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 PETITION FOR REHEARING EN BANC

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FRAP 35(b) STATEMENT

Appellant/Intervenor-Defendant National Organization for Marriage, Inc. ("NOM") respectfully requests rehearing en banc for the following reasons:

First, rehearing en banc is warranted under FRAP 35(b)(1) because the panel decision conflicts with decisions of the Supreme Court and this Court. Specifically, the panel's determination that county clerks do not have standing to intervene on appeal from a judgment invalidating a state law they administer conflicts with the Supreme Court's decisions in *Richardson v. Ramirez*, 418 U.S. 24 (1974), and *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968), as well as this Court's decision in *Planned Parenthood of Idaho v. Wasden*, 376 F.3d 908 (9th Cir. 2004), and *dicta* in *Perry v. Schwarzenegger*, 630 F.3d 898 (9th Cir. 2011). Additionally, the panel's determination that NOM does not have third-party associational standing to represent the official (as opposed to merely personal) interests of its county clerk member(s) conflicts with the Supreme Court's decision in *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333 (1977), and this Court's decision in *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121 (9th Cir. 1996). Finally, the panel's determination that the particularized injuries NOM alleged on behalf of its members are not sufficient for Article III standing in the wake of the Supreme Court's decision in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), interprets that decision so broadly as to create conflict with the Supreme

Court's well-established standing doctrine articulated in such cases as *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) and *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973), as well as by this Court in decisions such as *Natural Res. Def. Council v. E.P.A.*, 735 F.3d 873, 878 (9th Cir. 2013), and *Jackson v. San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014).

Second, rehearing en banc is warranted under FRAP 35(b)(2) because the issues presented by this case are of "exceptional importance." Indeed, the constitutional issue addressed in the underlying judgment is arguably the most contentious issue to have been addressed by the courts in forty years. The supposed jurisdictional barriers are also of exceptional importance, for they are already providing an incentive for "friendly" suits that is threatening the very adversarial nature of our system of justice.

INTRODUCTION

Plaintiffs filed the underlying actions to challenge the constitutionality of Measure 36, the initiative adopted in 2004 by which the people of Oregon codified in their Constitution the long-standing definition of marriage and determined not to redefine marriage so as to validate or recognize as marriages unions other than those between one man and one woman. The named defendants not only refused to defend Oregon's marriage laws, but actively joined in Plaintiffs' constitutional

attack. *See, e.g.*, State Defendants' Response to MSJ at 15, D.Ct. Dkt.#64 (arguing that Oregon's marriage law "would not survive even a rational basis review").[1] Moreover, although Defendants continued to enforce the prohibition on issuing marriage licenses to same-sex couples during the pendency of the litigation, they did not enforce the prohibition on "recogniz[ing]" as marriages same-sex relationships treated as marriages in other states. The day after the suit was filed, the Deputy Attorney General announced that the "recognize" aspect of the state constitution would not be enforced by state officials. *See Opinion of Oct. 16, 2013*, D.Ct. Dkt.#58-1. There was thus clearly no "case or controversy" giving the lower court jurisdiction to consider Plaintiffs' constitutional challenge to the "recognize" aspect of Measure 36. *See, e.g.*, *United States v. Windsor*, 133 S.Ct. 2675, 2686 (2013) (noting that its standing analysis would present "a different case if the Executive had taken the further step of [not enforcing the law by] paying Windsor the refund to which she was entitled under the District Court's ruling"). And because NOM's motion to intervene as a defendant was denied, there was no party in the case defending Oregon's prohibition on the issuance of marriage licenses to same-sex couples, which at least arguably deprived the lower court of jurisdiction to enter anything other than a default judgment applicable only to the

[1] Additionally, documents just produced by the Attorney General in response to NOM's public records request depict extensive collaboration between the "opposing" parties. Declaration to follow.

named Plaintiffs in the case. *Cf. Windsor*, 133 S.Ct. at 2688 (emphasizing that the jurisdictional problems with Defendants' non-defense of the law were cured by the participation in the case of a true adversary, the House Bipartisan Legal Advisory Group).

NOM filed an immediate appeal after its motion to intervene was denied, D.Ct. Dkt.#117, but before this Court could consider the merits of that appeal, the district court issued a final judgment holding that Oregon's marriage laws were unconstitutional and enjoining their enforcement. Although NOM filed a protective notice of appeal to preserve this Court's jurisdiction in the event the denial of the motion to intervene was reversed, D.Ct. Dkt.##121, 122, Defendants did not file an appeal. Slip.Op. at 3. The *Defendants* then moved to dismiss NOM's intervention appeal as moot, Dkt.#25, and as if to highlight the "friendly" nature of the case below, Plaintiffs joined in that motion to dismiss, Dkt.#27. Defendants also filed a second motion to dismiss NOM's protective notice of appeal on the merits. Dkt.#36.

A panel of this Court granted Defendants' motion to dismiss NOM's appeal as moot, on the ground that in its view, none of the particularized injuries NOM alleged on behalf of its members were sufficient to establish Article III standing. Slip.Op. at 3-4. The panel also interpreted the Supreme Court's 2013 *Hollingsworth* decision as denying standing to defend a state's law to anyone but

state officials themselves or local officials who appeared in an official capacity, not derivatively as members of a private association. Slip.Op. at 4.

REASONS FOR GRANTING REHEARING EN BANC

I. The Panel's Decision Conflicts with Prior Decisions of this Court and Binding Precedent of the Supreme Court.

A. The Supreme Court and this Court have both recognized that local officials, charged with administering state law, have standing to appeal a judgment invalidating that law.

In *Perry v. Schwarzenegger*, 630 F.3d 898 (9th Cir. 2011), this Court addressed a motion to intervene in the California marriage litigation that had been filed by a *deputy* county clerk and a County Board of Supervisors. This Court affirmed the district court's denial of the motion to intervene, noting that neither of the proposed intervenors had any legal responsibility for the issuance of marriage licenses under California law. But this Court specifically noted that "[w]ere Imperial County's elected County Clerk the applicant for intervention, [the] argument [that the injunction would directly affect the Clerk's performance of her legal duties] might have merit." *Id.* at 903. "[B]eing bound by a judgment [enjoining performance of official duties] may be an (sic) 'concrete and particularized injury' sufficient to confer standing to appeal," this Court added, but

"the 'injury,' if any, would be to the Clerk, not a deputy." *Id.* at 904 (quoting *W. Watersheds Project v. Kraayenbrink*, 620 F.3d 1187, 1196 (9th Cir.2010) [2]).

Although this language from *Perry* is *dicta*, it is well-grounded in governing precedent from both the Supreme Court and this Court. In *Richardson v. Ramirez*, for example, the Supreme Court held that "a live case or controversy" existed when a county clerk sought to intervene after the named defendants declined to defend, was added as a defendant, and then appealed a ruling by the California Supreme Court invalidating a law that she was tasked with administering. *Richardson*, 418 U.S. at 34-40. Indeed, the Supreme Court has noted that "[t]here can be no doubt" that local officials charged with official duties under state and local laws "have a 'personal stake in the outcome' of . . . litigation" involving the constitutionality of those laws sufficient to give them standing. *Allen*, 392 U.S. at 241 n.5 (citing *Baker v. Carr*, 369 U.S. 186, 204 (1962)); *cf. Planned Parenthood of Idaho*, 376 F.3d at 920 (holding that, under Idaho law, Attorney General was proper defendant because he had power to enforce the statute at issue in the case); *Blake v. Pallan*, 554 F.2d 947, 953 (9th Cir. 1977) ("A state official has a sufficient interest [to intervene as of right] in adjudications which will directly affect his own duties and powers under the state laws").

[2] Amended on denial of rehearing en banc, 632 F.3d 472, 482 (9th Cir. 2011).

Apparently recognizing that, under Oregon law, county clerks are the elected officials tasked with administering Oregon's marriage laws and therefore have standing to intervene in litigation challenging those laws, the Panel held that NOM could not piggy-back on that standing under the well-established rule of *NAACP v. Alabama*, 357 U.S. 449 (1958), because NOM's county clerk was "not appearing in an official capacity." Slip.Op. at 4. The only authority the Panel cited for that proposition was *Hollingsworth*, 133 S.Ct. at 2664-65, 2668, which, relying on *Karcher v. May*, 484 U.S. 72 (1987), merely held that private party petitioners who no longer held office lacked Article III standing "to defend the constitutionality of a state statute when state officials have chosen not to." NOM's county clerk member clearly holds office, so the Panel's decision appears to rest on the view that an elected official can be a member of private associations such as NOM in only a personal rather than an official capacity. But that, too, conflicts with governing Supreme Court and Ninth Circuit precedent.

The Supreme Court has held that "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*, 432 U.S. at 343; *see also San Diego Cnty. Gun Rights Comm.*, 98 F.3d at 1130–31 (applying

Hunt). The second of these "prerequisites" to associational standing, at issue here, 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 requirement exists to "assur[e] adversarial vigor in pursuing a 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 NOM is clearly pursuing that mission with adversarial vigor. Under *Hunt*, nothing more is required.

B. The Panel's holding that NOM's other members do not have particularized interests sufficient for Article III standing misconstrues *Hollingsworth* in ways that conflict with other precedent of both the Supreme Court and this Court.

1. NOM's members who provide wedding services, as well as its county clerk members in their personal capacities, are harmed by the invalidation of Oregon's marriage laws because they are now required to facilitate weddings in violation of their religious beliefs.

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, D.Ct. Dkt.#88. 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 same-sex marriage ceremonies because Oregon law did not allow them. 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 same-sex marriage ceremonies 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[3] 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 Federal Rule of Civil Procedure 24(a)(2) intervention purposes and a "concrete and particularized" injury giving them standing to participate in this litigation.

The same is true for the *personal* capacity interests of NOM's county clerk members (even assuming the correctness of the Panel's holding that NOM's associational standing cannot encompass official capacity interests). 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* …." Eastman Declaration ¶ 8 (emphasis added)

[3] That NOM's members who provide wedding services have not yet been prosecuted for violating Oregon's public accommodation law is of no moment. As the Supreme Court made clear earlier this year, "an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014). 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." Ore. Rev. Stat. § 659A.885(7); *SBA List*, 134 S.Ct. at 2342.

(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 v. Seldin*, 422 U.S. 490, 501 (1975). 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." Reply in Support of Motion to Intervene 17 (D.Ct. Dkt.#109). 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.

The Panel's decision to the contrary contravenes well-established precedent of both this Court and the Supreme Court. *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))). Indeed, "[m]any 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*, 95 F.3d at 1411-12 & n. 8).

2. If the Panel's interpretation of *Hollingsworth* as foreclosing vote negation claims were correct, then *Hollingsworth* implicitly overruled the Supreme Court's large body of vote dilution and vote negation jurisprudence, a highly unlikely result.

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 other 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 could have be made, *see, e.g.*, *Robicheaux v. Caldwell*, No. 13-5090, 2014 WL 4347099 (E.D.La. Sept. 3, 2014), the Oregon Attorney General deliberately sought to negate the votes of the more than one million Oregon voters who successfully supported Measure 36. Those voters, some of whom are members of NOM, have standing to appeal a decision negating their vote when the Attorney General declined 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 (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))).

NOM recognizes, of course, that such vote negation claims are not "particularized" in the way normally required by the Supreme Court's prudential standing jurisprudence, but that has not been an impediment to the Supreme Court considering such claims, and nothing in *Hollingsworth* suggests that the Court in that case overruled the whole body of vote dilution/vote negation claims *sub silentio*. The intervenors in that case did not assert a vote negation claim. Rather, they argued only that they had standing by virtue of a decision by the California Supreme Court to represent the interests of the state, and that their unique role in the adoption of the initiative gave them a particularized interest in its defense. *Hollingsworth*, 133 S.Ct. at 2662-63. The Court rejected both of those arguments for standing, but did not foreclose a vote negation claim of the type raised by NOM here. *Id.* at 2663-68.

II. The Issues Presented by this Case Are of Exceptional Importance.

Rehearing en banc is also warranted under FRAP 35(b)(2) because both of the issues presented by this case—the underlying merits of the constitutionality of traditional marriage laws, and the jurisdictional questions presented by NOM's motion to intervene—are of "exceptional importance."

A. The underlying merits determination presents one of the most hotly-contested constitutional issues in decades.

The constitutional question presented by the underlying district court judgment, the constitutionality of Oregon's long-standing and recently constitutionalized definition of marriage, is arguably the most contentious issue to have been addressed by the courts in the past forty years. The Supreme Court has previously indicated the importance of the merits issue by granting a writ of certiorari in a parallel case out of California, only to find that it had no jurisdiction to reach the merits in that case. *Hollingsworth*, 133 S.Ct. at 2668. Litigation challenging state definitions of marriage is currently pending in every state that has not already redefined marriage to encompass same-sex relationships. *See, e.g.*, "Marriage Litigation," Freedom to Marry, available at http://www.freedomtomarry.org/litigation (last visited Sept. 9, 2014). Petitions for writs of certiorari have been pending before the Supreme Court for a month in three of those cases. *Herbert v. Kitchen*, No. 14-124 (U.S. Aug. 5, 2014); *Smith v. Bishop*, No. 14-136 (U.S. Aug. 6, 2014); and *Rainey v. Bostic*, No. 14-153 (U.S. Aug. 12, 2014). Additional petitions have already been filed following the consolidated decisions this past week by the Seventh Circuit in *Baskin v. Bogan*, 14-2386, 2014 WL 4359059 (7th Cir. Sept. 4, 2014). *See Baskin v. Bogan*, No. 14-277 (U.S. Sept. 9, 2014) and *Walker v. Wolf*, No. 14-278 (U.S. Sept. 9, 2014). And anticipated merits decisions in the near future by the Sixth Circuit in six cases heard by that

Court on August 6, 2014, including *DeBoer v. Snyder*, No. 14-01341 (6th Cir. Mar. 21, 2014), and by this Court in the three cases it heard this week on September 8, 2014, *Latta v. Otter*, No. 14-35420 (9th Cir. May 14, 2014), *Sevcik v. Sandoval*, No. 12-17668 (9th Cir. Dec. 4, 2012), and *Jackson v. Abercrombie*, No. 12-16995 (9th Cir. Sept. 10, 2012) are likewise expected to yield petitions for certiorari in short order. The mere volume and extraordinary pace of related cases currently pending in the lower courts demonstrates the exceptional importance of the merits issues presented.

B. Given the unfortunate trend toward "friendly" suits, the jurisdictional issues presented by this case are also of exceptional importance.

The jurisdictional questions that have thus far prevented this Court from considering the underlying merits issue in this case are also of exceptional importance. As with the federal government defendants in *Windsor*, the state government defendants in this case provided no defense but rather, *as defendants*, affirmatively supported the constitutional challenge brought *by plaintiffs*. Although suitably judicious in its criticism of the Department of Justice's non-defense of DOMA in the *Windsor* case, the Supreme Court noted that "difficulties would ensue if this were to become a common practice in ordinary cases." *Windsor*, 133 S. Ct. at 2688. The refuse-to-defend tactic was successfully deployed by government officials in California who were opposed to the marriage

initiative they were nominally named to defend. *Hollingsworth*, 133 S.Ct. at 2660. It has been deployed by, among others, the Attorney General of Virginia, by the Attorney General of Kentucky, by the Governor and Attorney General of Pennsylvania, and by the Governor and Attorney General of Oregon in the case *sub judice*. *See, e.g.*, Notice of Change of Legal Position By Defendant Janet M. Rainey, at 1, Dkt. #96, *Bostic v. Schaefer*, No. 2:13-cv-00395, 2014 WL 3702493 (E.D.Va. Jan. 23, 2014), *aff'd*., No. 14–1167, 2014 WL 3702493 (4th Cir. July 28, 2014); Notice of Voluntary Dismissal of Defendant Attorney General Kane, Dkt.#58 (Nov. 1, 2013), *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014); *see also, generally*, Niraj Chokshi, "Seven attorneys general won't defend their own state's gay-marriage bans," Washington Post (March 4, 2013), available at http://www.washingtonpost.com/blogs/govbeat/wp/2014/02/20/six-attorneys-general-wont-defend-their-own-states-gay-marriage-bans/. In short, it is already becoming the "common practice" about which the Supreme Court warned. If, as the panel believed, the Supreme Court's decision in *Hollingsworth* really does hold that the Constitution erects a broad jurisdictional bar to intervention as defendants by those who would actually defend a state's fundamental law, then there may well be nothing to prevent the "friendly suit" trend. But if (as NOM contends) *Hollingsworth* does not implicitly overrule precedent that allows intervention by local government officials tasked with implementing the state law at issue (such as

NOM's county clerk members) or private parties who have concrete and particularized injuries affected by the judgment (such as NOM's wedding service provider and voter members), then it would seem to be a matter of utmost urgency to reaffirm that precedent before the "friendly suit" trend causes further and perhaps irreparable harm to our adversarial system of justice.

CONCLUSION

For the reasons stated above, NOM respectfully requests that the Court grant its petition for rehearing en banc, reverse the Panel's decision dismissing NOM's appeals, and proceed to briefing/argument on NOM's intervention appeal.

Dated: September 10, 2014

Respectfully submitted,

s/ John C. Eastman
John C. Eastman
CENTER FOR CONSTITUTIONAL JURISPRUDENCE

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 10, 2014, I electronically filed Appellant's PETITION FOR REHEARING EN BANC 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.

September 10, 2014

/s/ John C. Eastman
John C. Eastman
CENTER FOR CONSTITUTIONAL JURISPRUDENCE

Attorney for Appellant
National Organization for Marriage, Inc.

Form 11. Certificate of Compliance Pursuant to Circuit Rules 35-4 and 40-1

Form Must be Signed by Attorney or Unrepresented Litigant and Attached to the Back of Each Copy of the Petition or Answer

(signature block below)

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer is: (check applicable option)

_X_ Proportionately spaced, has a typeface of 14 points or more and contains 4,198 words (petitions and answers must not exceed 4,200 words).

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____ In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

s/ John C. Eastman
Signature of Attorney or
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FILED

AUG 27 2014

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEANNA L. GEIGER; et al.,

Plaintiffs - Appellees,

v.

JOHN KITZHABER, in his official capacity as Governor of Oregon; et al.,

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NATIONAL ORGANIZATION FOR MARRIAGE, INC., Proposed Intervenor,

Movant - Appellant.

No. 14-35427

D.C. Nos. 6:13-cv-01834-MC
6:13-cv-02256-MC
District of Oregon,
Eugene

ORDER

Before: SCHROEDER, THOMAS, and N.R. SMITH, Circuit Judges.

This appeal arises from the district court's denial of the National Organization for Marriage, Inc.'s ("NOM") motion to intervene in a consolidated action challenging the validity of Oregon's state constitutional and statutory provisions limiting civil marriage to one man and one woman, and the district court's subsequent order granting summary judgment. The district court's summary judgment order enjoined the enforcement of Article 15, § 5A, of the

Constitution of Oregon; O.R.S. 106.010; O.R.S. 106.041(1); O.R.S. 106.150(1); and any other state or local law, rule, regulation, or ordinance as the basis to deny marriage or the rights accompanying marriage to same-gender couples otherwise qualified to marry under Oregon law, or to deny recognition of a same-gender couple's marriage leally performed in other jurisdictions and in all other respects valid under Oregon law.

Before the court are two motions to dismiss filed by defendants-appellees (collectively "Oregon State Defendants"). On May 14, 2014, the district court denied NOM's motion to intervene in the consolidated district court action. On May 16, 2014, NOM filed a notice of appeal from that denial. On May 19, 2014, the district court issued an opinion and an order granting summary judgment for plaintiffs-appellees (collectively "Geiger"), and entered final judgment in favor of Geiger. On May 22, 2014, NOM filed an amended notice of appeal in the district court, amending the appeal to include a protective notice of appeal of the district court's May 19, 2014 order and judgment. On the same date, NOM also filed in the district court a separate protective notice of appeal of the May 19, 2014 order and judgment.

On May 20, 2014, the Oregon State Defendants filed in this court a motion to dismiss as moot the appeal of the district court's May 14, 2014 denial of NOM's

motion to intervene. Geiger filed a joinder in the Oregon State Defendants' May 20, 2014 motion. On June 13, 2014, the Oregon State Defendants filed a motion to dismiss the protective notice of appeal for lack of standing.

Neither Geiger nor the Oregon State Defendants filed a notice of appeal from the district court's May 19, 2014 final judgment. Therefore, even if NOM were to prevail in its appeal of the district court's denial of its motion to intervene, NOM must also demonstrate that it has Article III standing to challenge the final judgment. *See Diamond v. Charles*, 476 U.S. 54, 68 (1986) (intervenor's right to continue a suit on appeal "in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Article III").

NOM asserts that it has Article III standing to appeal the district court's judgment as a third party on behalf of several of its members, identified as Oregon members who provide wedding services, Oregon members who voted for Measure 36, and at least one member who is an elected Oregon county clerk. We find that NOM's Oregon wedding service provider members' objection to facilitating same-gender marriage ceremonies is not sufficient to establish Article III standing. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)) (Article III standing "requires 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[]"). Likewise, the interest of NOM's Oregon voter members in reversing the district court judgment in order to vindicate the constitutional validity of a generally applicable Oregon law is insufficient to establish Article III standing. *See Hollingsworth*, 133 S. Ct. at 2662-63 (holding proponents of ballot proposition had "no 'personal stake' in defending its enforcement that is distinguishable from the general interest of every citizen of California[]"). Finally, as the district court determined, we also find that NOM's member who is an elected Oregon county clerk is not appearing in an official capacity and that the clerk's personal objections are not sufficient to establish Article III standing. *See Hollingsworth*, 133 S. Ct. at 2664-65, 2668 (citing *Karcher v. May*, 484 U.S. 72 (1987)) (holding the private party petitioners who held no office lacked Article III standing, and declining to uphold "the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to[]").

We therefore hold that NOM lacks Article III standing to appeal the district court's May 19, 2014 final judgment. *See Hollingsworth*, 133 S. Ct. at 2663-64 (citing *Lujan*, 504 U.S. at 560-61). We grant the Oregon State Defendants' June 13, 2014 motion to dismiss NOM's appeal from the final judgment for lack of

standing. *See id*. We also grant the Oregon State Defendants' May 20, 2014 motion to dismiss as moot NOM's appeal of the denial of its motion to intervene.[1] *See Diamond*, 476 U.S. at 68.

DISMISSED.

[1]The district court denied intervention as a matter of right under Federal Rule of Civil Procedure 24(a) on the grounds that appellant's members lacked a significant protectable interest, and in its discretion denied permissive intervention under Federal Rule of Civil Procedure 24(b). The district court also denied the motion to intervene on the grounds that appellant's motion was untimely.