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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEANNA L. GEIGER; JANINE M.
NELSON; ROBERT DUEHMIG;
WILLIAM GRIESAR; PAUL
RUMMELL; BENJAMIN WEST;
LISA CHICKADONZ; CHRISTINE
TANNER; BASIC RIGHTS
EDUCATION FUND,

Plaintiffs - Appellees,

v.

JOHN KITZHABER, in his official
capacity as Governor of Oregon;
ELLEN ROSENBLUM, in her official
capacity as Attorney General of
Oregon; JENNIFER WOODWARD, in
her official capacity as State Registrar,
Center for Health Statistics, Oregon
Health Authority; RANDY
WALDRUFF, in his official capacity as
Multnomah County Assessor,

Defendants - Appellees,

v.

NATIONAL ORGANIZATION FOR
MARRIAGE, INC., Proposed
Intervenor; on behalf of their Oregon
Members,

Movant - Appellant.

U.S.C.A. No. 14-35427

PRELIMINARY RESPONSE TO
MOTION TO STAY PENDING APPEAL

The National Organization for Marriage, Inc. (NOM) filed an appeal of the denial of its motion to intervene. NOM is now before this court seeking an emergency stay pending resolution of its motion to stay pending appeal. State defendants Governor John Kitzhaber, Ellen Rosenblum, and Jennifer Woodward file this brief response asking that the court not issue a temporary stay, and will submit fuller briefing in opposition to NOM's motion to stay pending appeal.

The most critical point to note at the outset is that this case is unlike the Idaho case in which this court recently granted a stay. *Latta v. Otter*, No. 14-35420 (9th Cir.). This appeal arises in a very different posture. In *Latta*, some of the parties to the litigation—the defendant state officials—intend to appeal and sought a stay to protect the status quo. Here, in contrast, no party to the litigation challenging Oregon's same-sex marriage ban is seeking to stay the proceedings. Nor does any party to the litigation intend to appeal. To the contrary, Oregon officials are prepared to follow the court's directives and counties stand ready to begin issuing marriage certificates to same-sex couples otherwise qualified to marry should the district court strike down Oregon's ban on same-sex marriage.

Moreover, no stay is warranted because it is unlikely that NOM would prevail on appeal. Briefly and pending further and more complete briefing, NOM is a national political lobbying organization. That organization seeks to intervene to represent three individuals, individuals the district court labeled “phantoms” because they refused to identify themselves during the proceedings below. (D. Ct. Dkt. No. 115, p.52). Yet these “phantoms” seek an emergency stay of the district court’s order denying their motion to intervene and of the order that the district court intends to issue today at noon. It would be nothing short of extraordinary to allow three unnamed individuals with no identifiable interest in the litigation—other than a disagreement with the position that the Attorney General took in response to the lawsuit—to prevent these marriages from going forward. As the district court found, it is the province of the Attorney General, who answers to the electorate of Oregon, and not NOM, which does not, to determine what legal position to take in response to a challenge to state law. (D. Ct. Dkt. No. 115, p.51).

Moreover, the fact that the Attorney General determined that Oregon’s ban on same-sex marriage is unconstitutional under the federal constitution does not, as NOM asserts, mean that there is no “adversity” and thus no

jurisdiction in this case. The Attorney General is enforcing and will continue to enforce the ban on same-sex marriage until such time as she is directed not to.

Finally, NOM asserts that its three unidentified members have a protected interest in the merits of this litigation and in being able to appeal the district court's order on the merits because the state defendants have determined that they will not appeal. Even if this court assumes for purposes of the emergency stay motion that the three members of NOM have a concern about same-sex marriages in Oregon, they have failed to make any showing that they would have Article III standing to appeal. The member who voted for the same-sex marriage ban has no greater interest in the constitutional challenge to the ban than any other voter in Oregon and lacks standing to appeal.

Hollingsworth v. Perry, 133 S. Ct. 2652, 2668 (2013) (“We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here.”). A wedding planner who may or may not be asked to provide services to a same-sex couple seeking to celebrate their marriage lacks standing to challenge the constitutionality of that marriage. The same is true for a county clerk who may be asked to provide a license to a same-sex couple but who has only a personal and not an official objection to same-sex marriage. For both the

wedding planner and the individual who happens to be a county clerk, their objections may lead to other litigation concerning whether they have a right to not play a role in same-sex marriage, but they have no connection to plaintiffs' claims of a right to marry under the federal constitution.

For the foregoing reasons, this court should therefore decline to issue a temporary stay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2014, I directed the Preliminary Response to Motion to Stay Pending Appeal to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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