No. 14-35427

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL ORGANIZATION FOR MARRIAGE, INC.
Appellant-Proposed Intervenor

v.

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

and

JOHN KITZHABER, *et al.*
Defendants-Appellees

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

APPELLANT'S OPPOSITION TO MOTION TO DISMISS

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INTRODUCTION

Defendants—both the State Defendants and the Multnomah County Assessor who is responsible for issuing marriage licenses in his county—filed a motion to dismiss the appeal from the National Organization for Marriage, Inc. ("NOM") on the sole ground that the case was now moot because after NOM's motion to intervene was denied, the district court granted summary judgment for Plaintiffs and Defendants will not appeal that decision. As if to highlight the non-adversarial nature of the litigation in the district court below, both sets of Plaintiffs joined Defendants' motion to dismiss.

For the reasons set out more fully below, Defendants' and Plaintiffs' claim of mootness is erroneous. NOM has appealed from the order denying its motion to intervene, D.Ct. Dkt. #117 (May 16, 2014), and has also filed a protective notice of appeal from the underlying merits judgment itself, D.Ct. Dkt. #121 (May 22, 2014).[1] This case therefore remains a live controversy. If this Court holds that

[1] NOM did not file a separate motion to intervene for purposes of appeal after the judgment was issued below because the district court denied NOM's pre-judgment motion on both grounds of timeliness and lack of protectable interests. Because the protectable interests inquiry is the same for both pre- and post-judgment motions for intervention, a renewed motion to the district court would have been futile. The timeliness inquiry is different, however. *See, e.g., U.S. ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 719–720 (9th Cir. 1995) (holding that the district court abused its discretion in denying as untimely government's post-judgment motion to intervene for purposes of appeal, even after the government has specifically declined to intervene on several occasions before

NOM has a legal right to intervene in the case, the judgment below can be vacated and, following the procedure the district court already recognized would be appropriate, NOM can provide a brief in actual opposition to the motions for summary judgment, an adversarial (rather than a non-adversarial) hearing on those motions can be had, and a new judgment issued with possibility of appellate review by this Court. At the very least, if NOM's right to intervene is recognized by this Court, the protective notice of appeal from the merits judgment already filed by NOM would be sufficient to give this Court jurisdiction to review that judgment on appeal.

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judgment was rendered); *id.* at 719 ("Generally, the court will consider a post-judgment motion to intervene to be timely if filed within the time limitations for filing an appeal" (citing *Yniguez v. Arizona*, 939 F.2d 727, 734 (9th Cir.1991)). Because the district court arguably no longer has jurisdiction even to consider a motion for post-judgment intervention for purposes of appeal, *see Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 929 (5th Cir. 1983) ("the filing of a valid appeal deprives the district court of jurisdiction to hear a motion to intervene"); *cf. Smith v. Lujan*, 588 F.2d 1304, 1307 (9th Cir. 1979) ("the district court had no jurisdiction" to consider a Rule 60(b) motion filed after a notice of appeal had been filed), and because NOM's appeal of the denial of its original motion to intervene is already pending in this Court, it seems unnecessarily duplicative to file a new motion to intervene in this court for purposes of post-judgment appeal. Nevertheless, because of the difference in the timeliness inquiry, NOM requests that its prior motion to intervene be treated both as a motion to intervene pre-judgment for all purposes, and a motion to intervene post-judgment for purposes of appeal.

ARGUMENT

I. Defendants' Decision Not to Appeal the Adverse Judgment Below Does not Moot this Case as Long as NOM's Motion to Intervene Remains Live and a Protective Notice of Appeal from the Merits Judgment Has Been Filed.

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 this Court 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 Supreme Court's recent decision in *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013), reiterated that the intervenor must independently have standing in order to pursue an appeal when the original parties decline to do so, *id.* at 2661-62, 2668, but it 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 it has independent Article III standing, and the merits of its claim is pending review by this Court. If this Court agrees that NOM has independent Article III standing, then NOM would be able to pursue 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).

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 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, this Court 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.*[2]

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

[2] *LULAC* also held that the appeal of the order denying intervention was not moot because the district court had not yet issued a final judgment, only a memorandum opinion granting plaintiffs' motion for summary judgment. But the Court treated that and the *Purcell* holding as "two independent reasons" why the appeal was not moot. *Id.*

merits." *Mausolf v. Babbitt*, 125 F.3d 661, 666 (8th Cir. 1997). This Court has ratified that procedure. *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). And NOM has followed it by filing a protective notice of appeal in the district court. D.Ct. Dkt. # 121 (May 22, 2014).

Defendants' motion to dismiss 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), Defendants 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 "where the district court subsequently decides the underlying litigation and issues final judgment, and no party appeals." MTD at 3. Defendants read much too much into the *West Coast Seafood Processors* case, and ignore all of the above precedent (including precedent from this Court) to the contrary.

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).[3] 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.[4]

Here, NOM has filed a protective notice of appeal, a procedure that this Court 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 jurisdiction of this Court to consider NOM's appeal from the final judgment in the event this Court holds that NOM's motion to intervene

[3] The district court granted summary judgment on the relevant challenge on April 23, 2010 (Dkt. #340), and issued an Order on Remedy on April 29, 2010 (Dkt. #342). The United States appealed from those decisions on June 28, 2010 (Dkt. # 345), but later moved for voluntary dismissal of its appeal, which was granted on August 19, 2010 (Dkt. #352). West Coast Seafood Processors filed a notice of appeal on August 14, 2009 from the July 31, 2009 order denying its motion to intervene (Dkt. #305), but it never filed a notice of appeal from the summary judgment decision itself. The intervention appeal was argued on June 14, 2010, but not decided until July 6, 2011. *West Coast Seafood Processors*, 643 F.3d at 701.

[4] The Summary Judgment order invalidated the 2009-10 biennial fishing quota, which would have expired on its own by the time proposed intervenor's appeal was decided, rendering the case moot on that ground as well.

was improperly denied, as this Court held in *LULAC*. *LULAC*, 131 F.3d at 1301 n.1. The majority opinion in *West Coast Seafood Processors* does not even mention *LULAC*'s prior holding, much less purport to overrule it. Nor could it. "One three-judge panel of this court cannot reconsider or overrule the decision of a prior panel." *United States v. Gay*, 967 F.2d 322, 327 (9th Cir.1992).

Defendants' reliance on *United States v. Ford*, 650 F.2d 1141, 1143 (9th Cir. 1981), is likewise unavailing. In *LULAC*, this Court 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*").

In sum, governing circuit precedent 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.

II. The Significantly Protectable Interests NOM Has Asserted on Behalf of Its Members for Rule 24(a) Intervention of Right Are Also Concrete and Particularized Injuries in Fact for Article III Standing.

Defendants also contend that NOM's appeal is moot because NOM has "failed to make any showing that [its members] would have Article III standing to appeal." MTD at 5. Defendants have confused mootness with the merits of

NOM's intervention appeal. Whether or not NOM's members (and, derivatively, NOM itself under *NAACP v. Alabama*, 357 U.S. 449 (1958)) have Article III standing to appeal from the underlying merits judgment overlaps the intervention issue of whether they have "significantly protectable" interests relating to the subject of the action entitled them to intervene as of right under Rule 24(a)(2). *See Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817-18 (9th Cir. 2001). All of the interests NOM has asserted to meet the "significantly protectable" requirement under Rule 24(a)(2) also meet the requirements of Article III standing, which requires that "the litigant to prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision." *Hollingsworth*, 133 S. Ct. at 2661 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

NOM moved to intervene on behalf of three categories of members: 1) A county clerk, whose duties include issuance of marriage licenses in Oregon; 2) wedding services providers, whose sincerely-held religious objections to facilitating same-sex marriages will be placed in conflict with their legal obligations under Oregon's public accommodations law if the judgment below redefining marriage stands; and 3) an Oregon voter who voted for Oregon's marriage amendment in 2004 but now finds that, due to the non-enforcement and non-defense decisions of the Oregon Attorney General, that vote has been entirely

negated. NOM argued in its motion to intervene below, and will do so before this Court on appeal, that the interests each of those members have in this litigation are both "significantly protectable" interests for purposes of Rule 24(a)(2) and also meet the requirements for Article III standing, any one of which is sufficient.[5]

A. Article III Standing for NOM's County Clerk member.

Under Oregon law, county clerks are responsible for issuing marriage licenses "directed to any person or religious organization or congregation authorized by Ore. Rev. Stat. § 106.120 to solemnize marriages, and authorizing the person, organization, or congregation to join together as husband and wife the persons named in the license." Ore. Rev. Stat. § 106.041(1). The clerk must issue a marriage license if, but only if, "all other legal requirements for issuance of the marriage license have been met." Ore. Rev. Stat. § 106.077. "County clerks . . . cannot issue marriage licenses contrary to the statutes set out in ORS chapter 106 that circumscribe their functions." *Li v. State*, 110 P.3d 91, 95 n.5 (Ore. 2005). That includes Section 106.010, which provides that "Marriage is a civil contract entered into in person by males at least 17 years of age and females at least 17 years of age, who are otherwise capable, and solemnized in accordance with ORS

[5] Because there is no dispute that NOM's members meet the "fairly traceable" and "redressability" requirements, the discussion which follows focusses on whether NOM's members have concrete and particularized injuries sufficient to establish Article III standing.

106.150." Ore. Rev. Stat. § 106.010. It also has included, since its adoption by the voters in 2004, Article 15, Section 5a of the Oregon Constitution, which provides: "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.

As the Oregon Supreme Court noted in *Li v. State*, "[t]he ministerial aspects of issuing marriage licenses in Oregon have, by statute, long been a county function." *Li v. State*, 110 P.3d at 95 n.5. County clerks are "charged with the responsibility of physically issuing the licenses." *Id.* (citing Ore. Rev. Stat. § 106.041). "The county clerk is also the entity that must receive a couple's written application and verify that the legal requirements for issuing a marriage license have been met." *Id.* (citing Ore. Rev. Stat. § 106.077). Most significantly, the Court held that "County clerks . . . cannot issue marriage licenses contrary to the statutes set out in ORS chapter 106 that circumscribe their functions." *Id.* (citing Ore. Rev. Stat. § 106.110).

Given these official duties and obligations, a county clerk clearly has a protectable interest authorizing his or her intervention as of right under Rule 24(a), and it is an interest that is both "concrete and particularized" for purposes of Article III standing as well. Indeed, county clerks have frequently been named as defendants in litigation by same-sex couples challenging their State's marriage

laws. *See, e.g.*, *Smelt v. County of Orange*, 447 F.3d 673 (9th Cir. 2006) (lawsuit against Orange County, California clerk for injunction and declaratory relief that California law prohibiting same-sex marriage was unconstitutional); *Lockyer v. City & County of San Francisco*, 95 P.3d 459 (Cal. 2004) (county clerks sued for issuing same-sex marriage licenses); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007) (same-sex couples sue county clerks for refusing to issue marriage licenses); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) (same). Plaintiffs themselves recognized the official interest of county clerks by naming as a defendant the Multnomah County Assessor who, performing the duties with respect to the issuance of marriage licenses that are performed by county clerks elsewhere in the State, "is responsible for maintaining vital records of marriages and issuing marriage licenses in Multnomah County, Oregon." First Amended Complaint (D.Ct. Dkt. #8) ¶ 16.

Because Plaintiffs sought, and the district court has now entered, a permanent injunction barring enforcement of Oregon's marriage laws by all defendants and "their officers, agents, and employees," which the state defendants have interpreted as binding county clerks throughout the state, Proposed Intervenor's members who are County Clerks who issue marriage licenses are directly affected in the performance of their duties by the judgment below. That is both a "significantly protectable" interest for Rule 24(a), and a "concrete and

particularized injury" for Article III. *See Coleman v. Miller*, 307 U.S. 433, 441-42 (1939) (noting that public officials have a legitimate interest "to resist the endeavor to prevent the enforcement of statutes in relation to which they have official duties"); *see also Perry v. Schwarzenegger*, 630 F.3d 898, 903 (9th Cir. 2011) (noting that "[w]ere Imperial County's elected County Clerk [rather than the deputy clerk] the applicant for intervention, that argument [that the injunction would directly affect the Clerk's performance of her legal duties] might have merit").

B. Article III standing for NOM's members who are providers of wedding services.

As noted in its motion to intervene below, NOM's members include providers of wedding services who have sincerely-held religious objections to facilitating marriage ceremonies between people of the same sex. Brown Decl. ¶¶ 6, 7. Oregon's public accommodation statute defines a "place of public accommodation" as including "any place or service offering to the public . . . facilities or privileges whether in the nature of goods [or services . . . ." Ore. Rev. Stat. § 659A.400. The law then prohibits a "place of public accommodation" from selectively providing its services on the basis of, inter alia, "sexual orientation." Ore. Rev. Stat. § 659A.403. Prior to the judgment below, wedding service providers in Oregon were not required to facilitate official marriage ceremonies

between people of the same sex because Oregon law did not allow for such ceremonies. But after the judgment declaring Oregon's marriage law unconstitutional, NOM's members who provide wedding services and who have sincerely-held religious beliefs that prevent them from facilitating marriage ceremonies between people of the same sex find themselves in the untenable position of having to choose between: 1) adhering to their religious beliefs and either violating Oregon's public accommodation law or ceasing to engage in the wedding services business; or 2) complying with Oregon's public accommodation law in violation of their sincerely-held religious beliefs. That is both a protectable interest for Rule 24(a)(2) purposes and a "concrete and particularized" injury giving them standing to participate in this litigation.

C. Article III standing for NOM's members who voted for Measure 36.

NOM's members also include citizens of Oregon who voted in support of Measure 36, the 2004 ballot initiative that added Article 15, Section 5a to the Oregon Constitution, which provides "that only a marriage between one man and one woman shall be valid or legally recognized as a marriage." Ore. Const. Art. 15, § 5a; Brown Decl. ¶¶ 6, 8. The judicial relief obtained by Plaintiffs in these cases, after a non-adversarial proceeding in which State officials not only refused to defend but also refused to enforce part of Oregon's marriage law, negates the votes of those individuals (and the votes of the 1,028,546 Oregonians who voted to

approve Measure 36). The Supreme Court has repeatedly recognized that the right to vote is a constitutionally-protected fundamental right that cannot be denied directly but also cannot be destroyed or diluted indirectly. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). "Having once granted the right to vote," as Oregon has done here with its constitutional initiative process, "the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966)). Yet that is precisely what the Oregon Attorney General has done here. By refusing to provide any defense to the Oregon marriage law, adopted by the voters of Oregon in 2004, when a perfectly plausible defense can be made, the Oregon Attorney General has entirely and arbitrarily negated the votes of the more than one million Oregon voters who successfully supported Measure 36, in favor of the less than eight hundred thousand Oregon voters who unsuccessfully opposed it. Those voters who supported Measure 36, some of whom are members of NOM, have standing to appeal a decision negating their vote when the Attorney General declines to notice an appeal. *See League of United Latin American Citizens v. Clements*, 923 F.2d 365, 367 (5th Cir.1991) (holding that individual voters have standing to appeal from a judgment negating their votes when the state agency declined to do so, recognizing that "if the court were to deny standing to these voters, it 'would be forced to conclude that most of

the plaintiffs also lack standing, a conclusion foreclosed by the many cases in which individual voters have been permitted to challenge election practices.'" (quoting *Meek v. Metropolitan Dade County*, 985 F.2d 1471, 1480 (11th Cir.1993) (citing in turn *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *Baker v. Carr*, 369 U.S. 186 (1962))).

CONCLUSION

For the reasons stated above, NOM's appeal of the district court's order denying its motion to intervene is not moot. Defendants' motion to dismiss should be denied.

Dated: May 30, 2014

Respectfully submitted,

s/ John C. Eastman
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 30, 2014, I electronically filed Appellant's OPPOSITION TO MOTION TO DISMISS with the Clerk of the Court using the CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

May 30, 2014

/s/ John C. Eastman
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