No. A13-1173

In the

Supreme Court of the United States

NATIONAL ORGANIZATION FOR MARRIAGE, INC.,
on behalf of its Oregon members,

Applicant,

v.

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

Respondents (Plaintiffs),

and

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, and
RANDY WALRUFF, in his official capacity as Multnomah County Assessor,

Respondents (Defendants).

Response In Opposition to Application to Stay Judgment Pending Appeal

DIRECTED TO THE HONORABLE ANTHONY KENNEDY, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT

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To the Honorable Anthony Kennedy, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Plaintiffs-Respondents Deanna L. Geiger, Janine M. Nelson, Robert Duehmig, William Griesar, Paul Rummell, Benjamin West, Lisa Chickadonz, Christine Tanner, and Basic Rights Education Fund (collectively, the "Plaintiffs")[1] respectfully oppose the application to stay judgment filed by the National Organization for Marriage, Inc. ("NOM"), pending its appeal of the district court's denial of NOM's motion to intervene.

INTRODUCTION

On May 19, the district court granted Plaintiffs' motions for summary judgment, and enjoined as unconstitutional Oregon's exclusion of same-sex couples from the freedom to marry. The only parties with standing to appeal that decision have announced they will not. NOM, a national advocacy organization dedicated to opposing marriage rights for same-sex couples, now seeks a stay of the district court's judgment while it pursues an appeal from the denial of its intervention motion. This Court should deny that request for multiple reasons. First, intervention was properly denied below,[2] and there is no reasonable likelihood that

[1] The district court consolidated two cases brought by separate plaintiffs against common defendants. District court proceedings referred to the two sets of plaintiffs as the "Geiger Plaintiffs" and "Rummell Plaintiffs," respectively. All citations herein to the district court record will relate to case no. 6:13-cv-01834-MC (D. Or.).

[2] District Judge Michael J. McShane on May 14 ruled from the bench on the motion to intervene at the conclusion of oral argument. NOM's stay application did not include a copy of that ruling, as required by Supreme Court Rule 23(3). Accordingly, a copy of the transcript of the May 14 hearing is annexed hereto as Appendix A.

four members of this Court will grant certiorari to review that procedural ruling. NOM's motion to intervene was correctly deemed untimely, and this threshold finding, reviewed for abuse of discretion, will almost certainly be affirmed. NOM's appeal therefore presents no substantial question for this Court's consideration.

Second, NOM would lack standing to appeal the district court's judgment on the merits even if its motion to intervene were granted. NOM's alleged interests in this case derived from the interests of Oregon members it identified only by general description: a county clerk; a citizen who voted in favor of adding the discriminatory marriage provision to Oregon's constitution nearly ten years ago; and an individual who works in an unspecified role in the private sector providing services for weddings. (Application at 13.) Significantly, NOM acknowledges that it represents a county clerk in his or her personal capacity only. (App. A, Tr., May 14, 2014, at 12:20-23.) Thus, NOM does not speak for the clerk as an official of local government, but merely as an individual with personal opinions about marriage licenses issued by the office where he or she works. Similarly, the wedding service provider and Oregon voter have opinions about marriage equality in Oregon and would have preferred that the district court's order not take effect. But preferring that a judicial decision not take effect does not constitute suffering legally cognizable harm.

Third, NOM's application is procedurally deficient, as it never properly moved in the district court and Ninth Circuit for the relief it now requests of this Court.

The circumstances of this case thus render the Court extremely unlikely to ever grant certiorari, and the equities weigh heavily against issuance of a stay.

ARGUMENT

A Circuit Justice evaluating an application for stay is required "'to determine whether four Justices would vote to grant certiorari, to balance the so-called "stay equities," and to give some consideration as to predicting the final outcome of the case in this Court.'" *Deaver v. United States*, 483 U.S. 1301, 1302 (1987), quoting *Heckler v. Redbud Hospital Dist.*, 473 U.S. 1308, 1311-1312 (1985) (Rehnquist, J., in chambers), and *Gregory-Portland Independent Sch. Dist. v. United States*, 448 U.S. 1342, 1342 (1980). As detailed herein, NOM's stay application falls far short of meeting this standard.

I. NOM's Application Should Be Denied Because There Is No Reasonable Likelihood This Court Will Overturn the District Court's Rulings.

NOM cannot show it is reasonably likely to succeed in appealing the district court's May 14, 2014 decision denying its motion to intervene. In that decision, the district court explained in detail its reasons for rejecting the belated intervention attempt, which included not only untimeliness, but also NOM's failure to show interests warranting intervention. Further, there is no reasonable likelihood that this Court would overturn the merits decision in Plaintiffs' favor, since NOM would lack standing to appeal that decision even if it were permitted to intervene, and NOM's merits arguments fail in any event.

A. NOM's Motion to Intervene Was Untimely.

Federal Rule of Civil Procedure 24 allows for either mandatory or permissive intervention, under two different standards. Intervention is mandatory when a putative intervenor, by timely motion, "claims an interest relating to … the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). Intervention is permissible, in the district court's sound discretion, when the putative intervenor "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B).

For both mandatory and permissive intervention, a prospective intervenor must demonstrate that its effort to enter the case is timely. *Nat'l Ass'n for Advancement of Colored People v. New York*, 413 U.S. 345, 365 (1973); Fed. R. Civ. P. 24(a) (intervention of right available only "on timely motion"); Fed. R. Civ. P. 24(b)(3) ("In exercising its discretion [as to permissive intervention], the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights."). Timeliness "is to be determined from all the circumstances, with "the point to which the suit has progressed" being one factor. *NAACP*, 413 U.S. at 365-66; *see also United States v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984) (applying three-prong timeliness test for intervention that assesses stage of the proceeding, prejudice to other parties, and delay's reason and length).

The two cases consolidated here were filed in October 2013 and December 2013, respectively. (Geiger et al. Compl. October 15, 2013 (D. Ct. Dkt. No. 1);

Rummell et al. Compl. December 19, 2013 (D. Ct. Dkt. No. 11).) Both filings received significant media attention, as did the district court's January 2014 consolidation of the cases and setting of a schedule for summary judgment briefing, which was to conclude with a hearing on dispositive motions on April 23, 2014. (Tr., Jan. 22, 2014, at 16:16, 17:23-18:1, 19:6-8.)[3] In February, defendant Ellen Rosenblum in her official capacity as Attorney General of Oregon stated explicitly in her Answer to the Rummell Plaintiffs' Complaint that the State Defendants agreed with Plaintiffs that no valid constitutional justification existed for Oregon's exclusion of same-sex couples from marriage and that the defendants would not oppose the relief Plaintiffs sought in this case. (State Def.'s Answer to Compl. ¶ 28, Feb. 20, 2014 (D. Ct. Dkt. No. 58.).) NOM issued a press release that day condemning Attorney General Rosenblum's position. (D. Ct. Dkt. No. 106:7 (Ex. G).) Even though it knew or should have known all of these facts and circumstances in February, NOM moved to intervene on April 21, after briefing on Plaintiffs' summary judgment motions was complete and less than two days before the scheduled dispositive hearing. (Mot. to Intervene, April 21, 2014 (D. Ct. Dkt. No. 86).)

The district court held that NOM's motion to intervene was untimely. (Tr., May 14, 2014, at 49:2-3.) Although denial of mandatory intervention is subject to *de*

[3] (D. Ct. Dkt. Nos. 106:3, 106:5-6 (Exs. C, E-F)); *see also, e.g.*, Christian Gaston, *Two More Couples File Suit Against Oregon's Ban on Gay Marriage*, Oregonian (Dec. 19, 2013), available at http://www.oregonlive.com/portland/index.ssf/2013 /12/two_more_couples_file_suit_aga.html; Jeff Mapes, *Ruling on Gay Marriage Could Come by Summer after Federal Judge Consolidates Two Cases*, Oregonian (Jan. 22, 2014) available at http://www.oregonlive.com/mapes/index.ssf/2014/01/ruling_on_gay_marriage_in_oreg.html.

novo review, a district court's finding of untimeliness is reviewed for abuse of discretion. *NAACP*, 413 U.S. at 366; *United States v. Washington*, 86 F.3d 1499, 1503 (9th Cir. 1996); *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 658-59 (9th Cir. 1978). NOM has no credible argument that the district court abused its discretion, particularly given the facts the district court marshaled.

In deeming NOM's motion untimely, the district court noted the following:

- NOM filed its intervention motion at 11:04 p.m. PDT on April 21, 2014. The district court had on January 22 scheduled an April 23 hearing on summary judgment motions that the parties said they expected would resolve all issues in these two consolidated cases. In other words, NOM moved to intervene less than two days before the "dispositive" hearing in this litigation, and nearly three months after that hearing had been scheduled. (Tr., May 14, 2014, at 47:25-48:4.)
- The schedule set in January allowed the filing of *amicus curiae* briefs by a deadline of April 1. While three other citizen groups did file *amicus* briefs expressing their perspectives on issues in this litigation, NOM did not. (Tr., May 14, 2014, at 47:23-24 and 48:24-25.)
- NOM gave no advance notice to the district court of its intention to seek party-intervenor status. (Tr., May 14, 2014, at 48:24-49:1.)

NOM's April 21 motion to intervene was thus untimely relative to "the point to which the suit [had] progressed," and permitting NOM to intervene would have

delayed adjudication of the original parties' constitutional rights. *See* Fed. R. Civ. P. 24(b)(3); *NAACP*, 413 U.S. at 365-66.

NOM argues that several cases in which intervention was granted subsequent to a trial court decision and judgment render its pre-judgment intervention efforts timely. (Application at 31-33.) These cases do not help NOM. Each involved a party *unexpectedly* changing course so as to stop adequately representing the prospective intervenor's interests, in contrast to the Defendants' consistent position in the present case. *See United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977) ("[A]s soon as it became clear to the respondent that the interests of the unnamed class members would no longer be protected by the named class representatives [because plaintiffs were changing course and not appealing denial of class certification], she promptly moved to intervene to protect those interests."); *Yniguez v. Arizona*, 939 F.2d 727, 735-36 (9th Cir. 1991) (proponent of Arizona ballot initiative could intervene to defend initiative's constitutionality on appeal, where proponent had elected not to seek intervention in district court based on reasonable reliance on state defendants' representations that they would appeal an adverse ruling); *Tocher v. City of Santa Ana*, 219 F. 3d 1040, 1045 (9th Cir. 2000) (allowing post-judgment intervention by towing company in litigation originally against municipal officials, where company "ha[d] a good reason for its late intervention because the district court's preliminary injunction did not affect [its primary business interests] and because it only became apparent after the district court issued its final judgment that the City had failed to adequately represent

[company]'s interests), *abrogated by City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424 (2002) and *Tillison v. City of San Diego*, 406 F.3d 1126 (9th Cir. 2005). Here, by contrast, there has never been any doubt about the Defendants' position.

The district court also considered the length and purported reasons for NOM's delay in moving to intervene. *See Oregon*, 745 F.2d at 552. Responding to NOM's claim that the lateness of its intervention motion was excusable because it only recently became aware that Attorney General Ellen Rosenblum and the other defendants would not be defending the constitutionality of Oregon's marriage bans, the district court further noted the following facts:

- In October 2013, Attorney General Rosenblum submitted an *amicus curiae* brief in another case in which she took the position that the United States Constitution bars exclusion of same-sex couples from marriage (Tr., May 14, 2014, at 46:21-25);[4]
- On February 20, 2014, Attorney General Rosenblum publicly announced that the state of Oregon would not seek to defend the constitutionality of Oregon's marriage bans based on her understanding of applicable legal precedent (Tr., May 14, 2014, at 47:1-5);

[4] *See Brief of Massachusetts, California, Connecticut, Delaware, District of Columbia, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, New York, Oregon, Vermont, and Washington as Amici Curiae in Support of Appellants*, p. 2, *Sevcik v. Sandoval,* No. 12-17668, 9th Cir. Dkt. 24 (Oct. 25, 2013).

- NOM demonstrated its awareness and understanding of this development by issuing its own public statement in February that accused Attorney General Rosenblum of "shamefully abandoning her constitutional duty" (Tr., May 14, 2014, at 47:8-9);[5]
- Defendants in this litigation on March 18, 2014, filed responses to the Plaintiffs' motions for summary judgment, in which they argued that Oregon's marriage bans violate the U.S. Constitution and that Plaintiffs' motions for summary judgment should be granted (Tr., May 14, 2014, at 47:14-22).

That NOM knew or should have known so much about this case so far in advance of its belated intervention attempt renders that attempt untimely. *See NAACP*, 413 U.S. at 367 (rejecting as untimely motion to intervene filed April 7, 1972, by public interest organization that admitted having been aware of litigation since March 21, when "the suit was over three months old and had reached a critical stage" because plaintiffs had moved for summary judgment and prospective intervenor should have been aware that government defendant was unlikely to oppose that motion); *LULAC v. Wilson*, 131 F.3d 1297, 1304 (9th Cir. 1997) (citing prospective intervenor's admission that it had been aware of litigation since its filing months before as the key reason motion to intervene was untimely).[6]

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[5] *See also* Tr., May 14, 2014, at 47:10-13 ("As early as January 25, 2014, counsel for proposed intervenor was calling for the Oregon governor and attorney general to uphold their oath of office and defend the Constitution of Oregon.")

[6] NOM has previously tried to excuse its late effort to intervene by alleging that it believed during March and early April that other Oregon entities with similar political positions were planning to intervene in this litigation. (Emergency Motion for Ninth Circuit Stay at 2-3.) NOM cites no

Finally, the district court considered but rejected NOM's contentions that the time required to identify and interview Oregon members with alleged interests in this case and prepare intervention papers warranted its late filing. The district court found that "the proposed intervenor [NOM] has submitted no credible reason for failing to determine whether any Oregon member of its organization had significant and protectable interests [in the outcome of this litigation] until, as they stated in their brief, only days ago." (Tr., May 14, 2014, at 48:18-21); *see also United States v. Blaine County, Montana*, 37 F. App'x 276, 278 (9th Cir. 2002) (upholding denial of both permissive and mandatory intervention where movants "fail[ed] to offer sufficient explanation for their delay in filing their motion to intervene.")

For the first time in this Application, NOM now says that it did not learn until April 8 of the Defendants' position that they would not appeal a grant of summary judgment. (Application at 8.) At a minimum, though, NOM *should have known* earlier that the State Defendants were unlikely to appeal. The State Defendants indicated in their March 18 Response brief that they were eager to implement a grant of summary judgment and, in fact, offered the district court advice on how to structure its order. (D. Ct. Dkt. No. 64 p. 34.)[7]

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authority allowing prospective intervenors to toll the "stage of the proceedings" assessment pending possible intervention efforts by others. If NOM through its members truly had a serious stake in the outcome of this litigation, it should have pursued timely intervention on its own behalf.

[7] The April 8 email that NOM now contends alerted it to the State's intention not to appeal in fact says nothing about that. (D. Ct. Dkt. 110:1 (Ex. A).) It gave NOM no more information than NOM already had on March 18. Indeed, NOM admits that it began recruiting participants for this case in March. (D. Ct. Dkt. 88 ¶ 4 ("Upon learning in March 2014 that the … defendants in this case were not going to defend Oregon's marriage laws in this litigation, … I began trying to identify someone in

NOM bore the burden of demonstrating that its attempt to intervene was timely, and it failed to do so, particularly given the evidence that it was aware of Defendants' position in this litigation months before it moved to intervene. Because NOM, without good cause, waited so long to voice its purported interest in these cases that allowing intervention would have adversely affected the rights of the original litigants, the district court properly denied intervention.[8]

B. NOM Failed to Demonstrate a Significantly Protectable Interest in This Case.

Additionally, NOM has no realistic chance of prevailing on its appeal of the denial of intervention because the district court in its May 14 decision also correctly held that NOM had failed to demonstrate a significantly protectable interest in the outcome of this litigation. (Tr., May 14, 2014, at 49:10-13); *Donaldson v. United States*, 400 U.S. 517, 531 (1971), *superseded by statute on other grounds as noted in Tiffany Fine Arts v. United States*, 469 U.S. 310, 315-16 (1985). "An applicant has a 'significant protectable interest' in an action if (1) it asserts an interest that is protected under some law, and (2) there is a 'relationship' between its legally protected interest and the plaintiff's claims." *Donnelly v. Glickman*, 159 F.3d 405,

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Oregon who might be willing and able to intervene to defend Oregon's marriage law in this litigation.").)

[8] NOM also takes issue with the district court's alleged failure to give sufficient credence to its factual allegations. (Application at 33.) The transcript of the May 14 hearing shows that the district court expressly acknowledged its obligation to do so, and did credit all of NOM's nonconclusory factual allegations. (*See* Tr., May 14, 2014, at 13:21-24, 45:18-52:18.) NOM has mischaracterized the district court's observations that NOM failed to offer a *credible legal justification* for its late filing, based on the facts as NOM presented them, as findings that NOM's factual allegations themselves were not credible. (Application at 33.) The district court correctly applied the law on this point, and its holding that NOM's legal arguments lacked credibility was by no means an abuse of discretion.

409 (9th Cir. 1998), quoting *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996); *see also Diamond v. Charles*, 476 U.S. 54, 75 (1986) (O'Connor, J., concurring) (discussing nature of significantly protectable interests).

In rejecting NOM's claim that it possessed a significant protectable interest in this litigation, the district court noted that NOM had refused to identify (even in a sealed filing or *in camera* proceeding) any of the individual members whose standing NOM as an organization sought to rely on, thus shielding those members from *any* form of inquiry by the court or the parties as to the nature and extent of their purported interests in this litigation. (*See* Tr., May 14, 2014, at 49:10-13.) Although NOM asserted in a conclusory manner a significant protectable interest as an organization based on the perspectives of three members, none of the interests it has asserted qualifies as a basis for intervention.

NOM claimed that one of its Oregon members is a county clerk who possesses a significant protectable interest in the case because a judgment granting the Plaintiffs' requested relief might result in that clerk's job duties coming to include the issuance of marriage licenses to same-sex couples. (Memo. Supporting Mot. to Intervene at 9-10 (D. Ct. Dkt. No. 87).) NOM has conceded, however, that it represents the clerk in his or her personal capacity only. (Tr., May 14, 2014, at 12:20-23.) That concession is fatal. Since the declaratory and injunctive relief Plaintiffs requested in this case would affect local government officials in their official capacity rather than in their personal capacity, NOM's allegations were insufficient to demonstrate that its unidentified clerk member had a significant

protectable interest in the outcome that could be delegated to NOM through organizational standing. *Id.* at 50:10-11; *see also Donnelly,* 159 F.3d at 409 (requiring prospective intervenor to show relationship between its legally protected interest and the plaintiffs' claims). As the district court rightly noted, NOM's claims that its unidentified county clerk member had a personal religious or moral objection to issuing marriage licenses to same-sex couples represented no more than a "generalized hypothetical grievance." (Tr., May 14, 2014, at 50:10-11.)

While NOM broadly asserts that clerks are entitled to a "seat at the litigation table" (Application at 33), this Court need not delve into the question of whether a county clerk has a protectable interest as a matter of Oregon law because no clerk has sought to intervene in his or her official capacity, and no such clerk seeks a stay before this Court. NOM's clerk has no greater interest in this case than any other local government employee with a personal preference against facilitating the licensing of certain marriages.

NOM also contended that one of its members voted for the 2004 ballot measure that amended the Oregon Constitution to include a prohibition on marriage for same-sex couples. (Memo. Supporting Mot. to Intervene at 11-12.) But as the district court concluded, "the voters' interest in the outcome of a case is … a general interest and not a significant protectable interest that would allow for intervention." (Tr., May 14, 2014, at 49:23-50:1.) The intervention standard would be meaningless if every citizen who voted for a ballot proposition retained perpetual authority to intervene as of right in all challenges to the resulting law. *See*

generally Hollingsworth, 133 S. Ct. at 2668 ("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."); *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 345-46 (6th Cir. 2007) (noting that members of the general public are generally not entitled to defend the constitutionality of a law validly enacted through the democratic process).

Lastly, NOM alleged that some of its Oregon members work in the private sector in some unidentified capacity related to providing services for weddings, and have a personal objection to providing services for the weddings of same-sex couples. (Memo. Supporting Mot. to Intervene at 10-11.) The district court rightly rejected this argument as well, noting first that the claim was difficult to assess in the absence of specifics about such individuals' exact job function and particular objections to marriage equality. (Tr., May 14, 2014, at 50:13-16.) As the district court further observed, in the past decade many same-sex couples have hosted celebrations in Oregon of their commitment and/or their legal marriage in another jurisdiction. Because Oregon law already prohibits discrimination on the basis of sexual orientation by retail businesses, the alleged potential moral dilemma NOM describes already exists for anyone who operates a business open to the public that provides wedding-related services in Oregon. (Tr., May 14, 2014, at 50:17-51:5.) NOM itself has contended that its wedding service provider members "would be forced by Oregon's public accommodations law to facilitate [same-sex couples'] … marriages or cease providing wedding services," thus acknowledging that this

represents an objection to Oregon's long-standing nondiscrimination law and not to the marriage laws at issue in this case. (*See* Emergency Motion for Ninth Circuit Stay at 19.)

Each of NOM's three arguments that its members have significant protectable interests in this case thus fails, and NOM therefore has no reasonable likelihood of success in its appeal of the denial of mandatory intervention.

C. The District Court Correctly Rejected NOM's Arguments for Discretionary Intervention.

After it rejected NOM's argument for mandatory intervention, the district court also proceeded to reject NOM's argument for permissive intervention. Permissive intervention is subject to the lower court's sound discretion, and its denial is reviewed for abuse of discretion. *Brotherhood of R.R. Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 524-25 (1947); *McDonald v. Means*, 300 F.3d 1037, 1044 (9th Cir. 2002). The district court appropriately declined to exercise its discretion to afford NOM permissive intervention.

In reviewing NOM's request for permissive intervention, the district court observed that NOM is "a Washington, D.C.-based political lobbying organization," and found that its approximately 100 members in Oregon do not constitute "a representative number of Oregonians" with regard to the strength of NOM's argument that its participation in the case would give voice to the views of the Oregon public. (Tr., May 14, 2014, at 51:15-22.) The district court further noted that it was declining to exercise discretion to allow NOM to intervene because NOM purports to speak for the people of Oregon without being in any way accountable to

the people of Oregon (as, for instance, the elected State Defendants are). *Id*. at 51:23-25. In rejecting the permissive intervention request, the district court also cited *Hollingsworth v. Perry*, in which this Court rejected a similar effort by "a private interest organization" to intervene and thus effectively "substitute [for] the elected branch of government … simply because the organization disagrees with the legal interpretation" of state officials named as defendants in a case. (Tr., May 14, 2014, at 52:3-5); *see also Hollingsworth*, 133 S. Ct. 2666-67; *Arizonans for Official English v. Arizona*, 520 U.S. 43, 44 (1997) (expressing "grave doubts" about advocacy groups' standing to defend state law provisions state attorney general was not defending). Finally, the district court declined to allow this case's "timeliness" and "posture … to be held in abeyance" by NOM's intervention. (Tr., May 14, 2014, at 52:7-9.)

The district court thus demonstrated careful analysis of "the nature and extent of the intervenors' interest," as well as whether the proposed intervenors would "significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented," *Perry*, 630 F.3d at 905, having determined that NOM's intervention would serve to prolong or unduly delay the litigation. (Tr., May 14, 2014, at 52:7-9.) The district court acted well within its discretion in denying NOM permissive intervention, and NOM cannot show any likelihood of success on its appeal of this denial.

NOM now contends that the district court should have permitted its

intervention because interposing a party who sought to defend the constitutionality of Oregon's marriage bans was necessary to "solidify the lower court's jurisdiction." (Application at 31.) This distorts both the facts of the present case and the applicable law. The Defendants in this case continued enforcing Oregon's marriage bans by refusing to issue or sanction the issuance of marriage licenses to same-sex couples, even as they declined to defend the bans' constitutionality. In that sense, this case resembles *Windsor* and the cases cited in *Windsor*. 133 S. Ct. at 2684-87. The controversy was genuine and justiciable at the time of the district court's decision, and purported concerns about justiciability do not warrant departure from the well-settled rules as to when intervention is appropriate.

D. This Court Is Not Likely to Overturn the District Court's Merits Ruling Because NOM Lacks Standing to Appeal.

Additionally, even if NOM were permitted to intervene, that victory would be quixotic at best given the present posture of the case. If it became a defendant-intervenor, NOM would lack standing to appeal the district court's decision striking down Oregon's marriage laws as unconstitutional. There is accordingly no realistic chance that this Court would ever review, much less overturn, the district court's rulings on the merits.

Article III standing is not always necessary to intervene but is necessary to appeal. *Diamond*, 476 U.S. at 68-69. NOM lacks standing to appeal an adverse judgment for reasons this Court explained in *Hollingsworth*, 133 S. Ct. at 2260-68. There, as here, a State declined to defend its marriage exclusion law. Unlike here, the ballot initiative's proponents intervened in a timely fashion to mount a defense.

Id. A federal district court struck down the law, the State declined to appeal, and the intervenors attempted to bring an appeal. *Id.* This Court held that they had no standing to do so, reasoning as follows:

> To have standing [to appeal], a litigant must seek relief for an injury that affects him in a "personal and individual way." He must possess a "direct stake in the outcome" of the case. Here, however, petitioners had no "direct stake" in the outcome of their appeal. Their only interest in having the District Court order reversed was to vindicate the constitutional validity of a generally applicable California law.
>
> We have repeatedly held that such a "generalized grievance," no matter how sincere, is insufficient to confer standing. A litigant "raising only a generally available grievance about government — claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large — does not state an Article III case or controversy."

Id. at 2662-63 (internal citations omitted). The Court concluded: "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." *Id.* at 2668.

The instant case is materially indistinguishable from *Hollingsworth*. NOM argues that its claim to represent the interests of a member who is an Oregon county clerk is a distinguishing fact. It is not. As discussed above, NOM may represent the interests of a private citizen who goes to work every day as a county clerk; it does not, however, represent a county clerk in his or her official capacity. (Tr., May 14, 2014, at 50:3-5.)

NOM also attempts to distinguish this case from *Hollingsworth* by arguing that the decision by the Oregon Attorney General not to defend the same-sex

marriage ban even in the district court (although continuing to enforce it), somehow supplies NOM with standing that it would otherwise lack under Article III. This Court recently rejected a similar claim in unequivocal terms. "The assumption that if [an organization has] no standing to sue, no one would have standing, is not a reason to find standing." *Clapper v. Amnesty International, USA*, 133 S. Ct. 1138, 1154 (2013) (citations omitted).

Accordingly, even if allowed to intervene, NOM could not appeal the result in this case. It would make no sense to grant a stay pending appeal of NOM's intervention motion when even if successful on that motion, NOM could not obtain Ninth Circuit review of the merits or certiorari from this Court. At most, NOM could only intervene in the district court proceeding — which has already been resolved.

E. NOM Cannot Show a Reasonable Likelihood of Success on the Merits If This Court Were to Review the Judgment.

NOM devotes much of its stay application to attacks on the substance of the district court's opinion and order. These arguments are largely irrelevant to NOM's Application. This Court is very unlikely to ever hear a merits appeal in this case because the district court's denial of NOM's motion to intervene will almost certainly be affirmed, and, in any event, NOM lacks standing to bring a merits appeal.

But even if NOM could overcome the numerous procedural hurdles described above and secure this Court's review of the underlying constitutional questions, NOM cannot demonstrate a reasonable likelihood that this Court would overturn

the district court's decision deeming Oregon's exclusion of same-sex couples from marriage to violate the Equal Protection Clause.

Plaintiffs argued in their motions for summary judgment that the "ideal" or "optimal" environment for healthy childrearing was irrelevant to the issues at stake in this case because it is undisputed that many same-sex couples, in Oregon as elsewhere, are already raising children together. Excluding same-sex couples from marriage serves only to disadvantage their children; it has no impact on how many other children might be raised by their married, biological parents. In response to those summary judgment motions, the State Defendants further noted that Oregon public policy supports families of all configurations, and that the state of Oregon had chosen to acknowledge and facilitate childrearing by same-sex couples by establishing its registered domestic partnership system in 2008. NOM provides no support whatsoever for its contention that allowing same-sex couples to marry in Oregon will reduce incentives for opposite-sex couples to marry. Accordingly, while Plaintiffs strongly disagree with NOM's characterization of the social science research on parenting by same-sex couples, the "research" NOM cites in its application, much of which has been thoroughly discredited,[9] is immaterial to the issues in this case.

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[9] NOM and allied advocacy groups have made assertions similar to these in a number of prior cases, and the "research" they cite has been rejected every time it has been subjected to the scrutiny of a trial. *See, e.g.*, *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 765-68, 770-72 (E.D. Mich. 2014) (discrediting testimony of sociologist Dr. Mark Regnerus and related arguments regarding justifications for excluding same-sex couples from marriage); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 945, 947 (N.D. Cal. 2010) *aff'd sub nom. Perry v. Brown,* 671 F.3d 1052 (9th Cir. 2012 *vacated and remanded sub nom. Hollingsworth v. Perry,* 133 S. Ct. 2652 (U.S. 2013) (rejecting testimony of David Blankenhorn, president of the Institute for American Values, regarding marriage, fatherhood, and family structure as unreliable); *In re Adoption of Doe*, 2008 WL 5006172 at *17 (Fla. Cir. Ct. Nov. 25,

NOM's argument that *Windsor* mandates total deference to states' prerogative to exclude same-sex couples from marriage also fails. *Windsor* did not hold that federalism would trump all other constitutional concerns in subsequent controversies. States' prerogative to set their own public policy and establish family law structures by no means authorizes infringement of constitutionally protected liberties. As this Court has just observed: "The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects." *Hall v. Florida*, No. 12-10882, 2014 WL 2178332 at *16 (May 27, 2014).

NOM has no basis for contending that it would be likely to succeed in overturning the merits decision below, even if it were granted intervention and somehow were able to establish standing to appeal.

F. This Case Does Not Appropriately Present The Issues That NOM Seeks To Litigate.

As noted above, Oregon's Attorney General has chosen not to appeal the district court judgment invalidating Oregon's ban on same-sex marriage. NOM may disagree with that decision but it has no legal right to supplant it.

While this Court may well soon elect to take up constitutional questions surrounding marriage equality, granting certiorari in the present case would primarily mean revisiting the standing and justiciability questions on which this

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2008) (rejecting previous research presented in *Lofton* supporting a categorical ban of homosexual couples from adoption); *Howard v. Child Welfare Agency Review Bd.*, No. 1999-9881, 2004 WL 3154530 (Ark. Cir. Ct. Dec. 29, 2004) *aff'd sub nom. Dep't of Human Servs. & Child Welfare Agency Review Bd. v. Howard*, 367 Ark. 55, 238 S.W.3d 1 (2006) (discrediting clinical psychologist Dr. George Rekers and related arguments that a homosexual household provides inferior family structure that is not in the best interest of children).

Court set clear standards just last year in *Hollingsworth*. Meanwhile, dozens of cases challenging the constitutionality of state laws that prohibit marriage for same-sex couples, and/or recognition of same-sex couples' marriages, are currently pending in courts around the nation. Of these, at least eleven cases have resulted in federal district court decisions finding such laws unconstitutional, which state and/or local officials subsequently appealed.[10] Clearly a case in that posture would present a better vehicle than this one for ultimate resolution of the important issues at stake.[11] Nor, in the absence of any party to this case who seeks to overturn the judgment, is there a basis for staying this case pending resolution of other marriage equality cases that may or may not come before this Court in future months or years. *Accord Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936) (stating that ordinarily a litigant should not "be compelled to stand aside while a litigant in

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[10] *See* Notice of Appeal, *DeBoer v. Snyder*, No. 12-10285 (E.D. Mich. Mar. 21, 2014) (Dkt. No. 153); Notice of Appeal, *Bostic v. Rainey*, No. 13-395 (E.D. Va. Feb. 25, 2014) (Dkt. No. 144); Defs.' Notice of Appeal, *Tanco v. Haslam*, No. 13-1159 (M.D. Tenn. Mar 18, 2014) (Dkt. No. 74); Def. Sally Howe Smith's Notice of Appeal, *Bishop v. United States ex rel. Holder,* No. 04-848 (N.D. Okla. Jan. 16, 2014) (Dkt. No. 274); Notice of Appeal to the Seventh Cir., *Baskin v. Bogan*, No. 14-00355, 2014 WL 1568884 (S.D. Ind. May 8, 2014) (Dkt. No. 66); Notice of Appeal, *Obergefell v. Wymyslo,* No. 13-501 (S.D. Ohio Jan. 16, 2013) (Dkt. No. 68); Notice of Appeal, *Kitchen v. Herbert*, No. 13-217 (D. Utah Dec. 20, 2013) (Dkt. No. 91); Notice of Appeal by Def./Intervening Def. Steven L. Beshear, In His Official Capacity as Gov. of Ky., *Bourke v. Beshear*, No. 13-750 (W.D. Ky. Mar. 18, 2014) (Dkt. No. 68); Notice of Appeal, *Henry v. Himes*, No. 14-129 (S.D. Ohio May 9, 2014) (Dkt. No. 33); State Defs.' Notice of Appeal, *De Leon v. Perry*, No. 13-982 (W.D. Tex. Feb. 27, 2014) (Dkt. No. 74); Gov. Otter's Notice of Appeal, *Latta v. Otter*, No. 13-482 (D. Idaho May 14, 2014) (Dkt. No. 103); Notice of Appeal, *Latta v. Otter*, No. 13-482 (D. Idaho May 14, 2014) (Dkt. No. 104).

[11] NOM's other grounds for claiming this Court will or should grant certiorari also fail. Their assertion of a conflict with the Eighth Circuit's decision in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), is at best an argument for granting certiorari in some subsequent case in which a party with standing raises the constitutional issues addressed in *Bruning*.

NOM also argues that the present case warrants certiorari because it conflicts with *Baker v. Nelson*, 409 U.S. 810 (1972). Application at 15. As the Second Circuit has noted, the precedential value of *Baker* has been substantially diminished by "myriad doctrinal developments" in equal protection law, *Windsor v. U.S.*, 699 F.3d 169, 178-79 (2d Cir. 2012), including this Court's decision in *Windsor* itself. *See Hicks v. Miranda*, 422 U.S. 332, 344 (1972) (describing impact of "doctrinal developments" on precedential value of a summary affirmance).

another settles the rule of law that will define the rights of both").

For all these reasons, NOM cannot show that this Court is reasonably likely to grant certiorari in the present case.

II. The Equities Weigh Heavily Against Issuance of a Stay.

A stay should not issue because NOM is unlikely to succeed on the merits of its appeal, and because this Court is unlikely to grant review of this case. NOM's requested stay should also be denied because it can show none of the traditional "stay equities" weigh in its favor — whether there is a likelihood of irreparable harm, whether the harm a stay would cause other parties is greater, and the nature of the public interest in the situation. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

The harms NOM claims it has suffered, is suffering, and/or will suffer as a result of the denial of intervention and entry of judgment for the Plaintiffs in this case do not outweigh the clear harm to Plaintiffs of resuming enforcement of Oregon's former marriage bans. Even if they are generously viewed as likely to come true, the harms NOM predicts to itself and its members do not weigh as heavily as the harms previously suffered by the Plaintiffs as a result of Oregon's exclusionary marriage laws, and the additional harms associated with suspending the injunctive relief already granted in this case, several weeks after it took effect.

A. NOM Will Not Suffer Irreparable Injury Absent a Stay.

To demonstrate that the equities weigh in its favor, a stay applicant must demonstrate that it will be irreparably harmed in the absence of a stay. *See Nken v. Holder*, 556 U.S. 418, 434 (2009). NOM cannot meet this standard.

NOM's derivative interests in this case, based on its Oregon members, do not give rise to cognizable irreparable harm. At base, NOM contends that three of its members are unhappy that this case proceeded to a judgment in the Plaintiffs' favor. This is by definition a generalized interest, not a specific, individualized, irreparable harm. *See supra* pp. 11-15.

For the same reasons the district court correctly determined that NOM failed to demonstrate a significant protectable interest in this case so as to warrant its intervention, NOM is unable to show specific irreparable harms it is likely to suffer if Judge McShane's May 19 decision remains in effect.

B. The Harm a Stay Would Cause Plaintiffs Far Outweighs Any Purported Harm to NOM.

After the Ninth Circuit rejected NOM's emergency stay motion on the morning of Monday, May 19, the district court issued its opinion granting summary judgment for Plaintiffs and holding that Oregon's exclusionary marriage laws violated Plaintiffs' right to equal protection. The district court then entered an order enjoining enforcement of the marriage bans. Thus, on the afternoon of Monday, May 19, Oregon began allowing marriage for same-sex couples. Many couples immediately applied for marriage licenses and celebrated their marriages.

In evaluating a motion for stay pending appeal, courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987); *see also Winter*, 555 U.S. at 20. Here, while NOM cannot show that it will suffer irreparable harm without a stay, Plaintiffs

have shown that Oregon's marriage exclusions caused them, as well as other same-sex couples and their families, serious and irreparable harm.

In support of their motions for summary judgment, Plaintiffs built a factual record detailing numerous ways that same-sex couples' exclusion from the freedom to marry in Oregon caused them not only dignitary harm but also practical and tangible harms. In particular, Oregon same-sex couples, until the district court's decision, could only access state-administered benefits associated with marriage if they were willing and able to travel out of Oregon to marry; were unable to access many of the federal benefits associated with marriage, such as Social Security survivor benefits, even if they did marry in another jurisdiction; and were sometimes denied private sector benefits such as health insurance for the spouses of employees. (*See* D. Ct. Dkt. No. 33 (Rummell Plaintiffs' Memorandum in Support of Motion for Summary Judgment), 13-16.) Plaintiffs contended that Oregon's marriage bans thus operated to deprive them of constitutionally protected due process and equal protection rights. (*Id.* at 16-43.) The district court credited these arguments in its opinion granting summary judgment for Plaintiffs. *Geiger v. Kitzhaber*, slip. op. at 2-3 ("Because Oregon's marriage laws discriminate on the basis of sexual orientation without a rational relationship to any legitimate government interest, the laws violate the Equal Protection Clause."); *see also Windsor*, 133 S. Ct. at 2694 (observing that lack of full legal recognition of their parents' marriages "demeans" the children of same-sex couples). Reinstating the marriage ban pending NOM's appeal of the denial of its motion to intervene would

again subject same-sex couples in Oregon, including some of the Plaintiffs who have not yet married, to these harms.[12]

C. This Case Differs Significantly from Other Recent Cases in Which Stays Have Been Issued.

NOM puts great weight on this Court's decision ordering a stay in *Herbert v. Kitchen*, 134 S. Ct. 893 (Jan. 6, 2014), but to no avail. Unlike here, the defendant state officials in *Kitchen* were engaged in a vigorous defense of the constitutionality of Utah's ban on marriage for same-sex couples and had appealed the district court's injunction. The same is true in other cases NOM cites in which district courts or circuit courts granted stays pending appeal. In each of those cases, one or more defendants has appealed the district court's decision on the merits.[13] Here, in contrast, no party with standing to do so has appealed the ruling, so no stay serving to interrupt implementation of the ruling during the resolution of appellate proceedings was or is warranted.

One day after it denied NOM's motion in this case, the same three-judge panel granted a motion to stay in *Latta v. Otter*, No. 14-35420 (9th Cir.), an appeal

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[12] The marriage licenses and certificates issued to same-sex couples in the days since the district court's merits decision are valid, regardless of ensuing legal developments. *See Evans v. Utah*, No. 2:14-CV-55-DAK, 2014 WL 2048343, *6-16, 20 (D. Utah May 19, 2014) (granting preliminary injunction to require Utah to recognize otherwise valid marriages of same-sex couples performed after the district court's merits decision in *Kitchen v Herbert* and before that decision was stayed). NOM's contention that the state of Oregon is likely to incur "administrative and financial costs" associated with the marriages entered into by same-sex couples since May 19, Application at 37, in a hypothetical scenario where the district court's merits decision is later overturned, ignores both its inability to show any realistic possibility that the merits decision will be overturned and the continued validity of past marriages even if the judgment were subsequently reopened. Nonetheless, the fact that marriage has now been available to same-sex couples in Oregon since May 19, and the widespread confusion and frustration that a second reversal of Oregon law would cause, contribute to the public interest in marriage equality's continuation in Oregon.

[13] *See* note 10 *supra*.

from a district court's order striking down Idaho's marriage ban. In *Latta*, as in *Kitchen*, the State is prosecuting an appeal. As the Ninth Circuit seemed to recognize, the instant case is different. Here, the subject of the appeal is denial of a motion to intervene, not a merits decision, and no appeal with a potential to alter the judgment is forthcoming.

III. NOM's Application Is Procedurally Deficient, As It Never Properly Moved Below for the Relief It Now Requests of This Court.

Supreme Court Rule 23(3) provides that "[e]xcept in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof." NOM's application should additionally be denied because of its failure to comply with this rule.

NOM never sought from the district court a stay of its May 19 opinion, order, and judgment granting Plaintiffs the relief they requested. NOM verbally sought a stay of proceedings at the May 14 district court hearing, moments after the denial of its motion to intervene. NOM then filed a notice of appeal regarding the denial of intervention, and on the morning of May 19 — before the district court decided the summary judgment motions — NOM unsuccessfully sought an emergency stay of proceedings in this case pending resolution of its interlocutory appeal on the question of intervention. In its emergency motion for a stay of proceedings, NOM requested in the alternative a stay of the district court's judgment, but this request was not ripe because no district court judgment yet existed.

After the district court issued its opinion, order, and judgment on the

afternoon of May 19, NOM on May 22 filed a "protective" notice of appeal, indicating its intent to appeal the merits decision to the Ninth Circuit. However, NOM's notice of appeal did not request a stay of the decision's effect.

Accordingly, although NOM just before issuance of the district court's merits decision in this case tried unsuccessfully to obtain a stay of proceedings from either the district court or the Ninth Circuit, NOM never properly asked either court to stay the effect of the district court's May 19 order and judgment after they were released. Nor has NOM identified extraordinary circumstances that would have precluded its asking the courts below for the particular relief it now seeks. Thus, this stay application should not be entertained pursuant to Rule 23(3).

CONCLUSION

For the foregoing reasons, this Court should deny NOM's application for a stay of the judgment pending its intervention appeal.

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Dated: June 2, 2014

APPENDIX A

Transcript of Hearing on Motion to Intervene
May 14, 2014

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
THE HON. MICHAEL J. McSHANE, JUDGE PRESIDING

DEANNA L. GEIGER and JANINE M. NELSON; ROBERT DUEHMIG and WILLIAM GRIESAR,

Plaintiffs,

v.) No. 6:13-cv-01834-MC

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; and RANDY WALDRUFF, in his official capacity as Multnomah County Assessor,

Defendants.

PAUL RUMMELL and BENJAMIN WEST; LISA CHICKADONZ and CHRISTINE TANNER; BASIC RIGHTS EDUCATION FUND,

Plaintiffs,

v.) No. 6:13-cv-02256-TC

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; and RANDY WALDRUFF, in his official capacity as Multnomah County Assessor,

Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EUGENE, OREGON

WEDNESDAY, MAY 14, 2014

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PROCEEDINGS

WEDNESDAY, MAY 14, 2014

THE COURT: Please remain seated.

Thank you everyone. Good morning.

Ms. Pew, if you'd like to call our case.

THE CLERK: United States District Court for the District of Oregon is now in session, the Honorable Michael J. McShane presiding.

Now is the time set for Case 13-01834, *Geiger, et al. versus Kitzhaber, et al.*, oral argument.

THE COURT: All right. Thank you.

So I thought we could begin by having maybe each of the attorneys for each group who is going to represent their interests today introduce themselves.

I guess we can introduce everyone. It takes more time sometimes than the hearing itself.

So let's go ahead with the plaintiffs, if you'd like to make your introductions.

MR. JOHNSON: Your Honor, Tom Johnson for the *Rummell* plaintiffs, and I will also be speaking today on behalf of the *Geiger* plaintiffs.

THE COURT: All right. Thank you.

MR. JOHNSON: We have -- I won't introduce all of my -- our clients again. We did that last time.

The only person who is not here today is

Mr. Rummell, who is on a business trip.

THE COURT: Okay. Thank you, Mr. Johnson.

All right. For the defense.

MS. POTTER: Sheila Potter for the Department of Oregon -- Justice -- excuse me; I am sorry -- the Oregon Department of Justice.

I will be arguing on behalf of the state and the county defendants.

THE COURT: All right. Thank you.

All right. For the proposed intervenors.

MR. JOHNSON: Judge McShane, John Eastman, and with me Roger Harris on behalf of the intervenors National Organization for Marriage.

THE COURT: All right. Thank you, Mr. Eastman.

So I have read the briefs, and what I don't want to do is recite the briefs into the record.

I would like to keep the discussion focused on the law and try to keep some of the hyperbolic statements in the briefs to a minimum. I know each side has very different, strong views of the motion to intervene, but there are some legal issues we need to resolve.

So I am going to pose some questions. I am probably going to pose more questions to Mr. Eastman because the burden is on the National Organization for Marriage to intervene. But I will ask, then, the other parties if they

have particular comments on anything that Mr. Eastman says.

So Mr. Eastman, I will start with Chief Justice Roberts' fairly blunt holding in *Hollingsworth*.

He states, "We have never before upheld the standing of a private party to defend the constitutionality of a state statute where state officials have chosen not to. We decline to do so for the first time here."

So after that statement in *Hollingsworth*, is there any law or cases that you can cite to where the federal court has in fact allowed a private party to stand in for the Executive Branch that is still good law?

MR. EASTMAN: Well, Your Honor, I think that mischaracterizes what *Hollingsworth* is about. They were specifically seeking to intervene on behalf of the state, not representing their separate, particularized injuries.

And --

THE COURT: But you continue to say in your briefing that -- or maybe I am mixing it up with your statements in the newspaper, and they are somewhat overlapping, is that if they won't defend it, somebody has to and it should be us.

MR. EASTMAN: Well, that's right. But seeking to defend the statute because the party has particularized injury is different than standing in the shoes of the

attorney general to defend it. We are not claiming to represent the state. But the county clerk, and I think the *Hollingsworth* case itself at a prior stage when the Imperial County was denied intervention in that case, that was because the county itself and the deputy county clerk didn't have any independent obligation to enforce the law there.

"The county clerk," the court said, "may well have, but that was not before us because the county clerk did not seek to intervene."

We have a county clerk seeking to intervene.

THE COURT: But not in any official capacity you don't.

MR. EASTMAN: Well, Your Honor --

THE COURT: How do you distinguish *Karcher v. May* on that issue?

MR. EASTMAN: Well *Karcher v. May* involved -- I actually think it's much closer to our case and it goes our way. *Karcher v. May* had two legislators who had no authority under the state to intervene other than the state Supreme Court had allowed them to intervene when the attorney general wouldn't defend.

The Supreme Court of the United States rejected their continuing intervention after they lost their offices, but it was because they had no longer any particularized injury. They had particularized injury as long as they were

in those legislative positions.

Here, our county clerk continues to be in that position, and he or she would -- you know, would be bound by a ruling by this court, which the plaintiffs seek to have a statewide injunction issued.

THE COURT: Well, "Karcher and Orechio were permitted" -- this is Justice Roberts -- "were permitted to proceed only because they were state officers acting in an official capacity. As soon as they lost that capacity, they lost standing."

MR. EASTMAN: Well --

THE COURT: So what I know about your clerk is it is an individual in some county in Oregon who works as a clerk. They are not making an appearance in this case. You have avoided any attempt at having a dialogue with this court about protective orders, about declarations under seal.

You simply have made this statement: We have somebody who works as a clerk. They have been injured because they may have to, at some point, issue a license in some county to a same-sex couple and they have a religious objection to it. A religious, personal objection. I mean, that was your most current declaration.

And by the way, I am not striking the recent declaration that was filed. I know there was a motion to

strike. I forget who filed it. But I am going to allow it. I don't think it adds a whole lot other than a little bit more information, which leads me to believe your clerk is a moving target. Every time somebody questions, well, who is this clerk, we get another declaration giving us a little bit more information.

But I am not hearing official capacity, any agency relationship. I mean, Roberts goes on and on about agency relationship in *Hollingsworth*. An agency relationship between your clerk and their local government.

MR. EASTMAN: Well, wait a minute. The problem we are -- the reason we are being vague, I think, is, I think, well established in *NAACP v. Alabama* and a large number of those cases. There have been a number of cases where -- so I want to unpack this to kind of get the discrete issues.

The first is NOM's third-party standing to represent the interests of the clerk or the wedding provider or the voters and then those particular interests.

So the reason we are not disclosing who the clerk is is the same reason the doctors in *Griswold/Connecticut* didn't disclose who their confidential married customers were that wanted to seek contraceptive services or that *NAACP v. Alabama* wouldn't disclose their members.

There are a whole host of cases from the Supreme Court in that line of cases that specifically say when you

have got problems about exposing yourself, the confidentiality that would be lost, the harassment that might follow as a result of that, that's exactly the situation that sets up the opportunity for the third-party standing. So that's why we have done that.

Now, the second piece of that, though, is does the clerk, him or herself, have standing. And if the clerk was intervening on the clerk's own behalf, I think there would clearly be standing.

And that's the prior round in *Perry* -- in the *Perry* case doesn't address that because a clerk had not moved to intervene in that case. But the language of that that we cite in our brief says that, you know, it may well be different. The clerk may well have standing because the order is going to be applied to that clerk when it finally comes down, when a statewide injunction issues.

So as an official of the state who is going to be bound by that injunction, I think -- I think there would clearly be standing.

So now the question is can that clerk, by being a member of us with these concerns about harassment, in her private capacity being a member, allow us to raise, on the clerk's behalf, those claims.

And I think what we set out in our brief on this, I think, is very important. For example, if a clerk was

going to be forced to resign because could not do the job after a decision from here made that job different than what it had been when the clerk had first run for office, that would be a personal harm as a result of the official duties.

THE COURT: How would I ever know that? How would I ever know that that's a personal harm? I mean, you haven't even 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, for example, and that's -- not being from Oregon, Lake County is a fairly non-populace county, a large one but not much population -- 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, it is a real harm, or are Lake County officials willing to make an accommodation for this particular individual.

But the way you have formulated it to the court is we have got a phantom back here, take my word for everything that's going to happen to him.

MR. EASTMAN: Well, two things. First of all, I think the *Southwest Center* says you have to take the well pleaded facts as true in a motion to intervene.

THE COURT: Not conclusory facts, though.

MR. EASTMAN: Not conclusory facts, but --

THE COURT: That's what I am faced with.

MR. EASTMAN: Well --

THE COURT: They are beyond inquiry.

MR. EASTMAN: Well, let me propose this, then:

We could -- we could submit something under seal. We could submit a declaration with the names and the county redacted because I can't exactly identify the county without identifying the county clerk, which, you know, is part of the problem. But I could submit a declaration from the clerk. I'd have to --

THE COURT: I'd like a declaration from the county official who is actually authorizing the clerk to intervene in an official capacity.

MR. EASTMAN: Well, as we represented in our reply brief, the county clerk is independently elected, which means that there doesn't have to be a specific authorization. There does have to be authorization if they are going to expend county funds. They are not, so -- which is, you know, the other -- the purpose of the third-party intervenor here.

THE COURT: Okay. Let me hear from the other parties on -- we have kind of jumped off of my *Hollingsworth* question into the issue of the substantial harm to the clerk.

I will hear from the parties on that.

Mr. Johnson, do you want to go first?

MR. JOHNSON: Yes, Your Honor. What question specifically?

THE COURT: Let's talk about the substantial interests of the clerk that's a member of the National Organization for Marriage.

MR. JOHNSON: Yes, Your Honor.

From a review of their reply brief, NOM's reply brief, it seemed that they had all but conceded that this person was not here in their official capacity.

It would have to be the office of the county that was before the court.

What NOM is attempting to do here is really borrow two levels of standing. They are attempting to say we are going to stand in the shoes of our member, and then we are going to also, then, adopt their official capacity, the office of that county.

And the kind of personal issue or personal interest that they are trying to then assert through that is a -- it's a personal issue. It's really kind of a free exercise issue.

And the office of the county, whatever county that is, doesn't have a religion. The office itself is secular. And so they can't represent the county. They can't adopt that office.

The -- in terms of the -- if you look at that personal interest, then, which is what you were talking about -- actually, Your Honor, in front of the court in the summary judgment briefing there is exactly the evidence that you are talking about. We submitted, I think it's -- it's in the Misha Isaak declaration, Exhibit 8 or 9, all of the -- all of the -- for the last seven years, six years, all of the domestic partnerships that have been applied for in all of the counties.

And there were, by my reading last night, seven or eight counties that have never had a domestic partnership applied for. So it's completely speculative that this person, a county official or not, would ever face this.

It's also completely speculative on just the personal issue that this is actually a free exercise issue under the *Smith* case, which is the peyote case, which Ms. Easton spoke about at the last hearing. There, the law is that a generally applicable, religiously neutral law, you can't have a free exercise claim there.

And we were looking at the research last night. There are a number of states where gay marriage is now legal, and in none of -- we could not find a single case in any of those states where this free exercise right has been recognized by any court.

THE COURT: What do you mean by "free exercise

right"? Sorry if I am not --

MR. JOHNSON: So in that case, in the *Smith* case, you -- there was -- a person working for the state had a drug test, and they came up positive on peyote. And they said, well, it's my religious right to -- I have to smoke peyote. And the court said, Justice Scalia, and that was what -- remember the feedback at the last hearing, Ms. Easton -- Justice Scalia wrote that opinion, finding that there was no free exercise right here.

Here, the generally -- the neutral law would be that anyone who walks in the door of this county has to get -- you know, any two people would have to get married. So it's neutral -- it's a neutral law, no religious specific there.

And then there's also a question in terms of the speculative nature of the claim that there's -- we don't have any evidence that -- with this particular county that accommodations could not be made for this clerk. That -- that somebody else could do the stapling or the filing of the forms. The *Lee v. State* case is quite clear, Your Honor, that in this state, marriage is really a state function. And what happened in that state -- and we can talk about the *Perry v. Schwarzenegger* case, but we are talking about Oregon law here.

What happened in *Lee v. State* was the lawsuit was

filed. Then Measure 36 came. And then the Supreme Court said, okay. Well, that's -- Measure 36 is not a violation of the state constitution, the privileges and immunities clause.

And Multnomah County said, not so fast. We have issued 3,000 marriages. And so all of those marriages came before Measure 36 came. So they are all valid.

And what the Supreme Court of Oregon said was no. That's -- the state is the -- is the arbiter of marriage in Oregon.

THE COURT: So why did you file against the Multnomah County equivalent of a -- of a clerk, especially when, in some of the cases I have read, one of the first arguments is why the clerk should be thrown out of the case. I forget which cases those are now, and I am sorry. You might have to remind me. But there are some cases that have been decided on marriage where one of the holdings is that in fact the county clerk has no standing and should not have been named as a party.

So why did you do this?

MR. JOHNSON: Your Honor, I imagined that you might ask that question.

So we filed our lawsuit against the State of Oregon and the office of Multnomah County and the county assessor, the office, the official capacity, in order to

have, in an abundance of caution, in light of *Lee v. State*, to have a county, in that office, in front of the court for purposes of the order that we would hope would be issued.

But we knew --

THE COURT: Well, then why not other counties and other clerks who are going to be subject to the same order?

MR. JOHNSON: Exactly. Exactly, Your Honor.

And we knew at the time, and I realize that the county is here, but please don't tell them, Your Honor, but we knew that we might be susceptible to a motion to dismiss under *Lee v. State*.

But importantly, Randy Waldruff is the person that holds that position who is the county assessor, and we named that office and named him because he holds that office. If it's tomorrow some other person, we would have put their name in the caption and not his name.

But we don't care, for purposes of the relief that we are requesting here, what his personal -- it's not germane to any of the issues that we have or the relief that we are requesting in the order what his personal views -- no disrespect to Mr. Waldruff, but we don't care, for purposes of this lawsuit, what his personal views are about same-sex marriage.

THE COURT: The argument is that somebody's personal views, when it comes to religion, can be a

significant harm, can't it?

MR. JOHNSON: It could be, but not in this context Your Honor. *Perry v. Hollingsworth* -- or *Hollingsworth v. Perry* is very clear. As you said, the final -- the sentence before the last paragraph said that we have never recognized having a private party come in to intervene to defend the state constitutionality or state statute, and that's what's happening here.

So in terms of those personal vows, although they may be very important to someone, they are not -- you can't come in as a -- as -- effectively as the attorney general and defend the constitutionality, and that's what's happening here. And they are just doing it based on those personal views.

I want to -- I know you referenced that -- the hyperbole at the outset, and I don't want to dwell on that. And I am completely confident that all of the lawyers in this case are acting in good faith, Your Honor, but I need -- I wanted to address just very quickly the -- in NOM's brief there was reference to "collusion" a number of times.

THE COURT: You know, I don't want to discuss that.

MR. JOHNSON: Okay.

THE COURT: I think it was a poorly -- very

poorly -- word choice. It suggests unprofessionalism, and I -- it does make me question about, in terms of discretionary intervention, whether I want to go down a road where people are accusing each other of unprofessional conduct when this court has seen none. So I don't want a conversation on it.

MR. JOHNSON: Okay.

THE COURT: So I want to hear from Ms. Potter on this issue if she wants to weigh in on the issue of the clerk.

MS. POTTER: Thank you, Your Honor. I won't repeat -- I think Mr. Johnson made some good points. I won't repeat those.

I think it's important here that the expressed substantial legal interest is not that the clerk would be unable to carry out his or her official duties. It is that if this court were to enter an order, then events might develop such that at some point down the line, the clerk would find himself in a position, or herself, in which he or she -- I am sorry -- in which he or she does not want to carry out part of his or her duties and does not want to delegate any of those duties to someone else.

And I don't find any support in any case law for the proposition that just having a personal preference not to want to do part of your job is a substantial legal

interest such that it would support an intervention here.

I think it also really raises some troubling interests with respect to transparency because if this -- this person can only come in as an official of this county, as an elected official of this county, as Mr. Eastman has represented, and is seeking to hide an act that he is attempting to take as an official of this county from the people who will be called upon to vote for him or her in the next election, if there is an official interest of this county official in appearing in this case to argue for his or her interests, it should be done in his or her official capacity and not through a nongovernmental interest group that he or she is a member of just personally.

THE COURT: Okay. Mr. Eastman, you have the burden, so I will give you the kind of final reply on these comments.

MR. EASTMAN: So I want to give a parallel hypothetical. Suppose we had a public hospital with a nurse who had a strong moral objection to performing abortions and there was a case challenging a state statute dealing with abortion that said they don't have to be performed in the public hospitals, and it was challenging that as a violation of -- unconstitutional.

And the relief sought was that every public employee in that hospital would be obligated to perform

these abortions. The nurse doesn't want to make an appearance on her own behalf, but she is part of an organization that opposes abortion.

The fact that there was a personal interest but that it is affected by her public duties that are going to be directly affected by that litigation I think is sufficient to give her standing and, hence, the third party standing for the organization of which she is a member.

And here's what the Oregon Supreme Court said in *Lee*:

"The ministerial aspects of issuing marriage licenses in Oregon have, by statute, long been a county function."

And then it goes on to list the litany of duties that the county clerk has in the issuance of marriage licenses.

The plaintiffs here have sought a statewide injunction through the named state defendants that will reach to every county clerk. So the county clerk, in the performance of those duties, is clearly going to be bound by this injunction if this court grants the relief they have requested. And it will implicate interests of hers or his that are involved because the job that that person took when they ran for that office will now be dramatically different as a result of this court's ruling and the injunction that

plaintiffs have sought than it would have been otherwise.

The standard for intervention is a very minimal one. That's a protectable interest, and it's a particularized injury. It's not the kind of generalized injury that the Chief Justice Roberts was talking about in *Hollingsworth*.

THE COURT: But it's a significant protectable interest relating to the property or the transaction that is the subject of this action.

In your hypothetical, the transaction is an abortion and the nurse would be part of that transaction if they were required to participate.

Here, the transaction is the conferral of rights of marriage. It's not handing out a certificate in an office. It's the marriage that -- I mean, marriage and going to a clerk's office to get paperwork are two different things. I don't -- I mean, they have to file something, I suppose, but you can file it in any county.

MR. EASTMAN: Then the relief that the plaintiffs have sought is not relevant to their case. They have sought an injunction that would require every county clerk to issue those licenses. It's this county clerk that will be obligated to perform that duty in response to such an injunction.

THE COURT: Okay. All right. In the -- again, I

turn to Roberts in the *Hollingsworth* case where he continues to talk about what I think really is a separation of powers issue, and what you are asking the court to do is say because there are members of your organization that disagree with the Executive Branch's interpretation of the law and failure to defend the law in this case, that a private organization without any agency relationship to the government will stand in.

And I mean, it would be me telling Ms. Rosenblum, who is right next to you, Ms. Rosenblum, I am going to replace the Executive Branch with an agency that doesn't answer to you.

And what Roberts said is: "Yet petitioners answer to no one; they decide for themselves, with no review, what arguments to make and how to make them. Unlike California's attorney general, they are not elected at regular intervals or elected at all. No provision provides for their removal. As one amicus explains, the proponents apparently have an unelected appointment for an unspecified period of time as defenders of the initiative, however and to whatever extent they choose to defend it."

And isn't he really saying that the Judicial Branch should not get involved in who and how the Executive

Branch is going to make these decisions?

MR. EASTMAN: No. The difference, Your Honor, with all due respect, is Chief Justice Roberts begins that discussion by focusing on the fact that the proponent in that initiative, after the initiative had passed, no longer had any particularized injury.

And so all they were doing was objecting in a generalized way to the lack of defense that was being provided by the attorney general.

They -- because they had no particularized injury, that whole discussion, I think, doesn't deal with the question where we now have alleged specific, particularized injuries.

And Your Honor asked earlier if I had any case where people have been allowed to intervene when the government itself was not adequately or fully defending; nothing since Chief Justice Roberts' opinion because that was relatively recently. But there are a whole slew of cases in the environmental context, for example --

THE COURT: That's legislatively created.

MR. EASTMAN: Well, it's legislatively created, but --

THE COURT: That's where the separation of powers issues come in. There are tons of cases where the legislature says citizen lawsuits, the consumer protection,

the environmental law, the law creates citizen lawsuits.

But when does the Judicial Branch create them? And I don't -- I mean, the question is I don't know if the Judicial Branch has the authority to create --

MR. EASTMAN: Given the duties that the law in Oregon bestows on county clerks, I think the law does create such an interest of particularized injury here.

And the statutes could not create standing if it did not meet constitutional grounds. The Supreme Court's been very clear on that.

So what the statutes have authorized has to be permitted under the Constitution. What we are saying here is that the particularized injury for the county clerk and for others who have particularized injuries that are going to flow from a change in the law in this state, you know, that that gives them enough standing to be able to intervene to at least be able to raise some objection.

And Your Honor, you mentioned earlier on the question of discretion. One of the -- the only issue where there's great discretion is on the timeliness question. But I do think, as part of the discretionary judgment, the fact that the parties are both -- all taking the same side of the case, seeking the same relief, makes this, by definition -- and it was not meant as a claim that there's any unprofessional conduct, but by definition, "collusion" is

when you take the same side of the case and you are admitting things that --

THE COURT: That's not the definition of "collusion." Don't -- let's have honor, Mr. Eastman. You chose "collusion" because it would suggest that the parties have gotten together; not that they just happened to agree on a legal topic. I mean, that's the import of that word.

MR. EASTMAN: There's a middle point, Your Honor, on it.

THE COURT: You should have chosen a different word.

MR. EASTMAN: The middle point --

THE COURT: You should have chosen a different word. I don't want to hear about a middle point. It was a bad choice of words. It suggested unprofessionalism.

MR. EASTMAN: When somebody makes a concession on factual claims or on legal claims that are not warranted in the law, you have a problem with both parties not being adversarial in the case.

THE COURT: Okay.

MR. EASTMAN: All right? And --

THE COURT: That was the argument that Thomas made in his dissent.

MR. EASTMAN: Well, but, again, the issue there was whether they had -- the California Supreme Court had

said they have standing because they represent the interests of the state. Right? They did not make the point on whether they had a particularized injury, which is what we are making. The particularized injury line of cases is entirely different on the agency cases.

And what Chief Justice Roberts is talking about in *Hollingsworth* is an agency case. They didn't make the -- they did make the claim in their brief, but that was not what Chief Justice Roberts was talking about. They claimed that they had a particularized injury that they didn't. Chief Justice Roberts said all you are claiming here is a generalized injury. I think we have got three different reasons why we have particularized injury. The county clerk was one, but I think the others are important as well.

THE COURT: How is the voter any different than the backers of the initiative in the *Hollingsworth* case?

MR. EASTMAN: They didn't make a vote dilution claim. And I think the argument here is -- again, maybe it's my law professor background, but let me make a hypothetical. Let's suppose in a -- a city in Alabama an African-American majority, temporary majority decides to change their electoral system from an at-wide -- a district-wide -- a citywide to a district election system.

The city attorney doesn't like that move. And so somebody sues, alleging that the effort to make that change

in the law was designed for the explicit purpose of benefiting a particular race. And the city attorney concedes that point in the answer to the complaint. That then sets up a summary judgment motion that completely negates the effect of that citywide election.

That would be a vote negation case, and every African-American who voted in favor of that thing could have a vote dilution claim, even though their interests are generalized to that extent.

There's nothing in the Supreme Court's decision in *Hollingsworth* that throws out that entire history of vote dilution cases. But every one of them is, in that sense, generalized. But because of the importance of the right to vote and not have it taken away, either by blocking you on the front end from casting it or negating its effect on the back end by conduct that effectively negates it, that you have those claims.

And that's why I think the voters here have a particularized injury as recognized from those cases all the way back to *Reynolds v. Sims* on those vote dilution cases. Every one of those involved a generalized injury, not a particularized one in the way we normally talk about particularized in standing, and yet the Supreme Court has routinely recognized standing in those cases.

THE COURT: Okay. Ms. Potter, do you want to

respond to that?

MS. POTTER: Yes, Your Honor. Thank you.

Just on -- in the immediate sense, of course, the votes weren't diluted. People who voted for Measure 36 had their votes counted. Measure 36 became law. It is law. It's being enforced right now today.

There's no basis to say that any of their votes were diluted, and the hypothetical is just not comparable to what happened here.

The other thing is that the injury that Mr. Eastman is discussing is not the injury that is -- that is relevant to the subject of this lawsuit. What he is articulating is an injury that he believes were done to the voters by the attorney general engaging in an independent analysis of the law and articulating the legal position that she determined was the correct one on the basis of federal and Oregon law.

That's not the subject of this lawsuit. The injury appears to be this -- the fact that the plaintiffs and the attorney general reached the same legal conclusion on the legal question that is the subject of this lawsuit. There isn't an injury to the voters on the subject of this lawsuit, which is a question of whether the plaintiffs' civil rights are being violated by Oregon law.

THE COURT: Hard one to explain to voters, but all

right.

Mr. Johnson, any comment on that? You don't need to if you don't have anything to add.

MR. JOHNSON: Your Honor, the only other point I would like to make is that in terms of trying to minimize the Supreme Court's holding in *Hollingsworth v. Perry* and say that the court was not considering people in their -- the individual views that voters might have or the individual views that a person might have in its holding, the court cited -- you mentioned the *Karcher* case, but the court also, in its reasoning and in its opinion, cited the *Diamond v. Charles* case.

And in that case, there was a particular person. There was a criminal statute outlawing abortion that a number of OB/GYN's came to challenge, and the state declined to defend that law. And a conscientious objector to abortion, somebody who had value interests consistent with that statute, similar to the views that people would say, consistent with Measure 36, attempted to intervene. And what the court said was -- and that person also indicated that they had a -- an economic interest consistent with the law because they said, well, I am a pediatrician and if there are fewer abortions, then there will be more patients. So they had both an economic interest that they were putting forth and this kind of value interest.

And the court dismissed that and said you can't come in and represent the side of the state when the state chooses not to enforce this law in the way that you would want it enforced.

And the court and Justice Roberts in *Hollingsworth v. Perry* talked about that case. That case is inherent in the court's ruling.

THE COURT: Okay. I'd ask you to respond to this statement:

> "A prime purpose of justiciability is to ensure vigorous advocacy, yet the court insists upon litigation conducted by state officials whose preference is to lose the case."

And granted, that is in Justice Thomas's dissent, but it does certainly reference what the intervenors are claiming, and that is advocacy is something that should be -- that improves the system and improves decision making as opposed to hinders it.

What are your thoughts on that?

MR. JOHNSON: I think I will answer that -- I am not going to be too roundabout, but I will give a little bit of a history lesson here in terms of this case.

So when we came into this case, the *Rummell* plaintiffs, we were a couple months behind the *Geiger* plaintiffs, and we brought our case knowing that -- that

there was an answer in the *Geiger* case already, and that answer attached the memo from then Deputy Attorney General Mary Williams to Michael Jordan; not that Michael Jordan.

And the -- so we were -- it was clear to us at that point when we came into this lawsuit that this case would be potentially a bit different from other cases where I have been on the other side of the DOJ. And so we knew that. That was obvious. That was in the court record.

And we had the hearing for the consolidation here in January. And then after that, we inserted -- the court asked for a scheduling order, and we inserted into that scheduling order for the court's consideration an amicus date because we did the research at that time. We looked at *Hollingsworth v. Perry*. We looked at these issues and said, okay, we are going to have a situation here where the court might be confronted with a situation where the state may not assert certain interests in the way that some people would want those interests to be asserted. So let's propose to the court that there be an amicus date. And that amicus date came and went.

But the thought was that yes, Your Honor, that this is, we recognize, a bit of a different experience in terms of the fact that the state is not defending the law in the same way that some organizations out there might want it to be defended, but that doesn't change the law in terms of

whether or not they have a right to intervene here.

THE COURT: Okay. Ms. Potter, anything on that issue?

MS. POTTER: Yes, Your Honor. Not only -- the state has advised if the court wants to hear the -- the state has certainly laid out arguments that have been made in other cases around the country. The court has available all those cases, the briefings by defendants that are defending their state bans vigorously. We have attempted to assist the court in its decision by laying out those arguments and responding to them. So the court has that opportunity.

We also, if the court wishes to receive briefing from NOM on the legal questions that are part of this, not as a party but as an amicus, simply to make those arguments with a level of vigor and conviction that the state is not presenting because we analyzed them and determined that those were not a basis to uphold the law, we don't have an objection to the court deciding that it would like to receive a late-filed amicus brief in which NOM can make all of the arguments that it wants the court to consider.

And I think it really gets -- this gets to the distinction between advocacy and being an adversary, and NOM has suggested that it wants to play an adversarial role. And the problem is it is not an adversary to the plaintiffs

here nor are its members because nothing that this court could order NOM to do would have any effect on the relief that the plaintiffs are actually seeking.

So legally NOM isn't an adversary. The parties who are in a position to be ordered to do something and to defend the state law are in the case already. That's the adversarial role. The advocacy can be handled by an amicus brief if the court wants to accept a late-filed brief. We don't have an objection to that.

THE COURT: Okay.

MR. EASTMAN: Your Honor, can I address that point?

THE COURT: Yes. And I think, Mr. Eastman, I am probably -- those are really the heart of my questions. So if you want to make a general statement, if you want to respond and anything else outside of your briefs you want me to consider, now would be the time to convince me.

MR. EASTMAN: You know, on this both parties have said repeatedly that the state defendants are enforcing the law, and that, under *Windsor*, was enough to create the necessary adversarialness for jurisdiction according to Justice Kennedy's opinion. But that's not accurate. They are only enforcing half of the law. With respect to at least two of the plaintiffs, those who were married out in Canada and are seeking to have the marriage recognized, the

day after the lawsuit was filed, the attorney general said, we are not going to enforce that, and they have actually now adopted regulations in this state not enforcing that part of the law.

So at least on that part of it, there is not only not a defense of the law but not an enforcement of the law either. And I do think that creates a real problem for adversarialness, even under Justice Kennedy's *Windsor* opinion.

There's an easy way out of that, according to *Wright* [sic] and *Miller*. The easy qualification is that a case where the parties desire the same result may be saved by intervention of a genuine adversary who represents the rights that otherwise might be adversely affected.

So if we have rights of a county clerk who are adversely affected or voters on a vote dilution claim or wedding providers who are going to have a different legal regime that they have to operate under as a result of a statewide injunction, if it issues as the plaintiffs have requested, those are rights that might be adversely affected. Any one of them could intervene on their own name. We believe that there's clear authority for us as an organization to intervene on their behalf given the hurdles to them intervening themselves.

THE COURT: Okay.

Anything else outside your briefs?

MR. EASTMAN: No, Your Honor.

THE COURT: Anything from the other parties you want me to consider outside your briefing?

MR. JOHNSON: Your Honor, could I talk about the timeliness issue for a moment?

THE COURT: You can if there's something new. I think I have -- and I have put together a list here in my notes of findings with regard to the timing.

MR. JOHNSON: The only thing I wanted to add is that one of the factors in timeliness is, obviously, in the complete discretion of the district court.

THE COURT: Yes.

MR. JOHNSON: On timeliness, one of the factors for timeliness -- there's three prongs: The stage of the proceedings, the reason for the delay, and the prejudice.

On the stage of the proceedings, we made the point, I am not going to make it again, about 38 hours before the motion for summary judgment was heard and all of that. And then the cases on both sides were, frankly, not applicable. You know, it's really the question of the stage of the proceedings in this case.

And I am sure that we all -- all the lawyers and Your Honor have been involved in cases that went on for much longer and involved many depositions and that kind of thing.

That's not this case.

But if the court were to look to see, okay, well, what kinds of cases could I compare this to to determine the stage of the proceedings, we would urge Your Honor to look at all of the cases that have been filed post-*Windsor*. And if you look at those cases, and now I think 13 have been decided, all in the direction that we are seeking here, Your Honor, but if you look at those cases, there are a number of them that have been decided in less time or around the same time as right now here in this case.

So in terms of the stage of the proceedings, we believe that they are late; that the *Bostic v. Rainey* case in Virginia was brought in July and decided in February. The *Love* [sic] *v. Beshear* case was brought in July and decided in February. The *Lee v. Orr* case in Illinois was brought in December and decided in February. That's three months. The *De Leon* --

THE COURT: Which case was that? I am sorry.

MR. JOHNSON: The *Lee v. Orr* case in Illinois was brought in December and decided February, three months. The *De Leon v. Perry* case in Texas was brought in October and decided in February, four months. And just yesterday, the Idaho District Court struck down that state's gay marriage ban. That case was brought in November and decided yesterday. The motion for summary judgment in that case was

filed on February 18th, the same day we filed our motion.

THE COURT: Okay. Timing, Mr. Eastman, if you want to?

MR. EASTMAN: The one thing not in our brief on this point is the statement by the ACLU's executive director, counsel for the plaintiffs here, back on January 25th. "I think it's a little early to characterize the state's defense of Measure 36." This is in one of the exhibits attached to one of the declarations.

"I think we will not have a clear picture until the state responds to our own motions for summary judgment."

I think that's true.

And what happened since then, we learned that what those legal arguments were or, rather, what was being abandoned, we learned that there was not going to be an appeal taken.

And quite frankly, NOM did not have standing on its own to intervene until it became clear that it had members who had this *NAACP v. Alabama* hurdle to intervening, themselves. That did not happen overnight, but we were diligent in trying to pull that together.

THE COURT: Okay. All right. I am going to take a brief recess, maybe five minutes, and go over my notes. I think I am prepared to issue a ruling on intervention. So I am going to take a -- let's take a five-minute recess.

(Recess.)

THE COURT: I did want to address a filing, the notice of request for information regarding recusal that was filed by the proposed intervenor.

I had a little hard time understanding what was being asked. I think there's a misunderstanding in the notice of both the facts and the law in the case, and I may have contributed some to misunderstanding of the facts back on January 22nd.

So I want to clarify that I have never made a finding under Section -- it would be 455(a) for recusal that would warrant a waiver by the parties to the case. A finding hasn't been made.

You know, there's quite a -- I don't think there's a legal basis for a nonparty, or maybe even a party, to discovery of a judge on an issue of recusal, but I did open my mouth up on January 22nd, so I don't have any problem explaining some of this to you because it was raised.

So let me kind of clarify some of the issues that were raised in the notice. And I want to begin by -- I think I said this on January 22nd. On the issue of gay marriage, I have never attended a rally. I have never made a public statement. I cannot recall having donated money to an advocacy group that supports gay marriage.

Despite being gay and involved in the law, the

subject of gay marriage has held little legal or personal interest to me. Until I was assigned to this case, I had not read the entirety of the *Windsor* decision. I had read the dissent, and I had read none of the *Hollingsworth* opinion. And I know of no personal or financial benefit I would receive that is dependent on the outcome of this case.

What I think I tried to discuss on January 22nd was that I do try my best, in a small community, which is generally Oregon, to avoid political discussions on matters that could come before me. There are times when comments are made, but inadvertent comments of others are not the basis upon which impartiality can reasonably be questioned.

So to give examples on an issue of same-sex marriage and where it probably comes up the most where I am subject to comments, it has actually been the times I attend Mass in recent years it has become very common for a priest to read political statements from the bishop or archbishop to the congregation condemning efforts to legalize gay marriage.

Another example that I raised at the January 22nd hearing was a CLE I attended at the law school. And I raised it because I believe it's Ms. Middleton was one of the speakers. I didn't know Ms. Middleton. I was just moved to Eugene when my clerks and I attended the CLE. It was approved for credit by the Oregon State Bar. It was

sponsored by the Oregon School of Law -- or University of Oregon School of Law, OGALLA, and, I believe, the ACLU.

And generally, it was a lecture on the history of *Windsor*, the holding, and the difficulty that practitioners face trying to advise clients.

At the very end, and this is where I said what made me nervous is I don't like to be campaigned. And at the very end, somebody from an organization in favor of a ballot initiative redefining marriage spoke, asking people to volunteer to stay and sign up. My clerks and I left because we did not want to become part of a political campaign.

And I guess those are the kind of events that I am talking about that if people were aware of and they had questions about I was willing to share them.

The other issue that's been addressed both by the notice and repeatedly with the media is the fact that I share characteristics with, I guess, at least the male plaintiffs in this case in that I am gay and raising a child. It's true. I guess we do share characteristics. To anyone under the age of 35, I think they would say that Mr. Eastman and I share more personal characteristics. So, you know, we are white, we are male, we are exactly the same age, I believe, or close to it. I think we are both -- well, I am 53. We have worked our whole life in the law.

We have both been advocates. We have both -- you know, as a public defender, I know what it's like to sometimes take on issues in an unpopular, sometimes, setting.

But the fact that the plaintiffs share characteristics with me, gay men appear in front of me all the time, sometimes with their families, throughout the years on criminal cases, on family law cases, on civil cases. I have sent people with very similar characteristics of me to prison, and I haven't given a thought to the fact that we have common characteristics.

So to me, in this case it's irrelevant. Certainly if the posture of the case changed, I would certainly -- I certainly understand my ongoing duty as a judge to be aware of any possible conflict.

So I did want to address that because it was raised by notice.

With regard to intervention, I am not going to leave you all hanging with a big surprise. I am going to deny intervention, and here is my, just, bench opinion:

Federal Rule of Civil Procedure 24 allows the court, in certain circumstances, to permit intervention of a nonparty in ongoing litigation. Intervention can be of right or by permission of the court. The burden is on the proposed intervenor to demonstrate that it meets the requirement under rule.

The Ninth Circuit has held that, in determining whether intervention is appropriate, the court should be guided by practical and equitable considerations.

The parties seeking intervention by right must make a four-part showing under Rule 24(a). Of the four, I am going to focus on the first two prongs: Whether the application is timely and whether the proposed intervenor has a significant protectable interest relating to the property or the transaction that is the subject of this action.

Intervention under Rule 24(b) is discretionary with this court. Nonetheless, to allow for consideration of the court, the proposed intervenor must satisfy a three-prong showing that the motion is timely; that it has an independent grounds for federal jurisdiction; its claim or defense and the main action share a common question of law or fact.

So the threshold question is timeliness, and the court makes the following findings:

The *Geiger* plaintiffs, Geiger, Nelson, Duehmig, and Greisar -- Greisar? Greesar? Greisar?

MR. PERRIGUEY: Greisar.

THE COURT: Greisar. Thank you. Sorry.

Brought this action on October 15th, 2013, challenging the definition of marriage found in the Oregon

Constitution and the Oregon statutes.

The *Rummell* plaintiffs, which include Rummell, West, Chickadonz --

MR. ISAAK: Chickadonz.

MR. JOHNSON: Chickadonz.

THE COURT: Chickadonz and Tanner filed their action on December 19th, 2013. Their challenges were identical to the *Geiger* plaintiffs.

The court consolidated the cases on January 22nd, 2014. At the same time, the parties agreed that this matter would be submitted to the court for dispositive ruling on summary judgment. The dispositive motion hearing was set for April 23rd, 2014.

And that was -- and I agree. That was going to be, under this -- the case posture, the dispositive, final hearing on the matter and only hearing on the matter.

The plaintiffs filed their motions for summary judgment on February 18th, 2014. That's the *Geiger* plaintiffs. The *Rummell* plaintiffs filed their motions for summary judgment on March 4th, 2014.

Prior to this case ever being filed, Attorney General Rosenblum, in an amicus brief to the Ninth Circuit, took a clear position that, quote, The exclusion of same-sex couples from marriage is unconstitutional. This occurred in October of 2013.

On February 20th, 2014, having just filed their answer to the *Rummell* complaint, Attorney General Rosenblum announced publicly that the state would not be defending the Oregon marriage laws based on their interpretation of recent appellate decisions.

That same day, the proposed intervenor, the National Organization for Marriage, announced that, quote, Attorney General Rosenblum is shamefully abandoning her constitutional duty, closed quote.

As early as January 25th, 2014, counsel for proposed intervenor was calling for the Oregon governor and the attorney general to uphold their oath of office and defend the Constitution of Oregon.

Defendants Kitzhaber, Rosenblum, and Woodward filed their response to summary judgment motions on March 18th, 2014. In their response, the defendants took the position that plaintiffs' motion for summary judgment should be granted because the defendants believed that Oregon's marriage laws restricting marriage to one man and one woman could no longer pass scrutiny under the federal constitutional analysis put forth in recent appellate decisions.

By April 1st, 2014, this court had received amicus briefs from three citizen groups.

On April 21st, 2014, so just two days prior to our

dispositive motion hearing, counsel for the proposed intervenor conferred with plaintiffs' counsel regarding intervention and delaying the April 23rd summary judgment hearing.

At 11:04 p.m. on the evening of April 21st, 2014, a motion to intervene was filed.

On April 22nd, 2014, the proposed intervenor filed a motion to delay the April 23rd hearing. That motion was denied as untimely, and argument was set for today to take up the issue of intervention.

The proposed intervenor has provided no credible reason for failing to notify the court of its intent to intervene sooner than the 40-hour windrow prior to the dispositive motion hearing.

The proposed intervenor had a clear understanding of the attorney general's position two months prior to the April 23rd hearing.

The proposed intervenor has submitted no credible reason for failing to determine whether any Oregon member of its organization had significant and protectable interests until, as they stated in their brief, only days ago. By their own admission, their membership is only around 100 Oregon members.

Proposed intervenor chose not to file an amicus brief raising the issue of intervention or even a simple

notice to the court as to their intent.

So I am finding the motion to intervene is untimely.

With regard to intervention of right, the proposed intervenor has, among its approximately 100 members, an unidentified worker in the wedding industry, an unidentified county clerk, and an unidentified voter that the proposed intervenor submits have significant protectable interests in this case.

The court and the existing parties are unable to determine the degree of the members' protectable interest because the proposed intervenor has chosen not to disclose their identities. And I understand there are, I think, genuine issues of concern that the proposed intervenor may have. But rather than hold a dialogue with the court regarding protective orders or requesting to file declarations under seal or in camera discussions, the proposed intervenor has 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.

One of the proposed members is a voter who voted for passage of Measure 36 in 2004. The voters' interest in the outcome of a case is of a general interest and not a significant protectable interest that would allow for

intervention.

One of proposed members is an individual who works as a clerk in a county in Oregon. The clerk is not appearing in an official capacity as a representative of any particular county or local government.

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. It is not at issue in this case.

One of the proposed intervenors' members works as a wedding service provider who also has a general moral or religious objection to same-sex marriage. It is unclear what service the member provides.

The case here is about marriage. I know, Mr. Eastman, you have tried to clarify this in your brief, but this case is not about who gets to eat cake. I have married many couples over the years in Oregon who fly off to Hawaii; they fly off to their hometown or their parents' town to take their formal vows and vice versa. I mean, there are, I assume, same-sex couples who go to Washington to get married and yet they come here to take their vows and ceremonies here in Oregon.

Nothing about a ruling I make is going to change that. Nothing about a ruling I make will change the Oregon laws that forbid businesses from discriminating against consumers based on sexual orientation. The harm, such as it is, already exists.

Discretionary intervention.

The proposed intervenor seeks discretionary intervention in order to provide the defense to Oregon marriage laws, quote, that the government itself should be raising but is not, closed quote. The argument, at the end of the day, is that the Executive -- if the Executive Branch of government is not willing to defend the law the Executive Branch believes is unconstitutional, then someone has to do it and it should be us.

The National Organization for Marriage is a Washington, D.C. based political lobbying organization, and and I am not -- I mean, I am just stating what I -- I think it's fact. I mean, obviously the ACLU is a political lobbying organization as well, but in terms of intervention, I want to focus on that because your membership in Oregon is approximately a 100 members. I am not finding that that is a representative number of Oregonians.

More significantly, the Executive Branch is answerable to the electorate of Oregon. Mr. Eastman and the directors of the National Organization for Marriage are not.

It would be remarkable, following the *Hollingsworth* opinion, for a court to substitute the Executive Branch of government with a private interest organization simply because the organization disagrees with the legal interpretation of Oregon's elected official.

This is an Oregon case that impacts the lives of Oregon citizens. Its timeliness and its posture are not going to be held in abeyance by the intervention of a political lobbying group.

I know that many Oregonians are probably disappointed by the lack of adversarial debate in this case, but I am not prepared to substitute the Executive Branch with a third party. And it's, to some degree, phantoms. It's hard for me to really get a clear idea of these harmed members given the posture they have been presented in.

So it's an Oregon case. It will remain an Oregon case.

The motion to intervene is denied.

Mr. Eastman, I do appreciate your arguments. I appreciate your briefing. You are a smart guy, and I -- you know, thank you.

All right.

MR. EASTMAN: Your Honor, if I may --

THE COURT: Yes.

MR. EASTMAN: -- because we need to request a

stay. This is an immediately appealable order, as you know, and we'd like a stay pending appeal of your order.

THE COURT: The stay will be denied.

Okay.

MR. JOHNSON: Your Honor, may I make one comment --

THE COURT: Yes.

MR. JOHNSON: -- in terms of your factual findings.

I believe that the *Geiger* plaintiffs originally brought their motion for summary judgment in January. They amended their memo on February 18th, and we also filed our motion for summary judgment on February 18th.

I think the March 4th date -- March 4th date is the date that the county replied to our summary judgment motion.

THE COURT: You are correct. Thank you for correcting that. I was scribbling down a lot of notes quickly. Okay.

MR. PERRIGUEY: Your Honor, there was one other factual issue.

THE COURT: Yes.

MR. PERRIGUEY: The state actually issued the order from Michael Jordan the day after the *Geiger* plaintiffs. You mentioned the *Rummell* plaintiffs in your --

THE COURT: Aah. Okay.

MR. PERRIGUEY: So that's just a slight modification.

THE COURT: All right. Thank you. I will allow that correction.

Anything else that I have mistaken on my dates?

All right. Thank you very much.

THE CLERK: Court is in recess.

(The proceedings were concluded this 14th day of May, 2014.)

I hereby certify that the foregoing is a true and correct transcript of the oral proceedings had in the above-entitled matter, to the best of my skill and ability, dated this 15th day of May, 2014.

/s/Kristi L. Anderson
_____
Kristi L. Anderson, Certified Realtime Reporter