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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

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

Plaintiffs,

v.

JOHN KITZHABER, in his official capacity as Governor of Oregon; **ELLEN ROSENBLUM**, in her official capacity as Attorney General of Oregon; **JENNIFER WOODWARD**, in her official capacity as State Registrar, Center for Health Statistics, Oregon Health Authority; and **RANDY WALDRUFF**, in his official capacity as Multnomah County Assessor,

Defendants,

and

Case No.: 6:13-cv-01834-MC (Lead Case)
Case No.: 6:13-cv-02256-MC (Trailing Case)

PROPOSED INTERVENOR'S REPLY IN SUPPORT OF MOTION TO INTERVENE

Judge: Michael J. McShane
Hearing: May 14, 2014, 9:00 a.m.
Location: Eugene Courthouse, Courtroom 2

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

Proposed Intervenor.

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

Plaintiffs,

v.

JOHN KITZHABER, in his official capacity as Governor of Oregon; **ELLEN ROSENBLUM**, in her official capacity as Attorney General of Oregon; **JENNIFER WOODWARD**, in her official capacity as State Registrar, Center for Health Statistics, Oregon Health Authority; and **RANDY WALDRUFF**, in his official capacity as Multnomah County Assessor,

Defendants,

and

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

Proposed Intervenor.

Proposed Intervenor, National Organization for Marriage, Inc. ("NOM"), on behalf of its Oregon members, hereby files this consolidated reply in support of its Motion to Intervene, in response to the two separate oppositions filed by 1) both sets of plaintiffs in these consolidated cases; and 2) the state and county defendants (collectively, "the Government") named in both cases.

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INTRODUCTION

Plaintiffs have filed a brief opposing NOM's motion to intervene. The Government has also filed a brief, siding *with Plaintiffs* in opposing intervention in this matter by the only entity prepared and willing to actually defend Oregon's constitutional definition of marriage. The Government's action only serves to highlight the importance to the adversarial process of NOM's motion to intervene. For the reasons set out below and previously, NOM (on behalf of its Oregon members) meets the requirements for intervention as a matter of right and, alternatively, for permissive intervention. Its motion should therefore be granted.

ARGUMENT

I. NOM Meets All of the Requirements for Intervention as of Right under Rule 24(a).

A. Given the "Tenth Hour" Actions Taken by the Attorney General, NOM's "Eleventh Hour" Intervention is Timely.

The Government and both sets of Plaintiffs make much of the fact that NOM's motion to intervene was filed just two days before the April 23, 2014 hearing on Plaintiffs' respective motions for summary judgment, motions that the Government did not oppose (thus turning this case into a collusive suit). But the Government's assertion that NOM "knew all the facts on which it … bases its motion" two months earlier is not true, (Defs.' Opp'n Mot. Interv. at 3; *see also* Pls.' Opp'n Mot. Interv. at 7), and neither is the Plaintiffs' claim that the Government's refusal to defend was clear even earlier, when in its answer to the *Geiger* First Amended Complaint the Government "recognize[d] that significant and serious questions exist" about the

constitutionality of the Oregon marriage laws. (Pls.' Opp'n Mot. Interv. at 3.)[1] How that demonstrates that the Government was going to take Plaintiffs' side on every one of those "significant and serious questions," Plaintiffs do not say. The normal rule, followed by almost every Attorney General in our nation's history at both the state and federal level, is that the Attorney General "has the duty to defend [a law] whenever a reasonable argument can be made in its support." 5 Op. O.L.C. 25, 26 (1981).[2] The Attorney General's public acknowledgement of "significant and serious questions" indicates to interested persons and the public generally that they can expect the Attorney General to fulfill her oath of office and statutory duty to defend the state constitution, *see, e.g.*, ORS § 180.060 (noting that the Attorney General "shall … appear *for* the state," not side with the plaintiffs *against* the state) (emphasis added), and it forecloses any supposition that there is no plausible defense to be made.

Plaintiffs also assert that NOM "must have known … of the likelihood that the State would not defend Oregon's marriage" law because "President Obama's administration had declined to defend the federal Defense of Marriage Act in *United States v. Windsor* and other

[1] Plaintiffs' effort to attribute to NOM a statement made in January by an attorney in the same firm as the attorney NOM retained in April to serve as local counsel in this matter is creative, but unfounded. As Plaintiffs' themselves note, Shawn Lindsay has not entered an appearance in this case. Pls.' Opp. at 4. But in any event, the statement attributed to Lindsay does not indicate knowledge that Defendants' were going to abdicate their duty; just the opposite, it calls on them to fulfill their duty. *Id.*

[2] The position of the Office of Legal Counsel at the U.S. Department of Justice is based on the federal Constitution's requirement that the President "shall take Care that the Laws be faithfully executed, U.S. Const. Art. II, § 3, which O.L.C. has further interpreted as requiring that, even when the Attorney General (who answers to the President) believes a statute to be unconstitutional, "he can best discharge the responsibilities of his office by defending and enforcing" it. 4A Op. O.L.C. 55, 55 (1980). Oregon's Take Care Clause is identical, Or. Const. Art. V, § 10 ("He shall take care that the Laws be faithfully executed"), and just as the U.S. Attorney General's duty derives from that obligation of the President, so too the Oregon Attorney General's duty to enforce and defend state law stems from that obligation of the Governor.

cases, and that several state attorneys general had refused to defend their states' marriage" laws. (Pls.' Opp'n Mot. Interv. at 8). But the Department of Justice in *Windsor* made certain that there was a party in the case—the Bipartisan Legal Advisory Group, representing the U.S. House of Representatives—to provide the defense that our adversarial system requires,[3] and it also appealed, first to the Second Circuit and then to the Supreme Court, the judgments of the lower courts holding DOMA unconstitutional, in order to ensure that the appellate courts had jurisdiction. *United States v. Windsor*, 133 S. Ct. 2675, 2684 (2013). Because the Government here has not ensured that there was another party in the case to defend the law and has already announced that they have no intent to appeal an adverse ruling, the circumstances in this case are vastly different.

NOM did know in February, as it acknowledged in its memorandum in support of the motion to intervene, that the Attorney general announced in her answer to the complaint in the parallel (now consolidated) *Rummell* case that the Government would not be defending Oregon's marriage laws. But it was not until the Attorney General actually filed her responsive brief to Plaintiffs' motions for summary judgment on March 18, 2014 that the full depth of her dereliction of duty became apparent. *See Clarke v. Baptist Mem'l Healthcare Corp.*, 264 F.R.D. 375, 380 (W.D. Tenn. 2009) ("The only time one can know whether an unaffiliated co-party will make an antagonistic argument is after it files its brief"), *aff'd*, 427 F. App'x 431 (6th Cir. 2011); *see also Jansen v. City of Cincinnati*, 904 F.2d 336, 343–44 (6th Cir.1990) (allowing intervention by group of firefighters when city made arguments disadvantageous to proposed intervenors).

[3] The other cases in which state Attorneys General are declining to defend are in a similar posture with *Windsor*; to counsel's knowledge, in every case except this one, there is *someone* defending the marriage law.

Among other things, the Attorney General argued in her brief for heightened scrutiny rather than rational basis review, despite strong arguments to the contrary under both the Equal Protection and Due Process analysis. She disparagingly characterized Oregon's citizens who voted in favor of Oregon's marriage amendment as wanting "to enshrine in the state constitution a belief that same-sex couples are disfavored." (Defs.' Opp'n Mot. Interv. at 14.) This false and baseless attribution of bad motive to more than one million Oregon voters not only undermines foundational defenses of Oregon's marriage laws, it reveals both a disregard of duty on the part of the Attorney General to those who elected her and an underlying animus towards the very people she has sworn to protect. And although she acknowledged that, in *Baker v. Nelson*, 409 U.S. 810 (1972), *dismissing, for lack of a substantial federal question, appeal from*, 191 N.W.2d 185 (Minn. 1971), the Supreme Court itself has already determined that the precise Due Process and Equal Protection constitutional challenges issues presented by this case did not raise a substantial federal question, she sided with the few lower courts who have recently held that *Baker* is no longer binding precedent because of intervening doctrinal developments, rather than siding with the courts that have held otherwise (including courts in the Ninth Circuit, *see, e.g.*, *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1088 (D. Haw. 2012) ("*Baker* is the last word from the Supreme Court regarding the constitutionality of a state law limiting marriage to opposite-sex couples and thus remains binding on this Court); *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1003 (D. Nev. 2012) ("the present equal protection claim is precluded by *Baker*"); *see also Perry v. Brown*, 671 F.3d 1052, 1097 (9th Cir. 2012) (N.R. Smith, J., concurring in part and dissenting in part) ("Because *Baker* is binding United States Supreme Court precedent and may foreclose Plaintiffs' claims, one must follow it or distinguish it"), *vacated and remanded on other grounds sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (U.S. 2013); *id.* at 1082 n.14

(majority opinion) (noting that *Baker* was not pertinent because the court did not address the question of the constitutionality of a state's ban on same-sex marriage, only the state's decision to remove marriage from a class previously eligible for it)). Further, she completely ignored the Supreme Court's own admonition that even when doctrinal developments call into question a prior decision, "the lower courts are bound by summary decisions [of the Supreme Court] 'until such time as the Court informs (them) that (they) are not.'" *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975); *see also Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions"). In other words, the Attorney General had Supreme Court precedent available that would support the validity of the state constitutional marriage prevision, yet she refused to submit it to this court. No competent attorney would fail to make such obvious arguments on her client's behalf.

To be sure, that was a month before NOM filed its motion to intervene. But as it noted in its memorandum, NOM shortly thereafter[4] began trying to identify someone who had both the

[4] NOM did not mean to suggest that no efforts had been made to locate possible intervenors earlier. NOM is aware that other groups began undertaking such efforts when the Attorney General first announced she would not defend Oregon's marriage law in late February. Decl. of John C. Eastman ¶ 2. But those efforts intensified after the State's response to summary judgment was filed, as did NOM's involvement in them. Decl. of Brian S. Brown ¶ 4.

Citing a Ninth Circuit case, Plaintiffs claim in their brief that submitting additional information by way of declarations supporting a reply brief "would be improper." Pls.' Opp'n Mot. Inverv. at 14 n. 7. Plaintiffs exaggerate the holding of the case, which nowhere says submitting additional evidence in support of a reply brief "would be improper." Rather, the Ninth Circuit simply held that "[w]here 'new evidence is presented in a reply to a motion for summary judgment, the district court should not consider the new evidence without giving the [non-]movant an opportunity to respond.'" *JG v. Douglas Cnty. Sch. Dist.*, 552 F.3d 786, 803 (9th Cir. 2008) (quoting *Provenz v. Miller,* 102 F.3d 1478, 1483 (9th Cir.1996) (quoting *Black v. TIC*

necessary standing to intervene (and, if necessary appeal from any adverse ruling) and the willingness to do so in the face of real concerns about threats and reprisals. Brown Decl. ¶ 4. Both prongs of that process presented significant hurdles. Standing was a hurdle because of the Supreme Court's decision last June in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). From a practical standpoint, the fear of retaliation proved to be an even bigger hurdle. Brown Decl. ¶ 4.

NOM and other pro-marriage organizations attempted to locate a county clerk[5] who would be willing to risk the harassment that has befallen county clerks elsewhere when they tried to defend their state's marriage laws. *Id.* NOM also identified businesses that would suffer particularized harms if Oregon's marriage law was held unconstitutional, and a couple of weeks before the scheduled hearing on the motions for summary judgment, NOM's counsel met with or spoke by phone with the representatives of one or more such businesses and also with one or more county clerks, all of whom expressed strong interest in intervening in the matter but also grave concerns about possible threats, harassment, and retaliation should they do so. Eastman Decl. ¶ 4. Ultimately, the potential intervenors advised[6] NOM's counsel that the risks were just

Inv. Corp., 900 F.2d 112, 116 (7th Cir.1990))) (alteration in original). Because the Eastman Declaration merely elaborates on points made previously in the Brown Declaration, NOM is of the view that further response is not required, but if Plaintiffs (and their supporting Defendants) believe they are somehow prejudiced by the additional detail, NOM would not object to them filing a surreply.

[5] By "county clerk," we mean the county official responsible for issuance of marriage licenses in each county in Oregon, regardless of whether that person's official title is "county clerk" or something else, as in the case of Multnomah County, where the County Assessor (named as a Defendant in these cases) performs those duties.

[6] These were attorney-client privileged or attorney work confidential conversations. The client has agreed to disclosure for the limited purpose of confirming that they occurred, but not with respect to their substance or the identity of the parties involved. This does not constitute a waiver of any privilege or confidentiality.

too great to intervene in their own names. Eastman Decl. ¶ 6. That was less than one week before the April 23, 2014 scheduled hearing.

The very next day—April 18, 2014, Good Friday—NOM's counsel suggested that, in light of the fears of reprisal that had been raised, NOM itself could, as a membership organization, intervene on behalf of its members under the authority of the Supreme Court's decision in *NAACP v. Alabama*, 357 U.S. 449, 459 (1958). Eastman Decl. ¶ 7. NOM and its counsel spent Easter weekend identifying members who were county clerks or who otherwise had some particularized stake in Oregon's definition of marriage that NOM could intervene to defend on their behalf. NOM also secured Oregon counsel, and its counsel researched and prepared a motion to intervene and accompanying memorandum of law, interviewed NOM members who had a particularized stake in the outcome of the case, prepared a supporting declaration for NOM's president, prepared answers to the amended complaints in the two consolidated cases, reviewed the transcripts of prior hearings in the case, prepared a motion for admission *pro hac vice*, began preparing a motion to postpone the April 23, 2014 hearing, began preparing a brief in opposition to the two motions for summary judgment, and, after seeing news accounts that raised potential mandatory recusal issues, researched the relevant ethics rules and case law dealing with recusal. Eastman Decl. ¶ 9.

On Monday morning, April 21, 2014, NOM's Oregon counsel notified opposing counsel—that is, counsel for the two sets of Plaintiffs, counsel for the State Defendants, and counsel for the Multnomah County Assessor, all of whom were supporting Plaintiffs' motions for summary judgment—that it would be filing as soon as possible a motion to intervene as well as a motion to postpone the hearing. The motion to intervene was filed late that evening, and the motion to postpone was filed the next morning.

"The passage of time is measured in relative, not absolute, terms. Thus, what may constitute reasonably prompt action in one situation may be unreasonably dilatory in another." *Id.* (comparing the holding in *Geiger v. Foley Hoag LLP Retirement Plan*, 521 F.3d 60, 65 (1st Cir. 2008), that a nine-month delay in moving to intervene was reasonable in particular circumstances, with the holding in *Banco Popular de Puerto Rico v. Greenblatt*, 964 F.2d 1227, 1231–32 (1st Cir. 1992), that a three-month delay was unreasonable in a different set of circumstances). Under the circumstances here, NOM acted reasonably, diligently, and expeditiously to protect the interests of its Oregon members. Given that "the timeliness inquiry centers on how diligently the putative intervenor has acted once he has received actual or constructive notice of the impending threat," *R & G Mortgage Corp. v. Fed. Home Loan Mortgage Corp.*, 584 F.3d 1, 8 (1st Cir. 2009), and given that "the timeliness requirement is often applied less strictly with respect to intervention as of right" than to permissive intervention, *id*. (citing *Navieros Inter–Americanos, S.A. v. M/V Vasilia Express*, 120 F.3d 304, 320 (1st Cir.1997), a finding of timeliness here is more than appropriate.[7] Moreover, the claim by Plaintiffs that NOM deliberately waited until the last minute "merely to disrupt the proceedings" and the timetable for what they apparently believe is certain victory in this heretofore collusive suit, is totally unfounded. (Plts.' Opp'n Mot. Interv. at 2, 9-10.)

More fundamentally, NOM did not learn until mid-April that the Government had already rewritten Oregon's marriage certificates in anticipation of a favorable ruling that would go into effect "immediately" because the Government, unlike the Department of Justice in the *Windsor* case, had no intention of appealing any adverse judgment against the State or requesting

[7] We recognize that the First Circuit added an important "caveat" that timeliness nevertheless "retains considerable bite," *id.,* but on the facts here, it would not remotely be an abuse of discretion for this court to hold that the timeliness requirement is met.

a stay pending appeal (and, as is likely, ultimate resolution of these issues by the Supreme Court). Eastman Decl. ¶ 5; *see also id.* Exs. A and B, FAQs: Same Sex Marriages (updated April 18, 2014) (State Registrar—a Defendant here—announcing to county clerks that she "anticipate[d] that sometime at the end of April or beginning of May 2014, same sex marriages will be legally allowed in Oregon" and that "[i]f Judge McShane rules that same-sex marriages are legal in Oregon, the State Registrar will *immediately* provide paper copies" of new marriage license forms with gender-neutral language, likewise indicating that the Government had no intention either to appeal or to request a stay pending appeal). The scheme to accelerate the implementation of the assumed outcome of this collusive lawsuit confirms the imperative that an adversarial intervention is required.

Under present circumstances, the protectable interests of NOM's Oregon members will never receive appellate review absent intervention. The courts have regularly recognized that an application for intervention to protect access to appellate review is timely even post judgment, and even if filed first in the appellate court. *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977); *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991). *A fortiori,* NOM's effort to intervene before any judgment has been rendered by this court, in order to protect appellate access in the event of an adverse judgment, is, therefore, timely as well, a proposition that is *supported* by the cases relied on respectively by Plaintiffs and the Government. *Clarke*, 264 F.R.D. at 380 ("The only time one can know whether a party intends to appeal is after a court enters judgment"); *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1044-45 (9th Cir. 2000) ("A post-judgment motion to intervene is generally considered timely if it is filed before the time for filing an appeal has expired"), *abrogated on other grounds by City of Columbus v. Ours Garage & Wrecker Serv., Inc.,* 536 U.S. 424 (2002). Indeed, as the Sixth Circuit held in a case cited in the *Clarke* decision

relied on by Plaintiffs, intervention is timely even after final judgment by someone whose interests were no longer protected once the party who had shared those interests in the trial court announced his intention not to appeal an adverse judgment. *Triax Co. v. TRW, Inc.*, 724 F.2d 1224, 1228–29 (6th Cir. 1984).

The other cases upon which the Government and Plaintiffs primarily rely involved distinctly different factual circumstances and, therefore, do not undermine the timeliness of NOM's motion. *See, e.g.*, *NAACP v. New York*, 413 U.S. 345, 366 (1973) ("Timeliness is to be determined from all the circumstances"); *R & G Mortgage Corp.*, 584 F.3d at 7 ("The timeliness inquiry is inherently fact-sensitive and depends on the totality of the circumstances"); *KG Urban Enterprises, LLC v. Patrick*, 293 F.R.D. 42, 47 (D. Mass. 2013), *appeal dismissed* (Oct. 1, 2013) ("The fact-intensive nature of this inquiry 'limits the utility of comparisons between and among published opinions'") (quoting *Pub. Serv. Co. of New Hampshire v. Patch*, 136 F.3d 197, 204 (1st Cir.1998)).

Dandridge v. Jefferson Parish Sch. Bd., 249 F.R.D. 243 (E.D. La. 2008), relied on by Plaintiffs, was a school desegregation case that had been active for more than forty years. In 2007, the Plaintiffs and the school district sought to amend a long-standing consent decree in order to permit magnet schools. During the year of negotiations which followed, neither the parents nor the teachers' union sought to intervene or otherwise participate in the discussions about modification of the original consent decree. Not until that lengthy process was finalized, and just a few days before the fairness hearing for the Court's ratification, did they seek to intervene. Under those circumstances, the court held the motions were untimely.

D'Amato v. Deutsche Bank, 236 F.3d 78 (2d Cir. 2001), relied on by Defendants, was a class action suit. The applicant for intervention, a class member, had been aware of the suit for

more than a year and had received notice of the class action that was sent to all members of the class more than two months before the fairness hearing. Yet he moved to intervene—and add additional parties—just 3 days before the fairness hearing on a settlement that had already been agreed to, without offering any reason. The First Circuit determined that the district court's denial of intervention as untimely under those circumstances was not an abuse of discretion. *Id.* at 84. Similarly, in *R & G Mortgage Corp.*, 584 F.3d at 9, a month after the proposed intervenor learned that its contractual interests were at stake in the litigation, it "threatened to intervene, … [b]ut despite this bluster, [it] inexplicably waited" another month and a half before actually moving to intervene. In that time, "the original parties had forged a settlement of their dispute," and the proposed intervention "was aimed at disrupting that settlement." *Id.*

The circumstances surrounding NOM's application for intervention, even if deemed somewhat tardy, are not comparable, and thus weigh strongly in favor of intervention. However, as Defendants correctly point out, the courts also consider the stage of the proceedings when the applicant seeks to intervene and any prejudice to the existing parties from any resulting delay if intervention is granted. *Silver v. Babbitt*, 166 F.R.D. 418 (D. Ariz. 1994) (citing *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657 (9th Cir. 1978). Both of those considerations support intervention.

On the "stage of the proceedings" consideration, Plaintiffs rely on *Clarke.*, filed as class action on behalf of nurses alleging that defendant hospitals had conspired to depress their pay. 264 F.R.D. at 377. The motion to intervene by someone wishing to join as a plaintiff was filed more than *three years* after the case was filed. *Id.* at 378. During that time, the court had considered and denied a motion to dismiss, the deadline for adding additional parties had passed, the court had denied a motion to add a class member five months after the deadline for adding parties had passed, class-certification discovery had been conducted and closed, and plaintiffs'

motion for class certification had been denied. *Id.* at 379. Although plaintiffs' counsel had been aware for more than two years of "adequacy of representation" problems with their two named plaintiffs, only after the class certification was denied did they seek to have an additional nurse intervene. *Id*. The court denied the motion, not "because the case had progressed to the summary judgment stage," as Plaintiffs claim, but because the intervenor sought "to relitigate the issue of class certification with the benefit of hindsight," with new expert testimony and a new definition of the putative class, all of which would require Defendants to reopen class discovery, analyze a new expert report, respond to an amended complaint, and generally "to start from scratch." *Id.* at 381. In other words, much more had occurred in that case that would have to be redone had intervention been granted.

Nothing of the sort is at play here. Indeed, given the friendly agreement, even facilitation and mentoring, between Plaintiffs and the Government Defendants in this case, no motions to dismiss were filed, no discovery was taken, and no real oppositions to the motions for summary judgment were filed or presented at oral argument. "Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances. *NAACP v. New York*, 413 U.S. at 365-66 (1973).

As for prejudice to the existing parties, "[t]he only prejudice relevant to the timeliness determination is incremental prejudice from a would-be intervenor's delay in intervening, not prejudice from the intervention in and of itself. *Davis v. Lifetime Capital, Inc.*, 11-4442, 2014 WL 1011430 (6th Cir. Mar. 18, 2014) (citing *Stotts v. Memphis Fire Dep't,* 679 F.2d 579, 584 (1982); *see also Stallworth v. Monsanto Co.,* 558 F.2d 257, 267 (5th Cir.1977) (relevant issue is not how much prejudice would result from allowing intervention, but rather how much prejudice

would result from the would-be intervenor's failure to request intervention as soon as he knew or should have known of his interest in the case).

Plaintiffs' only claim of "prejudice" is that "[i]t appears that NOM's strategy is to scuttle the plaintiffs' ability to vindicate their constitutional rights by creating a procedural morass and lodging an appeal in the Ninth Circuit, in the hope that this would force a stay of a favorable judgment for the plaintiffs." P's Opp. at 9. They claim that "[t]his could potentially forestall plaintiffs' ability to marry for years," a "significant" "prejudice to the plaintiffs." *Id.* at 9-10. Even if those concerns are accurate, they arise "from the intervention in and of itself," not from any incremental delay in NOM's seeking to intervene. Indeed, it is hard to fathom how NOM's seeking to intervene in April rather than in February (as Plaintiffs' apparently concede would have been timely) could be responsible for "potentially forestall[ing] plaintiffs' ability to marry for years." Plaintiffs' real concern is that having an opponent in the case who actually opposes their claims might result in contested trial and appellate proceedings. But that is not the kind of "prejudice" that is relevant to the timeliness determination. *Davis*, 2014 WL 1011430, at *15.[8]

Moreover, one has to question the sincerity of Plaintiffs' claims of "prejudice." Unlike the plaintiffs in the Proposition 8 case in California, who filed suit in federal court immediately after that initiative was upheld by the Supreme Court (in a suit which itself had been filed the day after the initiative passed), Plaintiffs in these consolidated cases waited nearly a decade after Measure 36 was passed before bringing suit. And as this Court has already noted, they could at

[8] The Government Defendants try to characterize their arguments of "prejudice" as tied to the delay itself rather than the fact of intervention. D's Opp. at 5-6 ("if the parties *must now* reverse course…."). But most of their claim turns on the fact of intervention, not the timing, and the one that does turn on timing—that the parties will have to "argue the summary judgment motions again"—is of their own making. NOM requested that the hearing be postponed, but both Plaintiffs and Defendants opposed the motion.

any time (and still can) obtain a marriage license in Vancouver or elsewhere, which the Attorney General has determined (albeit erroneously, as NOM will contend) will be recognized in Oregon.

In sum, the Ninth Circuit has recognized that "[i]n determining whether intervention is appropriate, [the courts] are guided primarily by practical and equitable considerations [and] generally interpret the requirements broadly in favor of intervention." *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998) (citing *United States ex rel. McGough v. Covington Techs. Co.,* 967 F.2d 1391, 1394 (9th Cir.1992) ("Generally, Rule 24(a)(2) is construed broadly in favor of proposed intervenors and we are guided primarily by practical considerations.") (internal quotation marks and citation omitted). Under that standard, and in light of the circumstances described above, NOM's application should be deemed timely.

B. NOM's members do have significant protectable interests that have been recognized by the courts.

Plaintiffs first argue that NOM has no protectable interest because it is an advocacy organization with only a general ideological interest in the lawsuit. Pls.' Opp'n at 10 (citing *Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 782 (6th Cir. 2007) and *Westlands Water Dist. v. United States*, 700 F.2d 561, 563 (9th Cir. 1983); *see also* Defs.' Opp'n Mot. Interv. at 10. This is a straw man argument, as NOM has not sought to intervene based on its "general ideological interest in the lawsuit," but on behalf of the particularized interests of several categories of its members. "[P]ublic interest groups … whose members are affected by the law, may likely have an ongoing legal interest in its enforcement after it is enacted." *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 345 (6th Cir. 2007); *see also Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 629 (1991); *NAACP v. Alabama*, 357 U.S. at 459.

Moreover, Plaintiffs' argument that "NOM has failed to provide the slightest evidentiary record to show that these members exist and that they endorse NOM's invocation of their membership to insert itself in this litigation," Pls.' Opp'n Mot. Interv. at 11, is patently false. NOM submitted the Declaration of its President, Brian Brown, in which Brown explicitly stated under oath that NOM has members with protectable interests in this litigation, including a county clerk, a wedding services provider, and someone who voted in favor of Measure 36, but who feared retaliation if they intervened in their own name. *See* Decl. of Brian Brown ¶¶ 4-8. It can also be reasonably inferred from Brown's Declaration that those members endorse NOM's intervention in order to protect the interests that they feared from protecting themselves. *Id*. Because Rule 24 is to be liberally construed in favor of intervention, *United States v. City of Los Angeles*, 288 F.3d 391, 398 (9th Cir. 2002), and because "a district court is required to accept as true the nonconclusory allegations made in support of an intervention motion," *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 819 (9th Cir. 2001), the factual statements in Brown's sworn declaration are more than adequate evidence that NOM has members who have protectable interests but who, because of real fears of harassment and retaliation that prevent them from protecting those interests themselves, welcome NOM's intervention on their behalf.

Each of the categories of members described in NOM's motion to intervene have protectable interests.

i. The fact that a county clerk may be a member of NOM only in his personal capacity does not defeat NOM's third-party standing to represent his interest as a county clerk.

It is anomalous, if not disingenuous, for Plaintiffs to assert that NOM's county clerk member has no standing when in their own brief Plaintiffs admit that they named the Multnomah

County official who is responsible for issuing marriage licenses (like county clerks are elsewhere in the state) "to help ensure there would be no question that counties are bound by the Court's judgment." *See* Pls.' Opp'n Mot. Interv. at 13 n.6. Indeed, Plaintiffs' admission is dispositive. The very fact that Plaintiffs are seeking to have county clerks bound by the judgment is what provides county clerks with a significant protectable interest in this litigation.[9] Public officials have a legitimate interest "to resist the endeavor to prevent the enforcement of statutes in relation to which they have official duties," *Coleman v. Miller*, 307 U.S. 433, 441-42 (1939), and the relationship of that interest to Plaintiffs' claims confers standing on them (and on NOM on their behalf), *Donnelly*, 159 F.3d at 409.

Plaintiffs try to avoid this pitfall by asserting that a county clerk could only be a member of NOM in his personal capacity and that, as a result, there can be no basis for NOM's third-

[9] Both Plaintiffs and the Government try to make something of the fact that because NOM has not identified its County Clerk member, it is impossible for this Court to determine whether the County Clerk has a protectable interest. As noted above, *supra* at n.5, NOM has used "County Clerk" as shorthand for both those who bear the official title of "County Clerk" and those other county officials who, in their counties, perform the duties of a County Clerk with respect to marriage. Moreover, despite the Government's intimation to the contrary, almost all County Clerks or the comparable county official have authority to issue marriage licenses. That is true in all 27 general law counties, both the 19 that are governed by a County Commission and the 8 that are governed by a County Court. All those County Clerks are elected (and therefore exercise their duties with respect to the issuance of marriage licenses independently of the County Commission or County Court). ORS 204.005(b). And they issue marriage licenses in their respective counties. ORS 205.320. County Clerks are also elected, and therefore have independent authority in performing their duties with respect to issuance of marriage licenses, in two of the nine "home rule" counties. *See* Jackson County Charter, Ch. 1, Sec. 5(2), Ch. 5, Sec. 20; Josephine County Charter, Ch. 5, Sec. 19. And while the clerks (or their equivalent) also issue licenses in the remaining seven home rule counties, they are appointed rather than elected, and therefore operate under the supervision of other county officials rather than independently. Whether that matters for standing purposes is irrelevant, however, for NOM's county clerk member is not from one of those seven counties. Eastman Decl. ¶ 7. We do note the rich irony of the Attorney General's claim that a county clerk could not defend the law because doing so would be illegally using his position to further a personal political agenda," Defs.' Opp'n at 13, when it is the Attorney General herself who is substituting a personal political agenda for official duty by *refusal* to defend (and actually attacking) Oregon's marriage laws embedded in the state constitution.

party standing on the clerk's behalf for the performance of official duties. The only authority Plaintiffs cite is *Cooke v. Hickenlooper*, No. 13-01300, 2013 WL 6384218, *9 (D. Colo. Nov. 27, 2013), for the uncontrovertable point that government officials can assert rights in two capacities. But that point does not address the issue presented here, namely, whether a clerk's private interests can be effected by his or her official duties. On that issue, Plaintiffs present no authority whatsoever, and the Government's authority, *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835-836 (9th Cir. 1996), dealing with 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, is far from the mark.

Even if *Cooke* and *Van Ort* can somehow be read to reach the issue, 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. For example, the office of county clerk is a paid position. Currently, an individual with a sincerely-held religious objection to facilitating same-sex marriages can hold the office of county clerk without violating any religious beliefs. If the Oregon law is struck down, that would no longer be 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. 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, and the clerk therefore has a protectable interest that NOM can assert on his behalf.

Plaintiffs also misrepresent the Ninth Circuit's decision in *Perry v. Schwarzenegger*, 630 F.3d 898 (9th Cir. 2011) ("*Perry II*"). The problem with the proposed intervention in that case was that it was *not* on behalf of the county clerk, but merely on behalf of a deputy county clerk

and the County Board of Supervisors, neither of which had a direct duty regarding the issuance of marriage licenses. The deputy county clerk had argued that she had a protectable interest in the litigation challenging the constitutionality of California's marriage law because "[a]ny injunctive relief granted by [the district court] would directly affect the Clerk's performance of her legal duties." *Id.* at 902. The court explicitly noted that "[w]ere Imperial County's elected County Clerk the applicant for intervention, that argument might have merit." *Id*. at 903. But the County Clerk was not seeking to intervene, only the deputy clerk was, and because the deputy clerk did not contend to be acting on behalf of the County Clerk, she had no protectable interest in the case. "To the extent [any] injunction [issued in the case] may affect local officers in counties beyond [those whose clerks had been named as defendants]," the court noted, "it would enjoin only other County Clerks from performing their duties as required by state law." *Id.* at 904. Moreover, the court specifically recognized that "being bound by [such] a judgment 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." *Id*.

Significantly, the Ninth Circuit made these statements even though "[u]nder California law," just as under Oregon law, marriage "is a 'matter of statewide concern' rather than a municipal affair." *Id*. at 905 (quoting *Lockyer v. City and County of San Francisco*, 95 P.3d 459, 471 (Cal. 2004)). That the county clerk's duties were merely ministerial on a matter of statewide concern had been the basis of the district court's denial of the motion to intervene, Order Denying Intervention, at 5, Dkt. #709, *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. Aug. 04, 2010) ("*Perry I*"), but in affirming the denial, the Ninth Circuit expressly did so "on grounds different from those relied on by the district court." *Perry II*, 630 F.3d at 901. Plaintiffs' reliance on *Li v. State*, 338 Or. 376, 396, 110 P.3d 91 (2005), for the twin propositions

that marriage is a matter of statewide concern and that the county clerk's role "is ministerial only" is therefore beside the point; neither proposition was relevant to the Ninth Circuit's holding on standing.[10]

Plaintiffs and Defendants also misconstrue the Supreme Court's subsequent decision in the case, *Hollingwsorth v. Perry*, which addressed not whether a county clerk had standing to intervene, but whether the proponents of the initiative did. The Ninth Circuit had 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). The Ninth Circuit 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, however, the Court also considered whether the Proponents had a particularized injury in their own right, holding that the injury they asserted was just 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 just generalized grievances) would have

[10] Plaintiffs' assertion, at p.13 n.5, that the "ministerial duties" with respect to marriage that county clerks have in Oregon makes them "most analogous to the role of Imperial County and its board of supervisors in *Perry*," is erroneous. The Ninth Circuit in *Perry* denied intervention to Imperial County because it "play[ed] *no role* with regard to marriage," not because it exercised only ministerial duties. *Perry II*, 630 F.3d at 905 (emphasis added).

had standing to intervene, but there is nothing in the opinion even to suggest that its long-established standing doctrine on that path to standing was in any way modified, much less overruled altogether. Quite the opposite; it is expressly reaffirmed in the very passage upon which Plaintiffs rely.[11]

So Defendants' contention, relying on *Hollingsworth*, that "only a state's designated agents may represents [the state's] interests in defending the constitutionality of its laws," Defs.' Opp'n at 8, is beside the point. NOM has not claimed to be representing the interests of the State. Rather, it claims to be representing the particularized interests of its members. It is those interests that provide grounds for intervention, and would also provide grounds for appealing any adverse judgment.

ii. **NOM's members who provide wedding services also have protectable interests.**

Plaintiffs' contentions about NOM's wedding service providers also misconstrue NOM's argument. Currently, wedding service providers in Oregon don't have to facilitate "marriages" for same-sex couples because Oregon law does not allow such marriages. They therefore do not have a freedom of religious conscience conflict on the issue directly implicated by this litigation. Whether or not they 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, Plaintiffs' argument assumes that the objection is to serving same-sex couples at all, but that

[11] Plaintiffs disingenuously attempt to conflate the two holdings by placing the conclusion about Proponents not having standing as agents of the state in the same breath as the discussion about particularized injury, thereby suggesting that no one—even someone with a particularized interest—has standing to defend a state law when the Attorney General refuses to do so. Pls,' Opp'n at 15-16 (citing *Hollingsworth,* 133 S.Ct. at 2662-62, 2668). But the two were entirely distinct holdings, and the Court's holding that the Proponents lacked a particularized injury was not a repudiation of the doctrine, merely a recognition that Proponents failed to demonstrate a particularized injury under it. NOM makes very different claims of particularized injury here.

assumption is not supported by any evidence and certainly has not been put in play by the pleadings or Proposed Intervenor's Answers. Rather, the objection identified in the Declaration of Brian Brown is to "facilitating marriage ceremonies." Brown Decl. ¶ 7. The conflict between that activity and religious liberty is sufficient to establish that there is a "relationship" between the "legally protected interest[s]" of NOM's wedding-service members "and the plaintiff[s'] claims" that qualifies as a "significant protectable interest." *Donnelly*, 159 F.3d at 409 (citing *Northwest Forest Resource Council v. Glickman,* 82 F.3d 825, 837 (9th Cir.1996)). An applicant generally satisfies the "relationship" requirement if the resolution of the plaintiffs' claims will affect the applicant. *Donnelly*, 159 F.3d at 410.

iii. NOM members whose votes are effectively negated by this collusive litigation have standing to protect their vote.

As we noted in our opening Memorandum, groups of voters who have effectively had their vote nullified by actions of their elected officials have standing to protect the efficacy of their vote. The Government has refused to defend the constitutional provision adopted by the voters of Oregon, and worse, it has coordinated with Plaintiffs in a collusive suit, conceded factual allegations that should have been disputed, failed to raise viable legal arguments, and even attributed discriminatory motive to these voters, all but guaranteeing that the provision would be struck down and the votes of those who supported Measure 36 rendered nugatory.

Plaintiffs' reliance on *Northland Family Planning Clinic* is misplaced. NOM is not contending that voters who approved Measure 36 have an interest in enforcement that is different from the general public and which, *Northland* holds, is "entrusted for the most part to the government." Rather, NOM contends that the government's actions here have effectively negated the votes of NOM's members who voted for Measure 36. Although the application of

that rule in the precise circumstances at issue here is somewhat novel—Attorneys General have not typically taken actions in dereliction of duty that effectively negated the votes of the citizenry they represent—that's a pretty standard vote dilution/vote negation claim of the sort that the Supreme Court has long recognized confers standing on individual voters. "[T]he right of suffrage can be denied by a *debasement* or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (emphasis added). "The right to vote … includes the right to have the vote counted at full value without dilution or discount. … That federally protected right suffers substantial dilution … (where a) favored group has full voting strength … (and) (t)he groups not in favor have their votes discounted." *Id*. at n.29 (quoting *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting). By her actions, the Attorney General here has "discounted" the votes cast by supporters of Measure 36 all the way down to zero.

Lance v. Coffman, 549 U.S. 437 (2007), is instructive. There, the Supreme Court denied standing to four Colorado voters who had challenged a state court interpretation of a Colorado redistricting law as violating the Elections Clause of the U.S. Constitution because a state court, rather than the legislature, drew the state's district lines. "This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past," the Supreme Court held. *Id.* at 442. But the Court proceeded to note that "[i]t is quite different from the sorts of injuries alleged by plaintiffs in voting rights cases where we have found standing." *Id.* (citing, e.g., *Baker*, 369 U.S. at 207–208).

Several decisions following the rule from *Baker* are closely on point on the issue whether NOM's voter members have cognizable injuries or merely generalized, abstract grievances. In *Michel v. Anderson*, for example, the D.C. Circuit upheld the standing of voters to press a

constitutional challenge that their member of Congress's vote was unconstitutionally diluted by a House of Representatives rule allowing non-member delegates from territories to vote in the Committee of the Whole. *Michel v. Anderson*, 14 F.3d 623, 626 (D.C. Cir. 1994). The court specifically rejected the contention that because every voter in the country suffered the same vote-dilution injury, they were "raising only a generalized, abstract grievance which … is not an injury for Article III purposes." *Id.* "That an injury is widespread," the court noted, "does not mean that it cannot form the basis for a case in federal court so long as each person can be said to have suffered a distinct and concrete harm." *Id.* (citing *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 449–50 (1989)). Because the "Supreme Court has repeatedly held that voters have standing to challenge practices that are claimed to dilute their vote," these voters likewise had standing to bring the derivative vote dilution claim. *Id.*

Similarly, in *Department of Commerce v. U.S. House of Representatives,* the Supreme Court upheld the standing of an Indiana voter challenging the constitutionality of the Census Bureau's decision to use sampling techniques when conducting the 2000 census, on the ground that the loss of a seat in Congress by Indiana as a result of the sampling would result in the dilution of "Indiana residents' votes." *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 332 (1999). That the voter would suffer the same injury as all other "Indiana residents" was not even mentioned by the Court.

Granted, *Michel* and *Department of Commerce* are vote dilution cases, and NOM is arguing that the Attorney General's actions here have effectively nullified its members' 2004 votes in favor of Measure 36 entirely. But as a hypothetical given by the *Michel* court confirms, that is a distinction without a difference. "Suppose, for sake of analysis, the House were to

prevent all congressmen from the State of Georgia from voting in the House," the court stated. "It is obvious that Georgia voters would have suffered an injury." *Michel*, 14 F.3d at 626.

The Supreme Court's decision in *Coleman v. Miller* also supports standing for NOM's voter members, whose votes are essentially being "overridden and virtually held for naught" by the capitulation of the Government here. In that case, the Supreme Court upheld the standing of "twenty senators, whose votes against ratification [of a federal constitutional amendment] have been overridden and virtually held for naught" by a decision of the state Supreme Court holding that the tie-breaking vote of the lieutenant governor was valid. "We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes," the Court held. "They have set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect and the state court has denied that right and privilege." *Coleman*, 307 U.S. at 438. NOM's voter members likewise "have a plain, direct and adequate interest in maintaining the effectiveness of their votes," and the Attorney General, by her actions and inactions, has deprived them of that right and privilege, of the effectiveness of their vote. That suffices for Article III standing.

Indeed, "any person whose right to vote is impaired … has standing to sue." *Gray v. Sanders*, 372 U.S. 368, 375 (1963) (citing *Smith v. Allwright*, 321 U.S. 649 (1944) and *Baker v. Carr*, 369 U.S. at 204-208). The right to vote "includes 'all action necessary to make a vote effective.'" *Allen v. State Bd. of Elections*, 393 U.S. 544, 566 (1969) (quoting 79 Stat. 445, 42 U.S.C. § 1973*l*(c)(1) (1964 ed., Supp. I). That right exists whether the impairment is done legislatively or by some other officer, such as the Attorney General and other Government Defendants here, who seek to effectively nullify the votes of those who supported Measure 36 by deliberately undermining Measure 36's defense. Borrowing from a famous eighteenth century

English case, the Supreme Court in *Gray* noted that "[i]t would look very strange, when the commons of England are so fond of their right of sending representatives to parliament, that it should be in the power of a sheriff, *or other officer*, to deprive them of that right, and yet that they should have no remedy …. This right of voting is a right in the plaintiff by the common law, and consequently he shall maintain an action for the obstruction of it. *Gray*, 372 U.S. at 375 n.7 (quoting *Ashby v. White*, 2 Ld.Raym. 938, 953, 954, 956 (1702) (Chief Justice Holt) (emphasis added).

Defendants' cases are not to the contrary, as none of them involved vote dilution claims. *See* Defs.' Opp. at 15 (citing, *e.g.*, *Drake v. Obama*, 664 F.3d 774 (9th Cir. 2011)).

C. Given the Government's complete abdication of defense of, and active participation in the attack on, the Oregon Constitution's marriage provision, inadequacy of representation should be a foregone conclusion.

Plaintiffs' assertion, briefly parroted by their supporting Defendants, that the Government is adequately representing the interests of NOM's members in defending Oregon's marriage law is laughable. Indeed, Plaintiffs' reliance on an Oregon statute that imposes on the Oregon Attorney General the "duty" to appear for the State and to "defend for the state all causes" is priceless. *See* P's Opp. at 17 (citing ORS 180.060(1)(d)). It is the Attorney General's incredible abandonment of her duty to defend the state's interest, reflected most profoundly by the policy judgment of the people of the state when exercising their power of initiative to amend their state constitution, that has necessitated NOM's intervention in this matter.

The burden of demonstrating inadequacy of representation is a minimal one. *Triax*, 724 F.2d at 1227 (citing *Trbovich v. United Mine Workers,* 404 U.S. 528, 538 n. 10 (1972)). "In

determining whether an applicant's interest is adequately represented by the parties," the Ninth Circuit "considers (1) whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the would-be intervenor would offer any necessary elements to the proceedings that other parties would neglect." *Glickman*, 82 F.3d at 838 (citing *California v. Tahoe Regional Planning Agency*, 792 F.2d 775, 778 (9th Cir.1986)). Although the "prospective intervenor bears the burden of demonstrating that existing parties do not adequately represent its interests, . . . the requirement of inadequate representation is satisfied if the applicant shows that representation 'may be' inadequate. *Id.* (citing *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (1983)).

We don't have to speculate here, however, for the Government Defendants have already made manifestly clear in their briefs in "response"—they couldn't even call them "oppositions"—to Plaintiffs' respective motions for summary judgment and at oral argument that they do not intend to make *any* arguments in defense of Oregon's marriage laws, much less that they "will undoubtedly make *all* the intervenor's argument." We outlined in our opening Memorandum in support of intervention at 1-3, and also above, *supra* at 4-5, a few of the arguments that Defendants should have made but have not.[12] Another obvious point the

[12] The Government seems to be of the view that merely "put[ting] arguments before this Court," even though attacking rather than advancing them, as Intervenor would, is sufficient to demonstrate adequacy of representation. Not surprisingly, they cite no authority for this extraordinary proposition. The Ninth Circuit's first factor is whether the current party will undoubtedly "make" all of the arguments that intervenor would make, not take shots at them. Moreover, Defendants claim elsewhere in their brief, when asserting that they will be "prejudiced" by NOM's intervention, that NOM's intervention would require that "the parties"—not "the Plaintiffs," but "the parties," apparently including Defendants as well—would have to "review a new set of arguments [and] brief responses to them." Defs.' Opp'n at 5. That certainly sounds as though the Government is anticipating additional and unique arguments by NOM, and that it plans to oppose those arguments by "brief[ing] responses"—not exactly the

Government missed is that the policy judgment reflected in Oregon statutes, which the Attorney General believes prevents her from providing a defense here, cannot trump or otherwise displace the policy judgment made by the people in their Constitution, because "all power is inherent in the people." Or. Const. Art. I, § 1. The relationship between the state Constitution and state statutes thus works the opposite direction from what the Attorney General asserted during oral argument on April 23, 2014, and in her brief. (Dfs.' Opp'n at 8.) Intervenor will correct that misrepresentation and advance that elementary proposition. In furtherance of her contempt for the voters of Oregon, the Attorney General just this week filed a Notice of Supplemental Authority seeking to *counter* the arguments that are being made by government defendants in other jurisdictions in defense of similar state laws, leveling another gratuitous, scurrilous, and unsubstantiated charge that Measure 36 was "unquestionably passed" by the million plus Oregonians who voted for it "to discriminate [invidiously] against a group of citizens on the basis of their sexual orientation" in the process. State Defs.' Notice of Supp. Auth. at 4.

In other words, there are a number of arguments that Intervenors will make that the current Defendants have demonstrated they are unwilling to make. Indeed, because the Attorney General's manifest unwillingness to defend Oregon's marriage law makes this a collusive suit, Intervenor would also provide the adversarialness that is necessary for this court's jurisdiction, thus filling the third factor that the Ninth Circuit says should be considered.

Finally, because Defendants have already announced they will not file an appeal of any judgment striking down Oregon's marriage law, their representation of Intervenor's interests is "inadequate" for that reason alone. *See Triax*, 724 F.2d at 1228 ("We conclude that, as of the

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kind of response one expects from someone who claims to be adequately representing the interests of the prospective Intervenor.

time Triax decided not to appeal, its representation of Lemelson's interest became inadequate … under Fed. R. Civ. P. 24(a)(2)).

II. NOM Also Qualifies for Permissive Intervention Under Rule 24(b).

If this Court denies NOM's motion to intervene as of right, it still has even greater discretion to grant NOM's request for permissive intervention if NOM has shown that it has an independent ground for jurisdiction, that its motion is timely, and that there is a common question of law and fact between its claim or defense and the main action. *Blum v. Merrill Lynch Pierce Fenner & Smith Inc.*, 712 F.3d 1349, 1353 (9th Cir. 2013).

For the reasons stated above and previously, NOM's motion is timely. *See supra*, at Section I.A. It has an independent ground for jurisdiction, based on third-party standing under *NAACP v. Alabama* and the particularized injuries that its members will suffer if Oregon's marriage law is held unconstitutional. *Supra* at Section I.B. Finally, because it is simply making a "defense" against Plaintiffs' claims of unconstitutionality, there is by definition a "common question of law or fact" between its defense and the main action. Indeed, the questions of law are identical.

The Government seems to be of the view that NOM has to have an affirmative defense in order to meet this requirement for permissive standing. That is not so. NOM, as a third-party intervenor, is raising the same "defenses" to Plaintiffs' constitutional challenges that its members with protectable interests are able to raise, and that the Government itself should be raising (but is not). Since one of those members—a county clerk—is in the identical position as one of the named Defendants—the Multnomah County Assessor, who performs in that county the duties of a county clerk with respect to marriage—there is no doubt that there is a "common question of law or fact between its claim or defense and the main action." The Government concedes that

the Multnomah County Assessor properly has a "defensive rol[e] in this constitutional challenge," but it does not explain how, given the statewide injunctive relief Plaintiffs seek, every other county clerk does not have exactly the same interest. For good reason—they clearly do. Permissive intervention is therefore warranted, in the event the Court finds some barrier to intervention as of right.

CONCLUSION

For the reasons stated above and previously, NOM's motion to intervene should be granted.

Dated this 9th of May, 2014.

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