex couples in "legal limbo"); *see also De Leon*, 2014 WL 715741, at *27 (district court "stay[ed] execution of [its] order pending appeal to prevent any legal and practical complications"). Repeating a similar experience would undoubtedly put Plaintiffs in a similar "legal limbo" and place enormous administrative burdens on local officials, such as NOM's county clerk member, whose duties include the issuance of marriage licenses. *See INS v. Legalization Assistance Project*, 510 U.S. 1301, 1305-06 (1993) (O'Connor, J., in chambers) (citing the "considerable administrative burden" on the government as a reason to grant the requested stay).

C. Plaintiffs Will Not Be Substantially Injured by a Stay.

As explained above, Oregon and its citizens will suffer irreparable injury from halting the enforcement of the State's definition of marriage: Every marriage performed under that cloud of uncertainty would be an affront to the sovereignty of Oregon and to the democratically expressed policy judgment of the people of

Oregon; and same-sex couples may be irreparably harmed if their marital status is retroactively voided.

By contrast, a stay would have only a minimal effect on two of the Plaintiffs, whose out-of-state marriage the State of Oregon is already recognizing (albeit in violation of Oregon's marriage law). *See* Letter of Attorney General, Oct. 13, 2013 (Dkt. #10) (directing state agencies to recognize out-of-state same-sex marriages); *Geiger* First Amended Complaint ¶ 12 (alleging that Plaintiffs Duehmig and Griesar were married in Canada in 2003). Given that decision by the Attorney General not to enforce the "recognize" portion of Oregon's marriage law, a stay would not even prevent the other plaintiffs from obtaining a marriage elsewhere that would be recognized in Oregon. And even if it did, a stay would at most subject Plaintiffs to a relatively minor period of additional delay pending a final determination of whether they may enter a legally recognized marriage relationship in Oregon. Plaintiffs Geiger and Nelson, for example, "have been in a committed relationship for 31 years," *Geiger* First Amended Complaint ¶ 11, but did not challenge Oregon's constitutional definition of marriage for nearly a decade after it was adopted in 2004.

Accordingly, the balance of equities tips in favor of NOM.

D. The Public Interest Weighs in Favor of a Stay.

Avoiding uncertainty should weigh very heavily in favor of staying a judgment invalidating Oregon's Marriage Laws pending appeal. And the Supreme Court's decision to stay the Utah litigation pending appeal further evinces the public interest in granting a stay.

Moreover, although the named defendants in this case have determined not to defend Oregon's marriage laws, it is unambiguously clear that the *policy* of the state, as determined by the ultimate sovereign authority in the state, namely, the people, *see* Ore. Const. Art. I, § 1 ("all power is inherent in the people"), is otherwise. "It is the *policy* of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage." Ore. Const. Art. XV § 5a. Thus, by reaffirming Oregon's commitment to man-woman marriage in 2004, the people of Oregon have declared clearly and consistently that the public interest lies with preserving the current marriage institution. And while it is always "in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy," *Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943) (quotation marks omitted), such considerations are particularly weighty here, as "it is difficult to imagine an area more fraught with sensitive social policy considerations" than the

regulation of marriage, *Smelt v. County of Orange, California*, 447 F.3d 673, 681 (9th Cir. 2006).

The people of Oregon have expressed their "concerns and beliefs about this sensitive area" and have "defined what marriage is," *id*. at 680—namely, as the "union of a man and a woman." In short, there is nothing in the Fourteenth Amendment that compels this Court to second-guess the people of Oregon's considered judgment of the public interest.

CONCLUSION

For the reasons stated above, NOM's request for a stay pending resolution of its appeal from the district court's denial of its motion to intervene as of right should be granted.

Dated: May 19, 2014

Respectfully submitted,

s/ John C. Eastman
John C. Eastman
Attorney for Appellant