**No. 14-35427**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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NATIONAL ORGANIZATION FOR MARRIAGE, INC.
*Appellant-Proposed Intervenor*

v.

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

and

JOHN KITZHABER, *et al.*
*Defendants-Appellees*

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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)

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# APPELLANT'S OPPOSITION TO SECOND MOTION TO DISMISS

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## INTRODUCTION

Defendants' second Motion to Dismiss turns on whether NOM's members have particularized and concrete injuries sufficient to give NOM standing to appeal the lower court's judgment on their behalf even though Defendants themselves have foresworn such an appeal. That is the same issue that was the basis of Defendants' still-pending first Motion to Dismiss, in which they argued that NOM's interlocutory appeal was moot because NOM did not have standing to appeal the underlying judgment even if this Court ruled it had a right to intervene. And it is very similar to the position Defendants asserted in opposition to NOM's motion to intervene itself, namely, that NOM was not entitled to intervene as of right because its members had no protectable interests in this litigation.

On behalf of its members, NOM has asserted protectable interests that are both concrete and particularized, interests that suffice not just for intervention but for Article III standing as well. Whether the government Defendants or NOM is correct is the issue that this Court will determine on NOM's appeal of the denial of its motion to intervene. This Court has established a briefing schedule to consider that important issue in due course. If it accepts NOM's position, then the

Government's argument in both its first and second Motions to Dismiss would likely fail as well.[1]

It almost seems as though Defendants want this case definitely resolved with a final judgment *against them* before the Supreme Court has a chance to issue a decision in a case from another state that might well uphold a marriage law identical to Oregon's and give lie to the Attorney General's position here that there is no colorable argument to be made in support of Oregon's marriage law. But that is not a proper reason to short-circuit the current appeal and briefing schedule with a preliminary adjudication of the same issue on a motion to dismiss. Alternatively, if Defendants are now of the view that there is some urgency to resolution of NOM's appeal because of uncertainty about the legal status of the marriage licenses currently being issued to same-sex couples, as well as concern that the Supreme Court might well undermine the judgment below when it decides one of the pending cases from Utah, Oklahoma, or Virginia, the appropriate way to address that concern is for this Court to reconsider NOM's request for a stay. *See* 9th Cir. Dkt. #5.

[1] While some "protectable interests" sufficient to warrant intervention may not be sufficiently concrete and particularized to satisfy Article III standing requirements, the interests NOM has alleged qualify for both.

In any event, for the reasons set out below, Defendants' claim that NOM lacks Article III standing is without merit. It is based on straw man arguments that are easily rebutted.

## ARGUMENT

### I. Defendants' Straw Man Arguments Mischaracterize But Do Not Defeat NOM's Arguments for Article III Standing.

Often, the strength of one's argument is directly proportional to the effort spent by opponents to mischaracterize it. That is certainly the case here. Defendants have gone out of their way to mischaracterize NOM's arguments into straw men, then asked this Court to rule in their favor because they have knocked the stuffing out of the scarecrows they created. But when this Court considers the arguments NOM has actually made, it will see that NOM's members do meet the criteria for Article III standing.

Mischaracterization number one, which pervades Defendants' brief, is that NOM's members have only a "generalized, hypothetical grievance," rooted in their "religious or other personal objection to same-sex marriage." Def's Second Mot. to Dismiss at 3, 5. If that were truly the basis of NOM's claim of right to intervene, then NOM would agree that the elements of Article III standing, as defined by current precedent, would not be met. But it is not the basis upon which NOM relies. Rather, for each class of its members on whose behalf NOM claims

standing, NOM has, through unrebutted, sworn testimony, asserted concrete and particularized injuries of the sort that the courts have routinely recognized as conferring Article III standing. Its county clerk member(s), for example, are public officials responsible under Oregon law for the issuance of marriage licenses, and because of the judgment below, are now compelled to issue marriage licenses contrary to that law. *See* Section II.A, *infra*. Prior to the judgment below, NOM's members who provide wedding services did not confront a conflict between their religious faith and Oregon law, but following that judgment, they now do. *See* Section II.B, *infra*. NOM has even alleged a sufficient injury for Article III standing purposes on behalf of its members who voted in 2004 for Measure 36, which added to Oregon's constitution Oregon's long-standing statutory definition of marriage. The courts routinely allow vote dilution and vote negation claims by voters who suffer the same injury as an entire class of voters, or even the same injury as all voters within a particular jurisdiction. That such injuries may not be "particularized" in the sense applied in other contexts has not been a bar to Article III standing. *See* Section II.C, *infra*.

Mischaracterization number two is that NOM has asserted only "personal capacity" injuries on behalf of its county clerk member(s) (and in fact can only assert such injuries). Def's Second Mot. to Dismiss at 4. But NOM has asserted

injuries on behalf of its county clerk member(s) that arise both from their performance of official duties and from the conflict between those duties and their religious beliefs that has resulted from the judgment below. Each of those injuries suffices for Article III standing. *Infra*, Section II.A.

Mischaracterization number three is that NOM's members who provide wedding services have no injury because they are already required by Oregon law to provide their business services without regard to the sexual orientation of their customers. But NOM has not asserted that its wedding service members object to providing services to gays and lesbians generally. Rather, it has asserted that those members have sincerely held religious objections to *"facilitating* marriage ceremonies between people of the same sex." Memo in support of Motion to Intervene (D.Ct. Dkt. #87) at 11 (citing Declaration of Brian Brown ¶¶ 6, 7). Prior to the judgment below, Oregon's public accommodations law did not require wedding service providers to facilitate same-sex weddings because Oregon law did not allow such weddings. After the judgment below, Oregon law requires wedding service providers to participate in and facilitate such weddings or risk prosecution or civil liability under Oregon's public accommodations laws. *See* Section II.B *infra*.

Mischaracterization number four is Defendants' assertion that NOM has claimed Article III standing merely because it disagrees with Defendants' legal arguments. Mot. at 10-11. NOM has never made such a claim, so Defendants' reliance on *Clapper v. Amnesty Int'l, USA*, 133 S. Ct. 1138, 1154 (2013), and *Hollingsworth v. Perry*, 133 S.Ct. 2652, 2661 (2013), is misplaced. Rather, NOM has elaborated on its extensive disagreement with Defendants' legal arguments (as well as Defendants' unnecessary concessions of fact) to demonstrate that Defendants were not adequately representing the protectable interests of NOM's members, one of the elements for establishing intervention of right under Rule 24(a). And for that purpose (as opposed to an Article III standing purpose), NOM's disagreement with Defendants' legal arguments is highly relevant. NOM's contention is not about a mere disagreement over litigation tactics, but an objection to Defendants' complete abdication of any defense. In any event, Defendants' refusal to file an appeal from the adverse judgment below is alone sufficient to establish inadequate representation for Rule 24(a) purposes. *See, e.g., Mausolf v. Babbitt*, 125 F.3d 661, 666–667 (8th Cir. 1997) ("The [National Park Service's] decision not to appeal … emphasizes the disparity between its interests and those of the" environmental organizations who sought to intervene and pursue the appeal that the government had abandoned); *Dimond v. District of Columbia*, 792 F.2d

179, 191–193 (D.C. Cir. 1986); *Legal Aid Socy. v. Brennan*, 608 F.2d 1319, 1328 (9th Cir. 1979).

Finally, Defendants mischaracterize both the law and facts on intervention, asserting that because there was no remedy for the injuries Plaintiffs alleged on their specific legal claims "that could be ordered against NOM or any of its members, . . . NOM's interests and those of its members were never at issue in the litigation." Mot. at 4. That claim is factually incorrect; Plaintiffs' sought a statewide injunction, and NOM's county clerk member(s) have now been ordered by the State Defendants to comply with the judgment below as supposed functionaries of the State Defendants. *See* D.Ct. Dkt. #119 (enjoining "Defendants and their officers, agents, and employees" from enforcing Oregon's marriage law).

But Defendants' assertion is also legally incorrect. The test for intervention is not whether the remedies sought by Plaintiffs will operate against the proposed intervenors, but whether the proposed intervenors will find their protectable interests harmed by those remedies. "Many cases establish that intervention can be sought in the district court for the purpose of appealing a judgment *that has an adverse effect on the intervenor*," even "when no party is appealing." Wright & Miller, 15A Fed. Prac. & Proc. Juris. § 3902.1 (2d ed.) (emphasis added) (*citing, e.g.*, *Bryant v. Yellen*, 447 U.S. 352, 365-69 (1980); *United Airlines, Inc. v.*

*McDonald*, 432 U.S. 385, 395 n. 16 (1977); *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1411-12 & n. 8 (9th Cir. 1996)). As this Court recently held, "a prospective intervenor 'has a sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation.'" *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (en banc) (quoting *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006)); *see also Association of Banks in Insurance v. Duryee*, 270 F.3d 397, 402–403 (6th Cir. 2001) ("When considering whether the intervenor-defendants have standing to appeal, our focus is on the injury caused by the judgment rather than the injury caused by the underlying facts"). "No part of Rule 24(a)(2)'s prescription engrafts a limitation on intervention of right to parties liable to the plaintiffs on the same grounds as the defendants." *Id.* at 1178-79. "Intervenors can allege a threat of injury stemming from the order they seek to reverse, an injury which would be redressed if they win on appeal." *Idaho Farm Bureau Fedn. v. Babbitt*, 58 F.3d 1392, 1398–1399 (9th Cir. 1995). Indeed, "private parties can litigate the constitutionality or validity of state statutes, with or without the state's participation, so long as each party has a sufficient personal stake in the outcome of the controversy as to establish standing." *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 428-30 (6th Cir. 2008).

With those mischaracterizations out of the way, we may now turn to the arguments NOM actually has made in support of its Article III standing on behalf of its members pursuant to the Supreme Court's decision in *NAACP v. Alabama*, 357 U.S. 449, 459 (1958).[2]

## II. NOM Has Alleged Interests on Behalf of Each of the Three Categories of Its Members Sufficient To Establish Article III Standing to Intervene in this Matter.

### A. NOM's county clerk member(s) have "concrete and particularized" injuries in both their official and personal capacities.

#### 1. A County Clerk's official duty to issue marriage licenses in accord with Oregon law is a sufficient interest for Article III standing purposes, and because that is "germane" to NOM's

[2] Defendants do not challenge, and therefore apparently concede, NOM's claim that it has third-party standing under *NAACP v. Alabama* to raise the claims of its members. For good reason, because the law is clear: "Even in the absence of injury to itself, an association may have standing solely as the representative of its members." *Warth v. Seldin*, 422 U.S. 490, 511 (1975) (citing *National Motor Freight Assn. v. United States*, 372 U.S. 246 (1963)). Instead, Defendants seek to undermine *NAACP v. Alabama* indirectly, referring to NOM's members as "unidentified," "anonymous," and a "mystery," Def's' Second Mot. to Dismiss, at 3, 5, 6, just as the court below had earlier described them as "phantoms," D.Ct. Dkt. #115, pp. 13, 52, in an apparent attempt to undermine their claims of standing for lack of specific factual allegations that would allow them to be identified. But *NAACP v. Alabama* and its progeny allowed third-party standing precisely where there are significant barriers to the individual members bringing claims on their own behalf, such as the documented fears of threats, harassment, and retaliation alleged by NOM here. It would make no sense to allow third-party standing in such cases only after requiring breach of the individual members' anonymity. *See NAACP v. Alabama*, 357 U.S. at 459 (rejecting such a requirement).

**organizational purpose, NOM can press that interest on behalf of its county clerk member(s).**

NOM has previously argued at length, in its opposition to Defendants' First Motion to Dismiss, that the official duties of its County Clerk member(s) are sufficient to establish Article III standing. *See* 9th Cir. Dkt. #31, pp. 11-14. Those arguments remain valid,[3] and NOM incorporates them here by reference in order to avoid unnecessarily burdening the Court with duplicative briefing. In sum, under Oregon law, County Clerks are responsible for issuing marriage licenses, and under the injunction issued to Defendants by the Court below and the subsequent implementing directive issued by the State Defendants, all County Clerks have now been directed to perform their duties differently. That establishes both a protectable interest for intervention and a "concrete and particularized injury" sufficient for Article III standing, as this Court has already discussed at length. *See 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

[3] Last week, the District Court for the Eastern District of Pennsylvania rejected a motion by a county clerk to intervene for purposes of appeal. Memorandum and Order, *Whitewood v. Wolf*, No. 13-cv-01861 (M.D. Pa., June 18, 2014). That decision, which the clerk has already appealed to the Third Circuit, *see id.*, Dkt. #152, is contrary to this Court's *dicta* in *Perry v. Schwarzenegger*, 630 F.3d 898, 903 (9th Cir. 2011).

performance of her legal duties] might have merit"); *id.* at 904 ("being bound by a judgment [enjoining performance of official duties limiting marriage licenses to opposite-sex couples] may be an (sic) 'concrete and particularized injury' sufficient to confer standing to appeal," but "the 'injury,' if any, would be to the Clerk, not a deputy").

Defendants appear to concede that a County Clerk's official duties are sufficient to establish Article III standing,[4] so in their Second Motion to Dismiss (repeating verbatim what they asserted in their reply in support of their first Motion to Dismiss), they argue that NOM can only assert personal as opposed to professional interests of its County Clerk members. Defendants cite no authority for that proposition,[5] and offer no argument why, under *NAACP v. Alabama* and its

[4] Indeed, Plaintiffs have even acknowledged that they named a County Clerk as a defendant "to help ensure there would be no question that counties are bound by the Court's judgment." *See* Plaintiffs' Joint Response in Opposition to Motion to Intervene, at 13 n.6 (D.Ct. Dkt. #105).

[5] Defendants have previously relied on *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835-836 (9th Cir. 1996), which addressed whether negligent training can give rise to a Section 1983 action when the tort was committed while the police officer was acting as a private citizen rather than a state actor. The distinction between private and official duties in that case has no bearing on the issue here. Similarly, Plaintiffs have previously relied on *Cooke v. Hickenlooper*, No. 13-01300, 2013 WL 6384218, *9 (D. Colo. Nov. 27, 2013), for the incontrovertable point that government officials can assert rights in two capacities. But that point does not address the issue presented here, namely, whether a private association can press

progeny, an organization devoted to protecting the one-man/one-woman definition of marriage in state law could not seek to vindicate the interests of its County Clerk members whose official duties include the issuance of marriage licenses.

Indeed, the law is to the contrary. As the Supreme Court has held, "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); *see also San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1130–31 (9th Cir. 1996) (applying *Hunt*). The second of these "prerequisites" to associational standing is at issue here, and that prerequisite does not distinguish between personal and professional interests, only whether "the interests" the association seeks to protect on behalf of its members "are germane to the organization's purpose." *Hunt*, 432 U.S. at 343. The reason the Court has such a prerequisite is because the requirement "assur[es] adversarial vigor in pursuing a

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interests rising out of the official duties of its members who are also government officials.

claim for which member Article III standing exists." *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 556 (1996).

Under the *Hunt* test, NOM's associational representation of the official interests of its County Clerk member(s) is clearly "germane" to NOM's purpose. County Clerks are the public officials responsible for issuing marriage licenses. NOM's mission is to protect the definition of marriage as between one man and one woman and to oppose its redefinition to include same-sex relationships, as Defendants themselves have acknowledged. *See* Defendants' Joint Response to the Motion to Intervene, D.Ct. Dkt. #102, at 2 ("NOM is a national organization focused solely on preventing same-sex couples from having the right to marry"). NOM therefore opposes the issuance of marriage licenses to same-sex couples, a purpose that is not just "germane" but directly related to the official duties of County Clerks in Oregon, and Defendants cannot possibly contend that NOM is not pursuing that mission with adversarial vigor. Under *Hunt*, nothing more is required.

The cases that limit third-party associational standing focus instead "on the nature of the relief sought," not on the hat being worn by the member on whose behalf the relief was sought. *Warth*, 422 U.S. at 515. In *Minority Employees of Tenn. Dep't of Emp't Sec., Inc. v. State of Tenn., Dep't of Emp't Sec.*, for example,

a private non-profit organization was held to have standing to seek injunctive relief on behalf of its government employee members, but not to seek damages for the specific harms any of its individual members might have suffered. 573 F. Supp. 1346, 1349 (M.D. Tenn. 1983). Individual participation by the injured parties was indispensable to a proper resolution of the claim for damages and that claim was therefore barred, but individual participation was not indispensable to the claim for injunctive relief and the non-profit association was allowed to press that claim on behalf of its members. *Id*.; *see also Hunt*, 432 U.S. at 343 (holding that third party "representational standing" is available if, *inter alia*, "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit").

Applying that rule here, NOM can defend against the injunction Plaintiffs sought (and have now obtained), because individual participation by the county clerk is not indispensable to that defense, but it may not be able to seek a specific accommodation remedy on the clerk's behalf because such a remedy would probably require the clerk's individual participation (which is itself only a prudential rather than an Article III limitation on standing, see *United Food*, 517 U.S. at 555).

**2. NOM has also alleged "concrete and particularized" personal interests of its County Clerk member(s) that are sufficient for Article III purposes.**

Even if this Court were to conclude that the *Hunt* germaneness inquiry precludes a private association from pressing interests that arise out of the official duties of its government official members, NOM has also alleged personal interests of its County Clerk member(s) that will also be affected in a concrete and particularized way by this litigation. In sworn, unrebutted testimony, NOM alleged that one of its members "is an elected County Clerk who issues marriage licenses, who supports marriage between one man and one woman, [and] *who 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* …." Declaration of John C. Eastman ¶ 8 (emphasis added) (D.Ct. Dkt. #110). Such "nonconclusory allegations made in support of an intervention motion" must be "accept[ed] as true." *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 819 (9th Cir. 2001). Moreover, "[f]or purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth*, 422 U.S. at 501.

That unrebutted, sworn allegation establishes that NOM's County Clerk member(s) have a "concrete and particularized" interest in this litigation, not a generalized interest, even if NOM can only press their personal interests. As NOM noted in its briefing in support of its Motion to Intervene, "the fact that a clerk may be a member of NOM only in his or her personal capacity rather than as a public official does not alter that he or she has protectable interests in this litigation." Reply in support of Intervention, at 17 (D.Ct. Dkt. #109). Specifically, NOM noted that, before the judgment below, "an individual with a sincerely-held religious objection to facilitating same-sex marriages [could] hold the office of county clerk without violating any religious beliefs." *Id.* But after the judgment, that is no longer . . . the case, and the person might feel compelled by religious conviction to resign rather than violate those beliefs, or to delegate away an important part of his or her duties." *Id.* Those are protectable interests, but they do not turn on whether the clerk's interest is official or personal. It is the conflict between the two that creates the problem. NOM's County Clerk member(s) therefore have protectable interests that NOM can assert on their behalf.

Defendants' contention that "the clerk might seek to have the county accommodate that objection by having a deputy clerk or some other county official issue the license that is now required by the district court's order in this case,"

Defendants' Second Mot. to Dismiss, at 5, does not alter the fact that these interests are both concrete and particularized. The issuance of marriage licenses is a significant part of a County Clerk's duties. Reassignment of those duties to someone else (even assuming Oregon law permits such a reassignment) is therefore a concrete and particularized injury in and of itself. *Cf. Coszalter v. City of Salem*, 320 F.3d 968, 974-77 (9th Cir. 2003) (holding that reassignment of employment duties is an "adverse" employment action that was unconstitutional retaliation for employee's exercise of free speech rights); *Rutan v. Republican Party of Illinois*¸ 497 U.S. 62, 73-75 (1990) (holding that employment actions less severe than termination, such as a transfer (even a non-punitive transfer) can be adverse and therefore unlawful retaliation under Title VII). At most, Defendants' contention addresses what kind of remedies might be available to accommodate the conflict between the religious interests asserted by NOM's County Clerk member(s) and the judgment below, not whether those interests are concrete and particularized. If this were a suit only about the actions that might be taken to accommodate that conflict, participation by the County Clerk(s) themselves might well be required, raising a prudential concern about NOM's third-party associational standing on that discreet point (and only that point). *See Hunt*, 432 U.S. at 343; *United Food*, 517 U.S. at 555. But this is not such a suit, and NOM's

opposition to the injunction issued below, if successful, would protect the interests of its County Clerk member(s) without requiring a separate litigation over possible accommodations. Under *Hunt*, that is sufficient to establish the standing of NOM's County Clerk member(s).

### B. NOM's members who provide wedding services have concrete and particularized interests affected by this litigation.

NOM has alleged, in unrebutted, sworn testimony, that its members who provide wedding services have sincerely held religious objections to *"facilitating* marriage ceremonies between people of the same sex." Memo in support of Motion to Intervene (D.Ct. Dkt. #87) at 11 (citing Declaration of Brian Brown ¶¶ 6, 7). As with the allegations regarding its County Clerk member(s) discussed above, those allegations must be accepted as true, both for intervention purposes and the supposed lack of standing asserted by Defendants in their motion to dismiss. *Southwest Center*, 268 F.3d at 819; *Warth*, 422 U.S. at 501.

Before the judgment was issued below, wedding service providers in Oregon did not have to facilitate "marriages" for same-sex couples because Oregon law did not allow such marriages. Wedding services providers therefore did not have a religious conscience conflict on the issue directly implicated by this litigation. After the judgment invalidating Oregon's marriage laws, they now do have such a conflict. It is not a generalized conflict, but a particularized one, because it is not a

conflict shared generally by the citizens of Oregon. And it is "concrete," not "hypothetical," because there is no question that Oregon's public accommodations law now requires wedding services providers to facilitate all marriages that must now be performed in Oregon in accord with the injunction issued below. *See* Or. Rev. Stat. § 659A.403 (prohibiting a "place of public accommodation" from selectively providing its services on the basis of, *inter alia*, "sexual orientation"); Or. Rev. Stat. § 659A.400 (defining a "place of public accommodation" as including "any place *or service* offering to the public . . . facilities or privileges whether in the nature of goods, *services*, lodgings, amusements or otherwise"). Nor is there any question that NOM's wedding service provider members face a "substantial risk" that the public accommodations law will be applied against them if, because of their religious objections, they refused to provide such services. As the Supreme Court made clear earlier this month in *Susan B. Anthony List v. Driehaus*, 13-193, 2014 WL 2675871, *9 (June 16, 2014), "an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law." A "threat of future enforcement" is sufficient where, as here, "there is a history of past enforcement," and particularly where, as here, enforcement "is not limited to a prosecutor or agency" but can rather be initiated by "any individual against whom any distinction, discrimination or restriction on account of … sexual

orientation … has been made by any place of public accommodation." Or. Rev. Stat. § 659A.885(7). *See SBA List*, 2014 WL 2675871, at *9.

In other words, the interests NOM has alleged on behalf of its wedding service provider members are both concrete and particularized, and those members "will suffer a practical impairment of [those] interests as a result of [this] litigation." *Wilderness Soc.*, 630 F.3d at 1179.

Apparently recognizing that such interests do suffice for Article III standing purposes, Defendants seek to recharacterize them with the same sleight-of-hand that the district court embraced below. "[A] wedding planner in Oregon might be asked to assist with *an event to celebrate* the marriage of a same-sex couple, with or without this litigation." Defs' Second Mot. to Dismiss at 6 (emphasis added) (citing (D.Ct. Dkt. #115, pp. 50-51). The wedding planner's interests would therefore not be affected by the issues in the litigation, Defendants assert (again relying on the erroneous decision below) "because any ruling the court would make would not alter the possibility that same-sex couples who could marry in other jurisdictions would seek *to celebrate* their marriages in Oregon and potentially seek out the services of a member of NOM." *Id.*

But NOM did not allege that its wedding service provider members objected to assisting with an event *to celebrate* the marriage of a same-sex couple. Rather,

it alleged that its members objected to "*facilitating*" the marriage ceremonies themselves. Memo in support of Motion to Intervene (D.Ct. Dkt. #87) at 11 (citing Declaration of Brian Brown ¶¶ 6, 7) (emphasis added). That is a significant difference.[6] Whether or not NOM's wedding service provider members have similar religious objections to other kinds of "celebrations" for which a same-sex couple might wish to obtain their services is irrelevant to the issues in this case. In fact, Defendants' argument assumes that the objection is to serving same-sex couples at all, but that assumption is not supported by any evidence and certainly was not put into play by the pleadings or judgment below.

In sum, NOM has alleged, in unrebutted, sworn testimony, that its wedding services provider members have religious objections to *facilitating* weddings between persons of the same sex. Prior to the judgment, the demands of Oregon's public accommodation law did not conflict with those religious views; after the judgment, they now do. That injury is sufficiently concrete and particularized to establish Article III standing.

[6] Even as recast, Defendants are compelled to admit that a judgment below upholding Oregon's marriage law "might minimize the number of potential same-sex clients who would seek the services of the wedding planner to plan a celebration of a same-sex marriage." Defs' Second Motion to Dismiss at 7. Minimizing the risk of conflict with Oregon's public accommodations law is, standing alone, arguably a sufficient interest for Article III purposes.

### C. NOM's voter members also have an interest in preventing their votes from being rendered null and void that is sufficient for Article III standing.

As with the interests of its County Clerk member(s), NOM has previously argued at length, in its opposition to Defendants' First Motion to Dismiss, that the interest of its voter members in not having their votes rendered null and void is sufficient to establish Article III standing. *See* 9th Cir. Dkt. #31, pp. 15-17. Those arguments also remain valid, and NOM incorporates them here by reference in order to avoid unnecessarily burdening the Court with duplicative briefing.

Rather than confronting the vote dilution/vote negation cases on which NOM has relied, Defendants assert that the "Supreme Court recently addressed a *similar* claim by the proponents" of California's Proposition 8 "and rejected their standing to appeal." Defs' Sec. Mot. to Dismiss, at 9 (emphasis added) (citing *Hollingsworth*, 133 S.Ct. at 2668. But *Hollingsworth* did not address a "similar" claim; it did not address a vote negation claim at all.

A brief history of the Proposition 8 litigation might prove helpful to clarify this point. Before reaching its decision in that case, this Court certified two questions to the California Supreme Court for elucidation under California law: Whether, under California law, initiative proponents had 1) a "particularized interest in the initiative's validity," or 2) "the authority to assert the State's interest

in the initiative's validity . . . ." *Perry v. Schwarzenegger*, 628 F.3d 1191, 1193 (9th Cir. 2011). The California Supreme Court answered only the second question (in the affirmative), declining to answer the first. *Perry v. Brown*, 265 P.3d 1002, 1015 (Cal. 2011). This Court then upheld Proponents' standing on that ground (and that ground alone) before ruling on the merits. *Perry v. Brown*, 671 F.3d 1052, 1070 (9th Cir. 2012), *vacated and remanded sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). When the Supreme Court considered the matter, it held that initiative proponents did not have standing because they were not agents of the state. *Hollingsworth*, 133 S. Ct. at 2666-67. Before reaching that conclusion, the Supreme Court also considered whether the Proponents had a particularized injury in their own right, holding that the injury they asserted was merely a generalized interest in enforcement of the law. *Id*. at 2663. The Court did not consider whether anyone else who had particularized interests (rather than only generalized grievances) would have had standing to intervene, but there is nothing in the opinion even to suggest that its long-established standing doctrine allowing appeal by intervenors who had particularized interests was in any way modified, much less overruled altogether.

NOM has not claimed to be an agent of the State, and it did not allege on behalf of its voter members a merely generalized interest in law enforcement.

Rather, it has alleged that the votes of its voter members were entirely negated by Defendants' conduct in the litigation below, conceding points of fact and law that all but guaranteed a judgment against the measure the voters had adopted.

Admittedly, vote negation claims are an anomaly in standing jurisprudence, as they often appear to involve injuries that individual voters share with large portions of the electorate. The Fifth Circuit's decision in *League of United Latin American Citizens, Council No. 4434 v. Clements*, 999 F.2d 831 (5th Cir. 1991) ("*LULAC No. 4434*"), is instructive. *LULAC No. 4434* involved a voting rights challenge to the county-wide election of judges in Texas. The Fifth Circuit upheld the standing of a Judge who "moved to intervene as a defendant to defend . . . his interests as . . . a registered voter in and citizen of Dallas County." 999 F.2d at 845.[7] "The settlement agreement would deprive voters of the right to vote for all judges with general jurisdiction over their county," and that provided the necessary Article III standing to allow the voter who had intervened as a defendant to pursue an appeal when the state defendants declined to do so. *Id.* So too here, where the

[7] The Judge has also intervened to defend his interests as a sitting judge elected under the at-large voting system that had been invalidated by the district court, but because the settlement reached by the state defendants protected his tenure in office and ability to run in county-wide elections, and thereby undermined his claim of standing on that score, the Fifth Circuit specifically recognized that he had standing as a voter to pursue the appeal when state officials chose not to do so. *Id*.

judgment below (which, given the Defendants' active support of Plaintiffs' motion for summary judgment, was tantamount to a settlement) has "deprive[d] voters of the right to vote"—or rather of the effectiveness of their vote—on a key component of marriage policy within their State.

The Fifth Circuit recently reaffirmed its ruling in *LULAC No. 4434* in the wake of the Supreme Court's decision in *Lance v. Coffman*, 549 U.S. 437 (2007), in which the Supreme Court dismissed an Elections Clause challenge to a judicially-imposed redistricting plan, reiterating that assertions of only an "undifferentiated, generalized grievance about the conduct of government" are not enough to establish Article III standing. The Fifth Circuit found *Lance* "readily distinguishable" from the standing of voters upheld in *LULAC No. 4434* because the individual plaintiffs in *Lance* "were not deprived of the right to vote for any office." *League of United Latin Am. Citizens, Dist. 19 v. City of Boerne*, 659 F.3d 421, 430 (5th Cir. 2011) ("*LULAC No. 19*"). "By contrast," the Fifth Circuit held, "in the present case and in *LULAC No. 4434*, the type of injury that serves as the basis for standing is the deprivation of a voter's pre-existing right to vote for certain offices." *Id.*

Although admittedly a close call—the Eleventh Circuit has gone the other direction in a post-*Lance* decision, *see Dillard v. Chilton Cnty. Comm'n*, 495 F.3d

1324, 1332 (11th Cir. 2007)—the fact that the votes of NOM's voter members have been entirely negated by the judgment below, which also serves to deprive them of their "pre-existing right to vote" on basic marriage policy in the state, counsels in favor of standing. In *Lance* itself, the Supreme Court stated that the injuries alleged by the plaintiffs in that case were "quite different from the sorts of injuries alleged by plaintiffs in voting rights cases where we have found standing." *Lance*, 549 U.S. at 1198 (citing *Baker v. Carr*, 369 U.S. 186, 207–208 (1962)). Significantly, the discussion in *Baker* that *Lance* distinguished upheld voter standing because the voters were "asserting a plain, direct and adequate interest in maintaining the effectiveness of their votes, . . . not merely a claim of the right possessed by every citizen to require that the government be administered according to law." *Baker*, 369 U.S. at 208 (contrasting *Coleman v. Miller*, 307 U.S. 433, 438 (1939), and *Leser v. Garnett*, 258 U.S. 130 (1922) (upholding standing), with *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922) (denying standing)). So too here. NOM, on behalf of its voter members, has "assert[ed] a plain, direct and adequate interest in maintaining the effectiveness of their votes, . . . not merely a claim of the right possessed by every citizen to require that the government be administrated according to law." Under *Baker*, and reiterated in *Lance*, the

complete deprivation of the effectiveness of their votes gives NOM's voter members standing.

## III. The Injuries NOM Has Alleged on Behalf of Its Members Are Traceable to the Judgment Sought (and Obtained) in this Litigation and Redressable by a Decision Reversing that Judgment.

In addition to demonstrating that its members have a concrete and particularized interest in the litigation, NOM also has to demonstrate that injuries to those interests are "fairly traceable to the challenged conduct, and … 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)). Reformulated to fit the litigation posture of NOM as a proposed intervenor-defendant, the test requires that the threat of injury alleged by NOM (on behalf of its members "stem[] from the order they seek to reverse, an injury which would be redressed if they win on appeal." *Idaho Farm Bureau Fedn.*, 58 F.3d at 1398–1399.

That test is clearly met here. Each of the injuries NOM has alleged—official and personal for its County Clerk member(s), risk of liability under the public accommodations law for its wedding service provider members, and complete negation of the effectiveness of the votes cast by its voting members—are "fairly

traceable" to the judgment below and would be fully redressed by a reversal of that judgment.

## CONCLUSION

For the reasons stated above, NOM has third-party standing to pursue an appeal of the judgment below, on behalf of its members who themselves had concrete and particularized injuries from that judgment. Defendants' motion to dismiss should be denied.

Dated: June 23, 2014

Respectfully submitted,

s/ John C. Eastman
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on June 23, 2014, I electronically filed Appellant's OPPOSITION TO DEFENDANTS' SECOND 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.

June 23, 2014

/s/ John C. Eastman
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