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 WALDRUFF, in his official capacity as Multnomah County Assessor,

Respondents (Defendants).

Reply in Support of Application to Stay Judgment Pending Appeal

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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:

Applicants respectfully submit this reply in support of its application for an immediate stay pending appeal of an order denying intervention and of the judgment and injunction entered by the United States District Court for the District of Oregon, invalidating and enjoining enforcement of Oregon's marriage laws to the extent they limit marriage to man-woman unions.

INTRODUCTION

Once again demonstrating the ongoing non-adversarial relationship of the parties to the case below, Defendants and Plaintiffs both oppose the application for a stay filed by the National Organization for Marriage, Inc. ("NOM"), which sought to intervene below under the authority of *NAACP v. Alabama*, 357 U.S. 449, 459 (1958) to protect the significant interests of its members in upholding Oregon's long-standing and constitutionally codified definition of marriage. NOM readily acknowledges the number of procedural hurdles that the non-adversarial parties have interposed in an attempt to prevent anyone from offering any defense of Oregon's marriage law. But, far from preventing this Court's consideration of NOM's application for stay, those hurdles highlight the need for it.

Part I below addresses the various procedural and jurisdictional arguments Respondents make in their respective oppositions to NOM's application for a stay. First, Rule 23.3 is not a bar because NOM *did* seek a stay from the courts below,

and specifically from the Ninth Circuit of the "proceedings" in the district court or, alternatively, of the "judgment." Even if that is not adequate for normal application of Rule 23.3, this case presents "extraordinary circumstances" that warrant direct application of a stay to this Court, in any event. Second, NOM's appeal is not moot, under governing Ninth Ciruit precedent. And finally, NOM, on behalf of its members, has articulated concrete and particularized injuries sufficient to provide it the Article III standing necessary to pursue an appeal of the judgment once its right to intervene is affirmed.

Part II rebuts Respondents' claims that, despite this Court's grant of a stay in the Utah marriage case, *Herbert v. Kitchen*, 134 S. Ct. 893 (Jan. 6, 2014) (a case, curiously, not even mentioned by the Government Respondents), there is no likelihood of certiorari being granted on the merits of the underlying judgment here, or of that judgment being reversed.

Part III addresses Respondents' claims that NOM is similarly unlikely to be successful on its intervention appeal, either before the Ninth Circuit or, if necessary, this Court. Given that this Court has frequently permitted intervention even post-judgment in order to preserve the right to appellate review, the district court's determination that NOM's motion was untimely is quite likely to be found to be erroneous. While mere error correction is normally not sufficient to warrant this Court's attention, given the fact that the district court arguably does not even have jurisdiction over a part of the case absent NOM's intervention, and given the highly contentious nature of the issues at stake in this litigation, there is at least a

"reasonable probability" that this Court would grant certiorari on the intervention issue as well (assuming the Ninth Circuit doesn't reverse the district court's denial in the interim).

In sum, none of the supposed impediments to this Court's issuance of a stay that have been raised by Respondents warrant treating this Oregon case differently than the Utah case, in which this Court has already issued a stay pending its likely consideration of the significant constitutional questions at issue here.

I. None of the Procedural or Jurisdictional Issues Asserted by Respondents Bar NOM's Application for a Stay from this Court.

A. Rule 23.3 Does Not Pose A Procedural Bar Because NOM Sought a Stay From Both the District Court and the Ninth Circuit, the Latter Explicitly Requesting a Stay of the District Court's "Proceedings" and, Alternatively, of Its "Judgment."

The Plaintiff-Respondents assert that NOM's application for a stay is procedurally defaulted under Rule 23.3 because, they claim, NOM did not first seek a stay of the judgment (as opposed to the proceedings) in the courts below. Plaintiffs' Resp. at 27-28. Rule 23.3 is not a bar here, for at least three reasons.

First, NOM *did* seek a stay from the Ninth Circuit, both of the ongoing proceedings in the district court pending interlocutory appeal of the order denying its motion to intervene, and of the judgment if one issued. Emergency Motion for Stay, 9th Cir. Dkt. #5 (May 19, 2014) ("Appellant respectfully seeks a stay of further proceedings in the district court (or, if a judgment has already issued, stay of the judgment) pending resolution of Appellant's appeal of the district court's denial of Appellant's motion to intervene"); *see also id.* at 9 ("Alternatively, if the judgment

has already issued adverse to Oregon's marriage law before this Court can issue a stay, NOM requests a stay of that judgment pending resolution of its appeal from the denial of intervention"); *id.* ("The proceedings below should be stayed (or, alternatively, any dispositive judgment stayed) pending resolution of NOM's appeal").

The Ninth Circuit denied NOM's emergency motion for stay about 11:30 a.m. Pacific time on May 19, 2014, 9th Cir. Dkt. # 15, and a half hour later, the district court issued its opinion and order granting Plaintiffs' respective unopposed motions for summary judgment, declaring Oregon's marriage law unconstitutional, and permanently enjoining its enforcement by "Defendants and their officers, agents, and employees." DCt. Dkt. ##118, 119. The final judgment was issued later that same day. DCt. Dkt. #120. Because NOM's motion for a stay, filed with the Ninth Circuit that same day, requested both a stay of "proceedings" and, alternatively, a stay of "judgment," is sufficient. *Cf. FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. 269, 274 (1991) (permitting notice of appeal to service as effective notice of appeal from subsequently entered final judgment); *id.* at 278 (Kennedy, J., concurring). Requiring NOM to file another motion for a stay less than an hour after its motion had just been denied would have been unnecessarily duplicative.

Second, a renewed motion for stay would also have been futile, as the Ninth Circuit's denial of the stay rested on this Court's decision in *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008), in which this Court reversed a Ninth Circuit injunction on the ground that the Plaintiffs in the case had not

demonstrated a likelihood of success on the merits or that the balance of equities weighed in their favor. Although NOM contends that the equities are in its favor and that there is a likelihood of success on the merits, both on its motion to intervene (which was fully briefed below) and on the underlying merits (which was referenced below in the context of this Court's issuance of a stay in the parallel Utah case),[1] neither the likelihood of success calculus nor the balance of equities changed in the intervening hour. A party need not file futile motions in order to preserve its rights for review by this Court. *See W. Airlines, Inc. v. Int'l Bhd. of Teamsters*, 480 U.S. 1301, 1304 (1987) (O'Connor, J., in chambers) (holding that stay need not be first filed in lower court where it would be "legally futile"); *Heckler v. Turner*, 468 U.S. 1305, 1309 (1984) (rejecting requirement that stay first be filed in lower courts when "[i]t would be an empty and costly formality").

Third, it is unclear whether the district court has jurisdiction to entertain a renewed motion for stay of its judgment even if one is submitted to it, since a protective notice of appeal from that judgment has already been filed. As Justice Rehnquist noted in *Heckler*, where there is doubt about whether a lower court has jurisdiction to take action post judgment once an appeal (in that case, a grant of

[1] *See* Emergency Motion (9th Cir. Dkt. # 5) at 10-28 (likelihood of success on intervention); *id*. at 6-9 (describing how this Court has already granted a stay from the judgment in the parallel case out of Utah, *Herbert v. Kitchen*, 134 S.Ct. 893 (Jan. 6, 2014); Memo in support of Motion to Intervene (DCt. Dkt. # 87) at 1-3 (outlining arguments on the merits); Reply in support of Motion to Intervene (DCt. Dkt. #109) at 4-5, 26-27 (merits arguments).

certiorari) has been filed, "an application [for a stay] directly to [the Supreme] Court is not improper." *Heckler*, 468 U.S. at 1308-09.

Thus, even if NOM's prior requests for a stay in both the district court and the Ninth Circuit do not qualify for Rule 23.3 purposes because the Ninth Circuit request, which expressly referenced both the order denying intervention and the judgment, was made a few hours (and decided less than an hour) before judgment was entered, the circumstances of this case outlined above are certainly "extraordinary" enough to warrant this Court's entertaining of NOM's application here to the extent that is deemed necessary. After all, Rule 23.3 provides that "*Except 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." Rule 23.3 (emphasis added). The refusal of the Attorney General below both to partially enforce and to defend her State's constitutional definition of marriage, the non-adversarial nature of the proceedings below, the denial of intervention by a party actually prepared to offer a defense, and the refusal of the Government defendants to file an appeal (contrary to the tactic employed by the Department of Justice in *United States v. Windsor*,133 S. Ct. 2675 (2013)) are, to say the least, "extraordinary circumstances" warranting consideration of the application for stay filed directly with this Court.

B. NOM's Ninth Circuit Appeal of the Intervention Denial is Not Moot, Because NOM Has Filed a Protective Notice of Appeal of the Underlying Merits Judgment.

The Government Respondents assert a jurisdictional bar of their own, contending that this Court should not grant NOM's stay because of their pending motion claiming that NOM's Ninth Circuit appeal is moot. Gov't Resp. at 10. Not surprisingly, the Plaintiff Respondents have joined the motion, but as NOM has comprehensively explained in opposition, the Government's assertion of mootness is erroneous.

It is well established that denial of a motion to intervene is an immediately appealable order. *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997) ("*LULAC*") ("The denial of a motion to intervene as of right pursuant to Rule 24(a)(2) is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291"). NOM has filed such an appeal, and the Ninth Circuit has established a briefing schedule.

It is also well established that if NOM is granted the right to intervene and is able to establish standing independent of the existing parties, then it would be entitled to participate in the litigation, including appealing from any judgment adverse to its protectable interests. *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375 (1987) ("An intervenor, whether by right or by permission, normally has the right to appeal an adverse final judgment by a trial court"); *Bryant v. Yellen*, 447 U.S. 352, 366-67 (1980) (intervenors "who sought to enter the suit when the United States forwent an appeal from the District Court's adverse

decision had standing to intervene and press the appeal on their own behalf"); *LULAC*, 131 F.3d at 1304 ("as a general rule, intervenors are permitted to litigate fully once admitted to a suit"); *Kootenai Tribe v. Veneman*, 313 F.3d 1094, 1109–1110 (9th Cir. 2002). Indeed, "[i]ntervention should be allowed even after a final judgment where it is necessary to preserve some right which cannot otherwise be protected." *Pellegrino v. Nesbit*, 203 F.2d 463, 465 (9th Cir. 1953); *United States v. California Mobile Home Park Mgmt. Co.*, 29 F.3d 1413, 1416 (9th Cir. 1994); *see also*, *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395 n. 16 (1977) (citing with approval *Pellegrino* and other decisions allowing post-judgment intervention for purposes of appeal); *Acree v. Republic of Iraq*, 370 F.3d 41, 50 (D.C. Cir. 2004) ("courts often grant post-judgment motions to intervene where no existing party chooses to appeal the judgment of the trial court"), *abrogated on other grounds by, Republic of Iraq v. Beaty*, 556 U.S. 848 (2009).

The fact that the district court entered final judgment while NOM's intervention appeal is still pending does not deprive NOM of the right to participate in the litigation and appeal from the final judgment, if either the Ninth Circuit or this Court ultimately reverses the district court's denial of NOM's motion to intervene. *See, e.g., Williams v. Katz*, 23 F.3d 190, 192 (7th Cir. 1994) ("[A] person who has been refused intervention may not appeal from the final judgment *unless he can get the order denying his motion to intervene reversed*") (emphasis added). Indeed, the Ninth Circuit has explicitly followed the holding of the Eleventh Circuit in *Purcell v. BankAtlantic Fin. Corp.*, 85 F.3d 1508 (11th Cir.1996), "that the

intervention-applicant's appeal from the district court's denial of its motion to intervene was not mooted by the district court's entry of judgment in the underlying litigation." *LULAC*, 131 F.3d at 1301 n.1. "[T]he intervention controversy was still live because, if it were concluded on appeal that the district court had erred in denying the intervention motion, and that the applicant was indeed entitled to intervene in the litigation, then the applicant would have standing to appeal the district court's judgment." *Id*.

The proper procedure in such circumstances is for the proposed intervenor "to file a protective notice of appeal as to the judgment, to become effective if the denial of intervention is reversed." Wright and Miller, 15A Fed. Prac. & Proc. Juris. § 3902.1 (2d ed.). As the Eighth Circuit has explained, "A notice of appeal filed by a would-be intervenor pending appeal from the denial of intervention is permitted because '[a] contrary rule would prevent a prospective intervenor who successfully appeals the … denial of his intervention motion from securing the ultimate object of the motion … if, as was the case here, the appellate court does not resolve the intervention issue prior to the district court's final decision on the merits." *Mausolf v. Babbitt*, 125 F.3d 661, 666 (8th Cir. 1997). The Ninth Circuit has ratified that procedure, and there is no reason to believe that it would repudiate it in this case. *See Brennan v. Silvergate Dist. Lodge No. 50, Internat. Assn. of Machinists*, 503 F.2d 800, 803 (9th Cir. 1974) (treating proposed-intervenor's separate appeal from the judgment "as protective or precautionary only" and not reaching the merits of that appeal only after rejecting the proposed-intervenor's appeal from the district court's

order denying intervention). NOM has followed that procedure by filing a protective notice of appeal in the district court. D.Ct. Dkt. # 121 (May 22, 2014).

The Government Respondents' claim that the appeal is nevertheless moot ignores all of these basic propositions. Relying instead on *West Coast Seafood Processors Ass'.n v. Natural Res. Def. Council, Inc.*, 643 F.3d 701 (9th Cir. 2011) and *United States v. Ford*, 650 F.2d 1141, 1142-43 (9th Cir. 1981), they claim that even when an appeal from a denial of a motion to intervene remains pending on appeal, the proposed intervenor's appeal is moot once the [lower] court issues final judgment, if no party appeals." Gov't Resp. at 10. The Government reads much too much into the *West Coast Seafood Processors* and *Ford* cases.

The principal difference between this case and *West Coast Seafood Processors* is that the proposed intervenor in *West Coast Seafood Processors* had not filed a protective notice of appeal from the summary judgment decision that it intervened to challenge, and by the time the appeal of the order denying intervention was considered, time to notice an appeal from the merits judgment had long since expired. See Docket, *West Coast Seafood Processors v. NRDC*, No. 3:01-cv-00421 (N.D. Cal., case filed Jan. 25, 2001). As a result, even if the Court of Appeals had reversed the decision denying intervention, the Court of Appeals would have had no jurisdiction to consider a late-noticed appeal from the proposed intervenor.

Here, NOM has filed a protective notice of appeal, a procedure that the Ninth Circuit has expressly recognized. See *Brennan*, 503 F.2d at 803; *see also Mausolf*, 125 F.3d at 666; Wright and Miller, 15A Fed. Prac. & Proc. Juris. § 3902.1 (2d ed.).

That preserves the Ninth Circuit's jurisdiction to consider NOM's appeal from the final judgment in the event either the Ninth Circuit or this Court holds that NOM's motion to intervene was improperly denied.[2]

In sum, governing precedent of the Ninth Circuit holds that an appeal of a denial of a motion to intervene is not mooted by the subsequent entry of final judgment by the district court and decision not to appeal by the original parties, when the proposed intervenor has properly filed a protective notice of appeal, as NOM has done here. The jurisdictional bar claimed by the Government Respondents is therefore nonexistent.

C. NOM's members do have Article III standing to appeal from the District Court's Judgment.

Both sets of Respondents have also contended that NOM's stay application should be denied on the ground that there is no jurisdiction in the Court of Appeals below because, they assert, NOM's members do not have Article III standing.[3] Gov't Resp. at 2; Plaintiffs' Resp. at 2, 3, 17-19. NOM does not contest that Article III standing is required for it to pursue the appeal below (and ultimately, to file a petition for writ of certiorari with this Court). This Court's recent decision in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), clearly reiterated that the intervenor

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[2] The Government's reliance on *Ford*, 650 F.2d at 1143, is likewise unavailing. In *LULAC*, the Ninth Circuit expressly distinguished *Ford* from a case involving circumstances nearly identical to those presented here. *LULAC*, 131 F.3d at 1301 n.1 ("ours is not a case like *United States v. Ford* …. Rather, the facts of this case are more akin to those of [the Eleventh Circuit's decision in *Purcell*").

[3] Neither set of Respondents challenges the proposition that NOM itself has third-party associational standing under *NAACP v. Alabama* if it can establish Article III standing for any of its members.

must independently have standing in order to pursue an appeal when the original parties decline to do so. *Id*. at 2661-62, 2668. But *Hollingsworth* did not close the door on appeals by intervenors who have Article III standing of their own. *Id*. at 2659. NOM's motion to intervene articulated several grounds for why its members have independent Article III standing, and the merits of its claim is pending review by the Ninth Circuit. If either the Ninth Circuit or this Court agrees that NOM has independent Article III standing—and those arguments are set out more fully in Part III.B below—then there would be no jurisdictional bar to NOM pursuing an appeal from the merits judgment below. *See, e.g., Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1412 (9th Cir. 1996) (holding that intervenor was allowed to appeal because it met "Article III's 'standing criteria by alleging a threat of particularized injury from the order [it] seek[s] to reverse that would be avoided or redressed if [its] appeal succeeds'" (quoting *Legal Aid Society of Alameda County v. Brennan*, 608 F.2d 1319, 1328 (9th Cir.1979))); *Legal Aid Society*, 608 F.2d at 1328 ("Post-judgment intervention for purposes of appeal may be appropriate if the intervenors act promptly after judgment, … and meet traditional standing criteria"). This is true even though the standing NOM asserts is as an association representing its members' rights. See *Wiggins v. Martin*, 150 F.3d 671, 674-75 (7th Cir. 1998) (considering whether membership organization/intervenor had standing to appeal either in its own right or as association on behalf of its members).

II. Respondents' Arguments that NOM is Unlikely to Succeed, Either in Getting this Court to Grant a Writ of Certiorari or Ultimately on the Merits of the Substantive Challenge, All But Overlook That This Court Has Already Issued a Stay of the Parallel Utah Case.

A. There is more than a "reasonable probability" that this Court will soon grant certiorari on the constitutional issues presented by this case.

Respondents appear to concede that there is a strong likelihood that this Court will soon grant certiorari in a case challenging the constitutionality of long-standing state laws defining marriage as between a man and a woman. Indeed, they recognize that this Court has previously granted certiorari in such a case (i.e., *Hollingsworth v. Perry*), and that "many other cases are likely to be presented to this Court raising [the] same legal issue as it works its way through various district and circuit courts." Gov't Resp. at 13; *see also* Plaintiffs' Resp. at 21-22. That alone suffices to demonstrate "a 'reasonable probability' that this Court will grant certiorari." *Maryland v. King,* 133 S. Ct. 1, 2 (2012) (Roberts, C.J., in chambers).

Without citation of any authority, the Government Respondents assert that although "it is possible that this Court may consider similar legal issues in a different case, that mere possibility does not satisfy the requirement that NOM show a reasonable probability that this Court will grant certiorari in *this* case." Gov't Resp. at 12 (emphasis in original). "It is simply not enough," they contend, "to suggest that the same issues might come before this Court in a different case involving different parties and different state interests." *Id.* But whether or not this Court ultimately takes this case from Oregon or instead grants certiorari and holds argument in one of the several other cases currently headed here is beside the

point. In such circumstances, the common practice of this Court is to "hold" cases pending resolution of another case raising identical issues. *See* GRESSMAN, *ET AL.*, SUPREME COURT PRACTICE § 5.9 (9th ed. 2007) (a "petition for certiorari … may be held until a decision is reached by the Court in a pending case raising identical or similar issues" (citing, e.g., *Keney v. New York*, 388 U.S. 440 (1967)); *id.* at § 5.12(b) ("In many instances, the certiorari papers are held by the Court pending its plenary ruling, following which the summary reconsideration order is entered" (citing *Hoevenaar v. Lazaroff*, 545 U.S. 1101 (2005); *Board of Trustees of the University of Illinois v. Doe*, 526 U.S. 1142 (1999)); *cf. id.* at § 5.12(a) ("summary affirmances may also occur when the Court has under consideration a number of related petitions and summarily disposed of all of them on the merits in the light of a new and controlling decision" (citing *Landau v. Fording*, 388 U.S. 456 (1967)).

The *Maryland v. King* standard does not require that this case be the lead case, or that it be set for oral argument. All that is required is that there be "a 'reasonable probability' that this Court will grant certiorari." Holding for summary reversal, or a GVR, or even summary affirmance, all meet that standard, even if one of the cases a bit further along in the queue is more likely to be the case where this Court settles the question being addressed in lower courts across the country. Indeed, it may be the preferred course, in order to have consistency across states on the constitutional question surrounding this important and contentious issue. It is simply not credible to assume that this Court will not grant certiorari in one of

those cases, when so many long-standing State laws and constitutional provisions are being held unconstitutional by the lower courts.[4]

Moreover, given the importance of the jurisdictional issues that have been raised in the wake of *Hollingsworth*, this Court's concern in *Windsor* that non-defense tactics not become a "common practice," 133 S.Ct. at 2688, and NOM's strong argument that it has standing to appeal the adverse judgment below notwithstanding *Hollingsworth*, there is a decent chance—a "reasonable probability"—that this Court would grant certiorari in this case as well as in one of the pure merits cases. It certainly granted certiorari in *Hollingsworth* in spite of (or perhaps because of) the important jurisdictional questions that case presented, and contrary to Plaintiffs's claim that this "case is materially indistinguishable from *Hollingsworth*," Plaintiffs' Resp. at 18, it is not. The intervenors in *Hollingsworth* did not include a county clerk whose duties include enforcement of marriage laws, or wedding service providers with concrete and particularized claims of harm. Neither did they make a vote negation claim, as NOM has made here on behalf of its voter members.

Given the short time since *Windsor* and *Hollingsworth* were decided in which defense abdiction by State Attorneys General has become a "common practice," the

[4] Plaintiffs' reliance on *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936), is misplaced, for it turns on their claim that there is an "absence of any party to this case who seeks to overturn the judgment." Plaintiffs' Resp. at 22. That claim gets the merits cart before the horse. If NOM's members have Article III standing, as it asserts, and it is allowed to intervene on their behalf, then there would be a "party to this case who seeks to overturn the judgment."

validity of NOM's serious efforts to articulate grounds for standing that survive this Court's holding in *Hollingsworth* is "an important question of federal law that has not been, but should be, settled by this Court," warranting certiorari under Rule 10(c). Thus, even if the Government Respondents are correct (which they are not) that the *Maryland v. King* standard requires a reasonable probability of a grant of certiorari in *this* case, that standard is met here.

B. There is a "fair prospect," albeit by no means a certainty, that this Court will reverse the merits judgment below.

For the reasons NOM set out in its Application for Stay, there is also "a 'fair prospect' that the Court will then reverse the decision below." *King*, 133 S. Ct. at 2. Although the Government Respondents contend that NOM's arguments have not been successful in any of the "13 federal courts to consider and address similar challenges," Govt. Resp. at 22, they completely overlook (and Plaintiffs attempt to minimize) that this Court has already granted a stay in a case raising identical constitutional challenges. *Herbert v. Kitchen*, 134 S. Ct. 893 (Jan. 6, 2014). That stay by *this Court* weighs more heavily than the bakers' dozen of district courts that have recently ruled that the traditional definition of marriage is unconstitutional.

That is particularly true when still-governing precedent of this Court holds that State laws defining marriage as between a man and a woman are constitutional. *See Baker v. Nelson*, 409 U.S. 810 (1972). Plaintiffs attempt to minimize the precedential value of *Baker* by citing this Court's decision in *Hicks v. Miranda*, 422 U.S. 332, 344 (1972), to the effect that subsequent doctrinal developments may undermine a summary disposition's precedential weight,

Plaintiffs' Resp. at 22 n.11, but they nowhere mention that *Hicks* also held, in unambiguous terms, that "the lower courts are bound by summary decisions by this Court 'until such time as the Court informs (them) that (they) are not.'" *Hicks*, 422 U.S. at 344-45.

The lower courts that have recently struck down state marriage laws have all relied on this Court's decision last June in *Windsor*, which did not purport to overrule *Baker*. As this Court is well aware, *Windsor* was a closely divided case, and the majority opinion relied heavily on federalism principles and the historic role of States as the primary determiners of marriage policy. *Windsor*, 133 S. Ct. at 2689-92; *see also id.* at 2697 (Roberts, C.J., dissenting) (noting the federalism basis of the majority's opinion). To be sure, there are other parts of the *Windsor* majority opinion that point the other direction, but the Government Respondents seem to conflate the "fair prospect" standard from *Maryland v. King* with a "certain to reverse" standard, which is not what the test from *Maryland v. King* requires.

In any event, whatever the standard for a stay, it is hard to credit Respondents' contention that it is not met in *this* case when this Court has already determined that it was met in the Utah case, in which the identical constitutional challenge was made.

C. This Court has already settled the "likelihood of irreparable harm" inquiry.

This Court's grant of a stay in the Utah case also settles the third prong of the *Maryland v. King* standard, namely, the "likelihood that irreparable harm [will] result from the denial of a stay." Among NOM's members, on whose behalf it seeks

to intervene under the authority of *NAACP v. Alabama*, are a county clerk responsible for the enforcement of Oregon's constitutional and statutory definition of marriage, and a voter who formed part of the sovereign majority of the people of Oregon who added Oregon's long-standing definition of marriage to the State Constitution.

When granting the stay in the Utah case, this Court necessarily determined that the stay applicants in the case had demonstrated a likelihood of irreparable harm. But the harm was not to themselves personally. It was to the sovereign interests of the state in having an important, constitutional policy judgment invalidated by a federal court. In Oregon, the actual implementation of that policy judgment is done by county clerks, one of whom is a member of NOM. And in this case, that policy was adopted—constitutionally codified—by the ultimate sovereign authority in the State, the voters, at least one of whom is another of NOM's members.

The Government Respondents seem to be of the view that they can wish away the sovereign judgment of the people of the State of Oregon (and hence the irreparable harm that flows from it being invalidated) by simply not defending a constitutional amendment adopted directly by the people, or by giving greater weight to policy judgments expressed in mere statutory pronouncements by the legislature than to the policy judgments expressed by the people by way of their Constitution. Gov't Resp. at 24-25. Similarly, Plaintiffs attempt to distinguish this Court's grant of a stay in the Utah case by arguing that the defendants in that case

"were engaged in a vigorous defense of the constitutionality of Utah's" marriage laws. Plaintiffs' Resp.. at 26. Such arguments do not undermine the irreparable nature of the harm caused when a sovereign act of the people of the State is held to be invalid; if anything, the harm is even greater when the sovereign's judgment is invalidated at the behest and encouragement of its elected officials.[5]

III. Respondents' Arguments that NOM is Unlikely to Succeed on its Motion to Intervene Also Fall Short.

Critical to NOM's claim that it is likely to succeed on the merits of its intervention appeal is that the fact that, under governing Ninth Circuit precedent, the district court was obligated to accept as true all non-conclusory facts in NOM's intervention motion. *See Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 819 (9th Cir. 2001). It did not do so, either with respect to NOM's claim of timeliness or its claim of protectable interests. But once those facts are accepted as true, as they must be, the likelihood that NOM's right to intervene as of right under Fed. R. Civ. P. 24(a), either by the Ninth Circuit or, if necessary, by this Court, is strong.

Moreover, contrary to Respondents' contention, the district court lacked jurisdiction over the claims of one set of Plaintiffs below. The Government

[5] Plaintiffs' reliance on *Clapper v. Amnesty International, USA*, 133 S. Ct. 1138, 1154 (2013) is again beside the point. NOM is not arguing that it should have standing because otherwise no one would have standing to sue. It is arguing that its members *do have standing*, and that they are sufficiently connected to the irreparable harm that a sovereign state suffers when a provision of its constitution is invalidated by a federal court to meet this prong of the *Maryland v. King* test.

Respondents contend, for example, that "the Attorney General did not acquiesce when confronted with the two complaints filed in this case and stand silently by or 'collude' with plaintiffs to reach a particular outcome, as NOM has contended." Govt. Resp. at 1. Similarly, the Plaintiff Respondents argue that "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." Plaintiffs' Resp. at 17 (emphasis added). But those claims are not true. Oregon's marriage amendment provides that "It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage." Ore. Const. Art. 15, § 5a. Plaintiffs challenged both aspects of that amendment, the ban on "recognize[ing]" as well as the ban on performing marriages between persons of the same sex. The day after the lead complaint was filed, the office of the Attorney General issued a memo directing all state agencies to "recognize" same-sex marriages performed in other states. DCt. Dkt. #10. In other words, this case does not "resemble[e] *Windsor* and the cases cited in *Windsor*," as Plaintiffs claim. Plaintiffs' Resp. at 17 (citing *Windsor*, 133 S. Ct. at 2684-87). Rather, it is the antithesis of *Windsor*. *See Windsor*, 133 S. Ct. at 2686 ("It would be a different case if the Executive had taken the further step of paying Windsor the refund to which she was entitled under the District Court's ruling" and was therefore no longer enforcing the law).

As a result, every indulgence in favor of intervention, which is already to be liberally granted, should be made. *See United States v. City of Los Angeles*, 288 F.3d 391, 398 (9th Cir. 2002).

A. The Ninth Circuit is likely to hold that NOM's motion to intervene was timely.

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

1) The Chairman of the Board of NOM learned in February or March 2014 that public policy groups in Oregon were trying to identify county clerks in Oregon who might be willing to intervene in the Oregon marriage case (DCt. Dkt. # 110, Eastman Decl. ¶ 2);

2) Upon learning in March 2014 that the Attorney General of Oregon was not only not going to defend Oregon's marriage law, but was instead going to actively join Plaintiffs' constitutional challenge, the President of NOM began trying to identify someone in Oregon who might be willing and able to intervene to defend Oregon's marriage law, only to discover that many of the people who would suffer particularized harms if marriage was redefined in Oregon to encompass same-sex relationships were concerned about possible retaliation because of various forms of retaliation that had been suffered by supporters of true marriage elsewhere in the country (DCt. Dkt. # 88, Brown Decl. ¶ 4);

3) In late March or early April, 2014, NOM's President inquired whether lawyers with the Center for Constitutional Jurisprudence would be willing to

represent a county clerk or other entity in Oregon who had the legal standing to intervene in the case (Eastman Decl. ¶ 3);

4) During the second week of April, an attorney with the Center for Constitutional Jurisprudence had telephone conversations or in-person meetings with several individuals who had colorable claims of standing to intervene in the Oregon marriage case, either on their own behalf or on behalf of their businesses (Eastman Decl. ¶ 4);

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

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

7) The Registrar's email to county clerks dated April 8, 2014 reaffirmed that the Department of Justice "will not defend Oregon's ban on same-sex marriage that the US District Court will hear on April 23," that Oregon Vital Records had already prepared a new "Application, License and Record of Marriage" form "to account for same-sex marriages," and that "[i]f the judge rules that same-sex

marriages are legal in Oregon, the state vital records office will immediately provide paper copies to county marriage offices" (Eastman Decl. ¶ 5, Ex. A);

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

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

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

11) Over the weekend of April 19, 2014, counsel for NOM affiliated with Oregon counsel, prepared a motion to intervene and accompanying memorandum of law, interviewed NOM members who had a particularized stake in the outcome of the case, prepared a supporting declaration for NOM's president, prepared answers to the amended complaints in the two consolidated cases, reviewed the transcripts of prior hearings in the case, prepared a motion for admission pro hac vice, began preparing a motion to postpone the April 23, 2014 hearing, began preparing a brief

in opposition to the two motions for summary judgment, and, after seeing news accounts that raised potential mandatory recusal issues, researched the relevant ethics rules and case law dealing with recusal (Eastman Dec. ¶ 9);

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

These are all nonconclusory allegations of fact, and under governing Ninth Circuit precedent, a "district court is required to accept as true the nonconclusory allegations made in support of an intervention motion." *Southwest Ctr.*, 268 F.3d at 819. Contrary to that explicit requirement, however, the district court found that NOM "provided no *credible* reason for failing to notify the court of its intent to intervene sooner than the 40-hour window prior to the dispositive motion hearing," and "submitted no *credible* reason for failing to determine whether any Oregon member of its organization had significant and protectable interests until … only days ago." Transcript of May 14, 2014 hearing (DCt. Dkt. # 115, Plaintiffs' Resp. Ex. A) at 48 (emphasis added).

In other words, the district court declined to accept as true basic non-conclusory facts on which NOM's motion to intervene was based (and which made the motion timely under the circumstances).[6] It refused to credit that the Attorney

[6] Plaintiffs apparently understand the significance of the district court's finding that these factual claims were not "credible," because they seek to recharacterize the district court's ruling as stating that "NOM failed to offer a *credible legal justification* for its late filing." Plaintiffs' Resp. at 11 n. 8. But that is not what the

General's decision to actively join Plaintiffs' attacks on the constitutionality of Oregon's marriage law (as opposed to merely declining to defend them) was not known by NOM until the latter part of March, 2014, when the Attorney General filed its "response" to the Plaintiffs' respective motions for summary judgment. The district court also refused to credit that NOM did not know until the second week of April that the Attorney General would not be filing an appeal from any judgment holding that Oregon's marriage laws were unconstitutional, contrary to the procedure employed by the U.S. Department of Justice in the *Windsor* case, 133 S. Ct. at 2684.[7] The district court refused to credit the factual allegation that NOM did not know until April 17, 2014, that it would be unsuccessful in its efforts to persuade an Oregon county official to intervene in the case in order to defend Oregon's marriage law. And the district court declined to accept as true that NOM quite reasonably only began seeking to identify its own members who had protectable interests at stake in the Oregon litigation at that point, when it became clear that fears of harassment and retaliation had definitively created a barrier to others intervening on their own behalf, a necessary precondition for NOM's ability to assert third-party standing on behalf of its members under *NAACP v. Alabama*.

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district court said, *see* Plaintiffs' Resp. Ex. A at 48, and Plaintiffs' attempt to redefine "credible" to mean "sufficient" just doesn't pass muster.

[7] Plaintiffs claim that "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." Plaintiffs' Resp. at 10. That claim is inaccurate. NOM made the factual assertion in its reply brief in support of intervention, filed in the district court on May 9, 2014. DCt. Dkt. #109, at 8. And it repeated the same factual assertion in its Application for Emergency State filed in the Ninth Circuit on May 19, 2014. 9th Cir. Dkt. # 5, at iii, 2-3.

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

The district court's refusal to accept as true NOM's nonconclusory allegations of fact was an erroneous application of the law established by the Ninth Circuit in *Southwest Ctr.*, 268 F.3d at 819. The finding that NOM's motion was untimely was therefore an abuse of discretion. Moreover, NOM's motion is timely "in light of all the circumstances of the case," which is the standard against which the motion's timeliness must be assessed. Wright & Miller, 7C Fed. Prac. & Proc. Civ. § 1916 (3d ed.). This is particularly true against the background principle that "Rule 24 has traditionally received a liberal construction in favor of applicants for intervention." *Washington State Bldg. & Const. Trades Council, AFL-CIO v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982) (citing Wright & Miller, 7A Fed. Prac. and Proc. § 1904 (1972)); *see also Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) ("we normally follow 'practical and equitable considerations' and construe the Rule 'broadly in favor of proposed intervenors'") (quoting *City of Los Angeles*, 288

F.3d at 397, and citing *Southwest Ctr.*, 268 F.3d at 818). At the very least, the circumstances here, combined with the rule of liberal construction in favor of intervention, demonstrate a likelihood of success on the merits of NOM's appeal. And given the importance of NOM's intervention even to the district court's full jurisdiction over the claims in this case, there is at least a "reasonable probability" that this Court will reverse the district court's denial of intervention if the Ninth Circuit does not, even though "abuse of discretion" matters are not common fodder here.

But there is an even more important reason why NOM's motion would likely be found timely by the Ninth Circuit and by this Court. Both Courts have recognized that motions to intervene are timely even post-judgment, if necessary to protect appellate rights. *United Airlines*, 432 U.S. at 395 n.16; *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991). Although Plaintiffs claim that "NOM should have known earlier that the State Defendants were unlikely to appeal," Plaintiffs' Resp. at 10, "[t]he only time one can know whether a party intends to appeal is after a court enters judgment." *Clarke v. Baptist Mem'l Healthcare Corp.*, 264 F.R.D. 375, 380 (W.D. Tenn. 2009), *aff'd*, 427 F. App'x 431 (6th Cir. 2011). Because "A post-judgment motion to intervene is generally considered timely if it is filed before the time for filing an appeal has expired," *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1044-45 (9th Cir. 2000), *abrogated on other grounds by*, *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424 (2002), there is a reasonable probability that NOM will prevail with its claim that its motion to intervene was timely.

B. NOM's members not only have protectable interests warranting intervention of right, but those interests meet the requirements for Article III standing.

Both sets of Respondents try to characterize NOM's claims as merely asserting "generalized" interests in enforcement of Oregon's marriage laws. Plaintiffs contend, for example, that "[a]t base, NOM contends that three of its members are unhappy that this case proceeded to a judgment in the Plaintiffs' favor." Plaintiffs' Resp. at 24. And the Government Respondents assert that NOM's county clerk "presented only 'a generalized hypothetical grievance' that he or she 'might have a moral or religious objection to' performing his or her duties." Gov't Resp. at 9.

Those are straw man arguments. Once the factual assertions actually made by NOM are fully credited, as the district court was obligated to do, it becomes clear that the interests of NOM's members meet both the requirements for intervention of right and for Article III standing. NOM's nonconclusory factual allegations include:

1) More than one of NOM's members are providers of wedding services who have informed NOM that they have sincerely-held religious objections to facilitating marriage ceremonies between people of the same sex (Brown Decl. ¶ 7);

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

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

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

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

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

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

Instead of accepting these nonconclusory factual allegations as true, as it was required to do under *Southwest Ctr.*, 268 F.3d at 819, the district court questioned whether NOM's members even existed. It referred to them as "phantoms" and a "moving target." Plaintiffs' Resp. Ex. A at 11, 13, 52. It rejected NOM's factual assertion that its county clerk member would suffer personal harms in the performance of his or her official duties because of sincerely-held religious objections

to facilitating same-sex marriages. *Id.* at 13 (The Court: "How would I ever know that? How would I ever know that that's a personal harm? I mean, you haven't given us, even under seal, the name of the county. I mean, I imagine if we looked at the census data for someplace like Lake County …, we may find that in fact there are almost no gay families registered in Lake County, and we might be able to at least use that information to decide, you know, is this a hypothetical harm, is it a real harm, or are Lake County officials willing to make an accommodation for this particular individual."); see also *Id*. at 50 ("The proposed intervenor has provided little information as to what the clerk's protectable interest is in this litigation other than that he or she may be required to perform a job duty that they might have a moral or religious objection to. Such a generalized hypothetical grievance, no matter how sincere, does not confer standing"). And the court even implicitly rejected NOM's factual allegation that its county clerk member was an elected county clerk (who by definition has an "agency" relationship with the county government), stating instead: "I am not hearing official capacity, any agency relationship. … An agency relationship between your clerk and their local government." *Id*. at 11.

That the district court failed to credit NOM's nonconclusory factual allegations as true is enough for the Ninth Circuit to overturn its decision denying NOM's motion to intervene. But the district court's insistence that NOM provide enough information to identify its members is particularly troubling. NOM brought this suit on behalf of its members on the authority of this Court's decision in

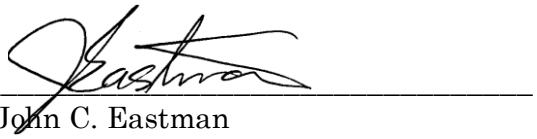
NAACP v. Alabama, 357 U.S. 449, 459 (1958). As NOM alleged and the district court seemed to accept, NOM's members face a real risk of harassment and intimidation if they intervene in their own name. Declaration of Brian S. Brown ¶¶ 4, 7, 8; Declaration of John C. Eastman ¶¶4, 6, 8; Plaintiffs' Resp. at 49 ("I understand there are, I think, genuine issues of concern that the proposed intervenor may have"). Disclosing the identities of NOM's members, or other information from which their identifies could be ascertained, as the district court seemed to demand, would expose those members to the very harassment risks that the organizational standing approved by the Supreme Court in NAACP v. Alabama was designed to prevent.

Thus, to the extent that the district court's holding was based on lack of the additional detail that revelation of the members' identities would have provided, it was an erroneous application of the law, and NOM is therefore likely to succeed on the merits of its appeal.

CONCLUSION

For the reasons stated above and previously, NOM respectfully requests that the Circuit Justice issue the requested stay of the district court's judgment and injunction pending appeal. If the Circuit Justice is either disinclined to grant the requested relief or simply wishes to have the input of the full Court on this application, NOM respectfully requests that it be referred to the full Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that I served a true and complete copy of the foregoing **REPLY IN SUPPORT OF APPLICATION FOR STAY**, via e-mail **and** via U.S. postal service delivery on June 3, 2014, to each of the parties and at each parties' regular address as shown in the attached service list.

DATED this 3rd day of June, 2014.

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