No. A13-_____

In the

Supreme Court of the United States

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

Applicant,

v.

DEANNA L. GEIGER, JANINE M. NELSON, ROBERT DUEHMIG, WILLIAM GRIESAR, PAUL RUMMELL, BENJAMIN WEST; LISA CHICKADONZ, CHRISTINE TANNER, AND BASIC RIGHTS EDUCATION FUND,

Respondents (Plaintiffs),

and

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

Respondents (Defendants).

Application to Stay Judgment Pending Appeal

DIRECTED TO THE HONORABLE ANTHONY KENNEDY, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT

Roger K. Harris
HARRIS BERNE CHRISTENSEN LLP
5000 SW Meadows Road, Suite 400
Lake Oswego, OR 97035
Tel: (503) 968-1475
Fax: (503) 968-2003
roger@hbclawyers.com

John C. Eastman
Counsel of Record
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
c/o Chapman University Fowler School of Law
One University Dr.
Orange, CA 92866
Tel: (877) 855-3330
Fax: (714) 844-4817
jeastman@chapman.edu

Counsel for Applicant National Organization for Marriage, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii
INTRODUCTION 1
BACKGROUND 7
JURISDICTION 10
REASONS FOR GRANTING THE STAY 11
I. There is a strong likelihood that certiorari will be granted if the Court of Appeals affirms. 12
A. This Court Has Already Granted Certiorari on a Case Raising the Same Substantive Constitutional Questions Presented by the Underlying Judgment Here. 12
B. As in *Hollingsworth*, the jurisdictional question presented by the District Court's denial of NOM's motion to intervene in the otherwise non-adversarial proceeding is itself likely to garner a writ of certiorari from this Court. 15
II. There is a strong likelihood that the district court's decisions denying intervention and enjoining Oregon's marriage laws will be overturned 19
A. *Windsor* itself strongly suggests that the States retain the authority to define marriage in a way that recognizes its gender complementarity and procreative purpose. 19
B. Because this Court has recognized that even post-judgment intervention is timely when necessary to protect appellate rights, and because at least some of NOM's members have protectable interests in this litigation, this Court would likely overturn the denial of intervention, particularly when intervention was necessary to solidify the lower court's jurisdiction. 31
III. Absent a stay, there is a likelihood of irreparable harm. 34
IV. The balance of equities favors a stay. 37
CONCLUSION 39
Appendix A: Opinion of District Court on Motions for Summary Judgment ...... App. A
Appendix B: District Court Order Granting Summary Judgment .... App. B
Appendix C: District Court Judgment .... App. C
Appendix D: Ninth Circuit Order Denying Stay .... App. D

TABLE OF AUTHORITIES

Cases

Adams v. Howerton,
673 F.2d 1036 (9th Cir. 1982) 23

Andersen v. *King County,*
138 P.3d 963 (Wash. 2006) 29

Arkansas v. Wright,
No. CV-14-427 (Ark. S.Ct. May 16, 2014) 2

Ashwander v. TVA,
297 U. S. 288 (1936) 32

Baker v. Carr,
369 U. S. 186 (1962) 32

Baker v. *Nelson,*
191 N.W.2d 185 (Minn. 1971) 22

Baker v. Nelson,
409 U.S. 810 (1972) 15, 22, 23

Barnes v. *£-Systems, Inc. Group Hosp. Med. & Surgical Ins. Plan,*
501 U.S. 1301 (1991) 12

Bishop v. United States ex rel. Holder,
962 F.Supp.2d 1252 (N.D. Okla. 2014) 2

Bostic v. Rainey,
970 F.Supp.2d 456 (E.D. Va. 2014) 2

Bourke v. Beshear, 3:13-CV-750-H,
2014 WL 556729 (W.D. Ky. Feb. 12, 2014) 2

Bowen v. Gilliard,
483 U.S. 587 (1987) 29

Brennan v. Silvergate Dist. Lodge No. 50, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO, 503 F.2d 800 (9th Cir. 1974) 10

Bush v. Gore,
531 U.S. 98 (2000) 14, 34

Chicago & Grand Trunk R. Co. v. Wellman,
143 U. S. 339 (1892) 32

Citizens for Equal Protection v. *Bruning,*
455 F.3d 859 (8th Cir. 2006) 5, 14, 23

Citizens United v. FEC,
558 U.S. 310 (2010) 16

City of Columbus v. Ours Garage & Wrecker Serv., Inc.,
536 U.S. 424 (2002) 32

Coleman v. Paccar, Inc.,
424 U.S. 1301 (1976) 12

Conkright v. *Frommer,*
556 U.S. 1401 (2009) 12

De Leon v. Perry, SA–13–CA–00982–OLG,
2014 WL 715741 (W.D.Tex. Feb. 26, 2014) 2

Deauer v. *United States,*
483 U.S. 1301 (1987) 11

DeBoer v. Snyder,
No. 14-1341 (6th Cir. 2014) 2

Doe v. Reed,
561 U.S. 186 (2010) 16

Donaldson v. State,
292 P.3d 364 (Mont. 2012) 23

Edelman v. *Jordan,*
415 U.S. 651 (1974) 23

Edwards v. Hope Med. Grp. for Women,
512 U.S. 1301 (1994) 12

Elrod v. *Burns,*
427 U.S. 347 (1976) 38

Evans v. Utah, 2:14CV55DAK,
2014 WL 2048343 (D. Utah May 19, 2014) 6

FCC v. Beach Communications,
508 U.S. 307 (1993) 24

Harper v. Virginia Bd. of Elections,
383 U.S. 663 (1966) 14, 34

Heckler v. *Lopez,*
463 U.S. 1328 (1983) 11

Heller v. Doe,
509 U.S. 312 (1993) 24

Herbert v. Kitchen,
134 S. Ct. 893 (Jan. 6, 2014) 2, 12, 19, 26

Hernandez v. *Robles*,
855 N.E.2d 1 (N.Y. 2006) 29

Hicks v. Miranda,
422 U.S. 332 (1975) 15, 23

Hollingsworth v. Perry,
133 S. Ct. 786 (2012) 15

Hollingsworth v. *Perry,*
558 U.S. 183 (2010) 11

In re Marriage of JB. & HB.,
326 S.W.3d 654 (Tex. App. Dallas 2010) 29

INS v. *Legalization Assistance Project of Los Angeles County Fed'n of Labor,*
510 U.S. 1301 (1993) 12, 37

Karcher v. *Daggett,*
455 U.S. 1303 (1982) 14

Kitchen v. Herbert,
961 F.Supp.3d 1181 (D. Utah, Dec. 20, 2013) 1

Kitchen v. Herbert, 2:13-CV-217,
2013 WL 6834634 (D. Utah Dec. 23, 2013) 2

Kitchen v. Herbert, No. 13-4178
(10th Cir., Dec. 24, 2013) 2

Latta v. Otter,
No. 14-35420 (9th Cir., May 15, 2014) 2

Li v. State,
110 P.3d 91 (Ore. 2005) 6

Lofton v. *Secretary of the Dep't of Children & Family Servs.,*
358 F.3d 804 (11th Cir. 2004) 28

Lucas v. *Townsend,*
486 U.S. 1301 (1988) 11

Maryland v. King,
133 S. Ct. 1 (2012) 34

Massachusetts v. U. S. Dep't of Health & Human Servs.,
682 F.3d 1 (1st Cir. 2012) 23

Mausolf v. Babbitt,
125 F.3d 661 (8th Cir. 1997) 10

NAACP v. Alabama,
357 U.S. 449 (1958) .... passim

New Motor Vehicle Bd. v. *Orrin W. Fox Co.,*
434 U.S. 1345 (1977) 34

Ohio ex ref. Popovici v. *Agler,*
280 U.S. 379 (1930) 20

Planned Parenthood of Greater Texas Surgical Health Servs. v. *Abbott,*
134 S. Ct. 506 (2013) 34

Reynolds v. Sims,
377 U.S. 533 (1964) 14, 34

Rodriguez de Quijas v. Shearson/Am. Exp., Inc.,
490 U.S. 477 (1989) 23

Roman v. *Sincock,*
377 U.S. 695 (1964) 14

Rostker v. *Goldberg,*
448 U.S. 1306 (1980) 12, 38

San Diegans for the Mt. Soledad Nat'l War Memorial v. *Paulson,*
548 U.S. 1301 (2006) 10, 12

Schuette v. Coalition to Defend Affirmative Action,
134 S. Ct. 1623 (2014) 7, 17

Sosna v. *Iowa,*
419 U.S. 393 (1975) 35

Southwest Ctr. for Biological Diversity v. Berg,
268 F.3d 810 (9th Cir. 2001) 33

Tocher v. City of Santa Ana,
219 F.3d 1040 (9th Cir. 2000) 32

Triax Co. v. TRW, Inc.,
724 F.2d 1224 (6th Cir. 1984) 33

Tully v. *Griffin, Inc.,*
429 U.S. 68 (1976) 22, 23

United Airlines, Inc. v. McDonald,
432 U.S. 385 (1977) 32

United States v. *Lara,*
541 U.S. 193 (2004) 36

Vance v. *Bradley,*
440 U.S. 93 (1979) 25, 26

Williams v. *North Carolina,*
317 U.S. 287 (1942) 20, 35

Yniguez v. Arizona,
939 F.2d 727 (9th Cir. 1991) 32

Statutes and Constitutional Provisions

28 U.S.C. § 1254(1) 10

28 U.S.C. § 1651(a) 11

28 U.S.C. § 2101(f) 10

Ore. Const. Art. XV, § 5a 7, 8, 13, 18

Ore. Rev. Stat. § 106.010 7

Ore. Rev. Stat. § 106.041(1) 6, 7

Ore. Rev. Stat. § 106.050(1) 7

Ore. Rev. Stat. § 106.077 6

Other Authorities

15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3902.1, at 113 (2d ed.1991) 10

BRENDA HUNTER, THE POWER OF MOTHER LOVE: TRANSFORMING BOTH MOTHER AND CHILD (1997) 27

DAVID BLAKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM (1995) 27

HENRY B. BILLER, PATERNAL DEPRIVATION (1973) 30

Jeff Mapes, *Oregon Gay Marriage Ban Struck Down by Federal Judge; Same-Sex Marriages Begin,* The Oregonian (May 19, 2014) 10

KRISTIN ANDERSON MOORE, *ET AL.*, CHILD TRENDS, MARRIAGE FROM A CHILD'S PERSPECTIVE: HOW DOES FAMILY STRUCTURE AFFECT CHILDREN AND WHAT CAN WE DO ABOUT IT? (June 2002) 26

LEONARD SAX, WHY GENDER MATTERS: WHAT PARENTS AND TEACHERS NEED TO KNOW ABOUT THE EMERGING SCIENCE OF SEX DIFFERENCES (2005) 26

Mark D. Regnerus, "Parental Same-Sex Relationships, Family Instability, and Subequent Life Outcomes for Adult Children: Answering Critics of the New Family Structures Study with Additional Analysis," 41 SOC. SCI. RES. 1367 (2012) 26

Matthew O'Brien, "Why Liberal Neutrality Prohibits Same Sex Marriage: Rawls, Political Liberalism, and the Family," 2012 BRIT. J. AM. LEGAL STUD. 411 27

Richard E. Redding, "It's Really About Sex: Same-Sex Marriage, Lesbigay Parenting, and the Psychology of Disgust," 15 DUKE J. GENDER L. & POL'Y 127 (2008) 26

ROBERT LERNER & ALTHEA K. NAGAI, NO BASIS: WHAT THE STUDIES DON'T TELL US ABOUT SAME-SEX PARENTING (2001) 26

SARA MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS (1994) 26

W. BRADFORD WILCOX, *ET AL.*, WHY MARRIAGE MATTERS (2d ed. 2005) 26

Rules

Fed. R. Civ. P. 24(a) 16

Sup. Ct. R. 23.3 11

To the Honorable Anthony Kennedy, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Applicants respectfully apply for an immediate stay pending appeal of an order denying intervention and of the judgment and injunction entered by the United States District Court for the District of Oregon, invalidating and enjoining enforcement of Oregon's marriage laws to the extent they limit marriage to man-woman unions. Requests for a stay pending appeal from the order denying intervention have been denied by both the district court and the Ninth Circuit.

INTRODUCTION

In *United States* v. *Windsor,* 133 S. Ct. 2675 (2013), this Court specifically left open the question "whether the States, in the exercise of their 'historic and essential authority to define the marital relation,'… may continue to utilize the traditional definition of marriage." *Id.*, at 2696 (Roberts, C.J., dissenting); *see also id.* ("This opinion and its holding are confined to … lawful marriages" between people of the same sex recognized by state law) (majority opinion); *Hollingsworth* v. *Perry,* 133 S. Ct. 2652 (2013) (declining to reach issue on jurisdictional grounds).

After the District Court for the District of Utah last December became the first state to invalidate a state marriage law post-*Windsor*, *see Kitchen v. Herbert*, 961 F.Supp.3d 1181 (D. Utah, Dec. 20, 2013), and then both the district court and

the Court of Appeals for the Tenth Circuit denied the State's motion for a stay pending appeal, *Kitchen v. Herbert*, 2:13-CV-217, 2013 WL 6834634 (D. Utah Dec. 23, 2013); Order Denying Emergency Motion for Stay, *Kitchen v. Herbert*, No. 13-4178 (10th Cir., Dec. 24, 2013), this Court granted a stay of its own, *Herbert v. Kitchen*, 134 S. Ct. 893 (Jan. 6, 2014), allowing the significant constitutional issues at stake to proceed in a more orderly fashion through the appellate process.

Since that time, a half dozen other federal district courts have rendered judgments holding that the long-standing definition of marriage is unconstitutional, but in each case, the judgments have been stayed pending appeal, either by the district court itself or by the court of appeals. *See Bishop v. United States ex rel. Holder*, 962 F.Supp.2d 1252, 1295–96 (N.D. Okla. 2014); *Bostic v. Rainey*, 970 F.Supp.2d 456, 484 (E.D. Va. 2014); *De Leon v. Perry*, SA–13–CA–00982–OLG, 2014 WL 715741, at *28 (W.D.Tex. Feb. 26, 2014); *Bourke v. Beshear*, 3:13-CV-750-H, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014); *DeBoer v. Snyder*, No. 14-1341 (6th Cir. 2014); *Latta v. Otter*, No. 14-35420 (9th Cir., May 20, 2014); *cf. Arkansas v. Wright*, No. CV-14-427 (Ark. S.Ct. May 16, 2014) (granting stay of state circuit court decision enjoining Arkansas' marriage law).

Until now, that is. The story in Oregon has played out differently.[1] Unlike with every one of these other cases, not one of the named defendants in Oregon

[1] Just last week, the District Court for the Middle District of Pennsylvania struck down Pennsylvania's marriage law, and the next day, the Governor of Pennsylvania stated he would not appeal the decision. *Whitewood v. Wolf*, No. 1-13-cv-1861 (M.D. Pa. May 20, 2014); Trip Gabriel, "Pennsylvania Governor Won't Fight Ruling That Allows Gay Marriage," New York Times A16 (May 22, 2016).

offered a defense. When the time came to oppose Plaintiffs' respective motions for summary judgment, the defendants actively joined in Plaintiffs' constitutional attack. Then, about two weeks before the hearing on the unopposed summary judgment motions, the defendants announced they would not be appealing any adverse judgment, an announcement that has since been confirmed in a formal pleading defendants filed in the Ninth Circuit. Motion to Dismiss, CTA Dkt. #25, p. 2 ("Defendants do not intend to appeal the district court's judgment"). Less than two weeks later, and relying on this Court's decision in *NAACP v. Alabama*, 357 U.S. 449, 459 (1958), the National Organization for Marriage, Inc. ("NOM") sought to intervene on behalf of its Oregon members, specifically including several who have particularized interests at stake in the litigation—a county clerk (who is responsible for the issuance of marriage licenses in his or her county), a provider of wedding services, and a voter whose vote in favor of the 2004 state constitutional amendment codifying Oregon's long-standing definition of marriage has been completed negated by the actions of Oregon's Attorney General.

The defendants and both sets of plaintiffs opposed NOM's motion to intervene, which the district court denied on May 14, 2014. DCt. Dkt. # 114. That left the case without an adversary, "something akin to a friendly tennis match rather than a contested and robust proceeding between adversaries," as the district court put it. *Geiger v. Kitzhaber*, Slip. Op. at 4. It is therefore unlike the procedural posture in *Windsor*, where the U.S. Department of Justice made sure that there was a party defending the federal marriage law and also filed appeals in both the Court

of Appeals and this Court to ensure that the appellate courts had jurisdiction to consider the serious constitutional challenges that had been presented. 133 S. Ct., at 2685-88.

The district court also denied NOM's motion for a stay pending appeal. DCt. Dkt. #114. NOM noticed its appeal two days later, and on the next business day after that, May 19, 2014, filed a motion for emergency stay with the Ninth Circuit, which was denied summarily about three hours later. CTA Dkt. #15.

This case, like the pending cases elsewhere in the country, squarely presents the question that this Court expressly left open last Term, namely, whether in their primary role for determining marriage policy, individual states may adhere to the long-standing definition of marriage as an institution rooted in the unique biological complementarity of men and women. After an extensive federalism discussion, the *Windsor* majority held that the federal government, in administering federal programs, cannot constitutionally disregard State marriage laws. *Windsor*, 133 S. Ct. at 2693, 2695-96. It therefore invalidated Section 3 of the Defense of Marriage Act (DOMA), recognizing that not accepting a state's definition of marriage was a substantial "federal intrusion on state power" to define marriage. *Id.* at 2692.

By contrast, this case involves not just a refusal by the federal government to accept a State's definition of marriage, but an outright *abrogation* of such a definition—by a single federal judge wielding a federal injunction in a non-adversarial proceeding. If *Windsor* and *Hollingsworth* warranted this Court's

review, surely there is a likelihood that this case will too (or at the very least that it will be held pending this Court's review of one of the many other cases currently working their way here)—particularly if the Ninth Circuit upholds the district court's injunction banning enforcement of Oregon's traditional marriage laws, and thus creates a circuit conflict with the Eighth Circuit. *See Citizens for Equal Protection* v. *Bruning,* 455 F.3d 859, 867-69 (8th Cir. 2006) (rejecting a right to same-sex marriage under the Fourteenth Amendment). And if DOMA's non-recognition was an impermissible "federal intrusion on state power" to define marriage, surely there is at least a good prospect that a majority of this Court will ultimately hold the district court's far more intrusive order and injunction invalid, and in so doing vindicate the prerogative of Oregon and its citizenry to retain the traditional definition of marriage if they so choose.

This particular case also presents an additional jurisdictional issue, namely, whether this Court's holding in *Hollingsworth* that Proponents of an initiative, as intervenors with only a generalized interest in the litigation, lacked standing to appeal when the named government defendants refused to do so, forecloses intervention by others who do have particularized interests in the litigation. This Court noted in *Hollingsworth* that the "only individuals who sought to appeal" were the initiative's proponents who had intervened in the district court, but "the District Court had not ordered them to do or refrain from doing anything," and the California Supreme Court's holding that they were authorized to represent the interests of the state did not make them "de facto

public officials." *Id.*, at 2662, 2666. The opposite is true here. NOM, under the authority of *NAACP v. Alabama*, 357 U.S. 449, 459 (1958), sought to intervene on behalf of its members, including a county clerk who, via the injunction that was issued to the state defendants, is being ordered to issue marriage licenses in violation of the Oregon marriage laws that the district court declared to be unconstitutional. Moreover, the county clerk is more than just a "de facto public official." *Hollingsworth*, 133 S. Ct., at 2666. County clerks in Oregon are actual public officials, with responsibility under state law for issuing marriage licenses. Ore. Rev. Stat. § 106.041(1). The clerk must issue a marriage license if, but only if, "all other legal requirements for issuance of the marriage license have been met." Ore. Rev. Stat. § 106.077. "County clerks . . . cannot issue marriage licenses contrary to the statutes set out in ORS chapter 106 that circumscribe their functions." *Li v. State*, 110 P.3d 91, 95 n.5 (Ore. 2005).

NOM's appeal of the denial of its motion to intervene is pending in the Ninth Circuit (as is its protective appeal from the final judgment), but despite the strong likelihood that this Court is soon going to consider the substantive constitutional issues presented by this case, both the District Court and the Ninth Circuit declined to grant NOM's motions for stay. As a result of the district court's injunction, marriage licenses are being issued to same-sex couples in Oregon with all the uncertainty and "legal limbo" that prevailed (and still prevails) in Utah before this Court issued a stay in that case. *Evans v. Utah*, 2:14CV55DAK, 2014 WL 2048343 (D. Utah May 19, 2014). And each such license

is not just contrary to the established policy judgment of the people of Oregon, adopted through ordinary democratic channels, *cf.*, *e.g., Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1636-37 (2014), but also to this Court's unique role as final arbiter of the profoundly important constitutional question that it so carefully preserved in *Windsor*. A stay is urgently needed to preserve these prerogatives pending appeal and, if necessary, this Court's ultimate review, and to minimize the enormous disruption to the State and its citizens of potentially having to "unwind" hundreds more same-sex marriages should this Court ultimately conclude, as Applicant strongly maintains, that the district court's judgment and injunction exceed its constitutional authority.

BACKGROUND

Plaintiffs-Respondents' ("Plaintiffs") complaint attacks a provision of the Oregon Constitution and several associated statutes that define marriage in Oregon as between one man and one woman. *See* First Amended Complaint, *Geiger v. Kitzhaber,* No. 6:13-cv-01834-MC, ¶¶ 4-6 (D. Ore. filed Oct. 15, 2013). Article XV, Section 5a of the Oregon Constitution, adopted under the name "Measure 36" by 53% of Oregon voters in the 2004 statewide election, provides that "It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage." Ore. Const. Art. XV, § 5a. Similarly, several Oregon statutes confirm that long-standing definition of marriage as a matter of state statutory law. *See* Ore. Rev. Stat. §§ 106.010, 106.041(1), and 106.150(1) .

In their complaint, Plaintiffs sought a declaratory judgment that Article XV, Section 5a of the Oregon Constitution violates Plaintiffs' rights under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution," and a "permanent injunction enjoining Defendants" from "denying Plaintiffs and all other same-sex couples the right to marry in Oregon." FAC Request for Relief ¶¶1, 2. The case was consolidated with a later-filed case pressing the identical constitutional challenges. Amended Complaint, *Rummel v. Kitzhaber*, No. 6:13-cv-02256-MC (D. Ore. filed Dec. 19, 2013).

Without engaging in any discovery, the two sets of Plaintiffs filed their respective motions for summary judgment in February 2014. Defendants filed their "responses" on March 18, 2014 and March 4, 2014, respectively, joining Plaintiffs' constitutional attack on Oregon's marriage laws. DCt. Dkt. #s 64, 59. Then, on April 8, 2014, one of the defendants announced in a notice to all county clerks that they should be prepared to beginning issuing marriage licenses to same-sex couples "immediately" once the district court issued its ruling (perhaps as early as the summary judgment hearing on April 23, 2013), thereby indicating that defendants would not appeal an adverse ruling or seek a stay. DCt. Dkt. #110, ¶ 5 and Ex. A. Less than two weeks later, on April 21, 2014 and before the district court had held a substantive hearing in the case, NOM moved to intervene on behalf of its Oregon members, including several with identified protectable interests. DCt. Dkt. #86. The district court set a briefing and argument schedule on NOM's motion to intervene, DCt. Dkt. #96, but then proceeded to hear argument on April 23, 2014,

on the unopposed motions for summary judgment without participation by NOM or anyone else opposing Plaintiffs' position, DCt. Dkt. #98.

Oral argument on the motion to intervene was held on May 14, 2014, and after a brief recess, the district court announced its ruling from the bench denying NOM's motion to intervene as both untimely and lacking protectable interests. DCt. Dkt. #114. NOM then moved for a stay pending appeal, which the district court denied. *Id.* NOM noticed its appeal from that interlocutory order two days later on Friday, May 16, 2014, DCt. Dkt. #117, and filed an emergency application for a stay with the Ninth Circuit when the court opened the following Monday. *National Organization for Marriage, Inc. v. Geiger, et al.*, No. 14-35427, CTA Dkt. #5 (case filed May 16, 2014). The Ninth Circuit denied the motion for stay about three hours later, CTA Dkt. #15 (Appendix D herein), and the district court issued its ruling less than an hour after that, on May 19, 2014, holding that Oregon's marriage laws violated the Fourteenth Amendment's Equal Protection Clause under rational basis review because "[n]o legitimate state purpose justifies the preclusion of gay and lesbian couples from civil marriage." Slip Op. at 25 (Appendix A herein). The district court also issued an injunction against the "defendants and their officers, agents, and employees," enjoining enforcement of Oregon's marriage laws. DCt. Dkt. #119 (Appendix B herein). A separate final judgment was issued the same day, confirming the court's order and injunction. DCt. Dkt. #120 (Appendix C herein). NOM filed a protective notice of appeal from the judgment on May 22, 2014, pursuant to *Brennan v. Silvergate Dist. Lodge No. 50, Int'l Ass'n of Machinists &*

Aerospace Workers, AFL-CIO, 503 F.2d 800, 803 (9th Cir. 1974), and *Mausolf v. Babbitt*, 125 F.3d 661, 666 (8th Cir. 1997); *see also* 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3902.1, at 113 (2d ed.1991) ("If final judgment is entered with or after the denial of intervention, ... the applicant should be permitted to file a protective notice of appeal as to the judgment, to become effective if the denial of intervention is reversed"). DCt. Dkt. #121.

Without a stay of the district court's decision pending appeal, the district court's decision and order created a "rush to officially wed at locations around the state." Jeff Mapes, *Oregon Gay Marriage Ban Struck Down by Federal Judge; Same-Sex Marriages Begin,* The Oregonian (May 19, 2014), *available at* http://www. oregonlive.com/mapes/index.ssf/2014/05/oregon_gay_marriage_ban_struck.html.

JURISDICTION

Applicants seek a stay pending appeal of the U.S. District Court's judgment dated May 19, 2014, as well as the District Court's decision denying NOM's motion to intervene dated May 14, 2014. The district court denied a stay pending appeal on May 14, 2013, and the U.S. Court of Appeals for the Ninth Circuit denied a stay on May 19, 2013. The final judgment of the Ninth Circuit on appeal will be subject to review by this Court under 28 U.S.C. § 1254(1), and this Court therefore has jurisdiction to entertain and grant a request for a stay pending appeal under 28 U.S.C. § 2101(f). *See, e.g., San Diegans for the Mt. Soledad Nat'l War Memorial* v. *Paulson,* 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers);

Heckler v. *Lopez,* 463 U.S. 1328, 1330 (1983) (Rehnquist, J., in chambers) (affirming that there is "no question" the Court has jurisdiction to "grant a stay of the District Court's judgment pending appeal to the Ninth Circuit when the Ninth Circuit itself has refused to issue the stay"). In addition, the Court has authority to issue stays and injunctions in aid of its jurisdiction under 28 U.S.C. § 1651(a).

REASONS FOR GRANTING THE STAY

The standards for granting a stay pending review are "well settled." *Deauer* v. *United States,* 483 U.S. 1301, 1302 (1987) (Rehnquist, C.J., in chambers). Preliminarily, this Court's rules require a showing that "the relief is not available from any other court or judge," Sup. Ct. R. 23.3—a conclusion established here by the fact that both the district court and the Ninth Circuit conclusively refused to stay the district court's proceedings pending resolution of NOM's appeal from the denial of its motion to intervene. A stay is then appropriate if there is at least "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth* v. *Perry,* 558 U.S. 183, 189 (2010) (per curiam). Moreover, "[i]n close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.* (citing *Lucas* v. *Townsend,* 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers); *Rostker* v. *Goldberg,* 448 U.S. 1306,

1308 (1980) (Brennan, J., in chambers)); *accord, e.g., Conkright* v. *Frommer,* 556 U.S. 1401, 1401 (2009) (Ginsburg, J., in chambers); *Barnes* v. *£-Systems, Inc. Group Hosp. Med. & Surgical Ins. Plan,* 501 U.S. 1301, 1302, 1305 (1991) (Scalia, J., in chambers). In short, on an application for stay pending appeal, a Circuit Justice must "try to predict whether four Justices would vote to grant certiorari should the Court of Appeals affirm the District Court order without modification; try to predict whether the Court would then set the order aside; and balance the so-called 'stay equities.'" *San Diegans,* 548 U.S. at 1302 (granting stay pending appeal and quoting *INS* v. *Legalization Assistance Project of Los Angeles County Fed'n of Labor,* 510 U.S. 1301, 1304 (1993) (O'Connor, J., in chambers)). Each of these considerations points decisively toward issuing a stay.[2]

I. There is a strong likelihood that certiorari will be granted if the Court of Appeals affirms.

A. This Court Has Already Granted Certiorari on a Case Raising the Same Substantive Constitutional Questions Presented by the Underlying Judgment Here.

Multiple circumstances suggest a very strong likelihood that four Justices will consider the issue presented here sufficiently meritorious to warrant this

[2] Respondents opposing the stay application in the Utah case, *Herbert v. Kitchen*, No. 13A687, argued for a higher threshold when the application for a stay to this Court is filed while the case is still pending before the Court of Appeals, not post-appellate judgment while pending decision by this Court on a writ of certiorari. *See* Memo. in Opp. to Stay App., at 2-3 (citing, e.g., *Edwards v. Hope Med. Grp. for Women*, 512 U.S. 1301, 1302 (1994) (Scalia, J., in chambers); *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers). The Court has applied the same three-part test in both contexts, however. *See Edwards*, 512 U.S. at 1302; *Legalization Assistance Project,* 510 U.S. at 1304 (O'Connor, J., in chambers). And even if there is such a higher standard, this Court apparently deemed it met in the Utah case, and it should likewise deem it met here.

Court's review, whether in this case or in one of the parallel cases currently working their way to this Court in multiple jurisdictions around the country.

First, the Court has already granted certiorari in another case that presented the same question, namely, whether the States may retain the long-standing and biologically-rooted definition of marriage. That case, of course, was *Hollingsworth* v. *Perry,* 133 S. Ct. at 2652, which presented that question in the context of California's Proposition 8, which, like Oregon's Measure 36, involved an effort by the people of California to preserve the traditional definition of marriage through a state constitutional amendment. Although the Court ultimately held that non-government actors with only a generalized interest in the case did not have standing to pursue an appeal when the government defendants refused to file an appeal themselves, there are both government officials and others with particularized injuries who sought to intervene in this litigation (via the *NAACP v. Alabama*-sanctioned third party organizational standing of NOM). NOM's county clerk member is a government official responsible for issuing marriage licenses and ensuring compliance with Oregon's marriage laws. Dkt. #87, pp. 9-10.[3]

[3] NOM also sought to intervene on behalf of a wedding services planner and a voter, each of whom have particularized rather than merely generalized interests in the subject of the litigation. Prior to the judgment below, the wedding services planner, who has a sincerely-held religious objection to facilitating "marriages" between persons of the same sex, was not compelled by the state's public accommodations laws to provide wedding services to same-sex couples in Oregon because such marriages were not "valid or recognized" in Oregon. Dkt. #87, pp. 10-11. After the judgment below, the wedding services planner now faces that conflict if she continues to provide wedding services at all, a concrete and particularized injury. NOM's members who voted for Measure 36 also have standing in their own right, as their vote has been effectively negated by the actions of the Attorney General refusing to provide any defense of Oregon's marriage laws. Dkt. #87, pp. 11-12. This Court

Second, this Court does not hesitate to impose a stay when another court invalidates and enjoins enforcement of a state statute or constitutional provision based on federal law—even where the Court ultimately upholds the lower court decision. *E.g., Karcher* v. *Daggett,* 455 U.S. 1303, 1307 (1982) (Brennan, J., in chambers) (granting a stay); *Roman* v. *Sincock,* 377 U.S. 695, 703 (1964) ("The District Court denied a motion to stay its injunction pending appeal, but on application by defendants below, Mr. Justice Brennan ... stayed the operation of the District Court's injunction pending final disposition of the case by this Court"). That practice appears to reflect a general and entirely appropriate policy that if a state statute or constitutional provision is to be invalidated under the banner of the federal Constitution, the people of the State are entitled to have that issue resolved by the Nation's highest court.

Third, if the Ninth Circuit ultimately upholds the district court's injunction in this case, that action will create a clear conflict with the Eighth Circuit's decision upholding a Nebraska constitutional amendment that is substantively indistinguishable from Oregon's Measure 36, and which likewise ensconced the traditional definition of marriage in Nebraska law. *See Citizens for Equal Protection,* 455 F.3d at 859. Such a conflict will give this Court even more reason to grant review.

---

has routinely recognized vote dilution/vote negation claims even though, in some sense, the individual voters making the claims share the vote dilution claim with every other voter similarly situated. *See, e.g.. Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966); *Bush v. Gore*, 531 U.S. 98, 104-05 (2000).

Finally, and perhaps most importantly, this Court has already decided the precise substantive constitutional questions presented by this case, dismissing for want of a substantial federal question a mandatory appeal from a decision by the Minnesota Supreme Court that upheld Minnesota's one-man/one-woman definition of marriage. *Baker v. Nelson*, 409 U.S. 810 (1972). That is a decision on the merits, and it remains binding on the lower courts unless and until this Court says otherwise. *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975). Whether or not doctrinal developments subsequent to *Baker* have undermined that decision's precedential effect is an extremely important question that, according to *Hicks*, should only be determined by this Court.

B. As in *Hollingsworth*, the jurisdictional question presented by the District Court's denial of NOM's motion to intervene in the otherwise non-adversarial proceeding is itself likely to garner a writ of certiorari from this Court.

This Court granted a writ of certiorari in the *Hollingsworth* case despite the jurisdictional issue that was implicated in the case, a jurisdictional issue that ultimately prevented this Court from reaching the merits of the significant constitutional questions presented. *Hollingsworth v. Perry*, 133 S. Ct. 786, 786 (2012) (granting certiorari and directing the parties to address whether petitioners had Article III standing); *Hollingsworth*, 133 S. Ct. at 2659. Normally such jurisdictional issues are considered a vehicle problem that counsels against granting a writ of certiorari. That it did not do so in *Hollingsworth* indicates that

this Court considered both the merits questions and the jurisdictional ones to be worthy of this Court's review.

This case presents follow-up jurisdictional issues that may be of even greater importance than the one presented in *Hollingsworth* itself, and which arise because of the constitutional barrier to standing recognized by that decision. Did *Hollingsworth* intend to prohibit standing by non-governmental actors who have *particularized* interests (as opposed to merely the *generalized* interest this Court found to be held by the intervenors in *Hollingsworth*) in a state law whose constitutionality is being challenged? Are *local* government officials who actually implement the state law being challenged allowed to intervene as of right under Rule 24(a) when the named defendants, such as the *state* officials who are defendants in this case, refuse to defend the state law? And in the face of a very real risk of threats and harassment, *see, e.g.*, *Citizens United v. FEC,* 558 U.S. 310, 370 (2010) (citing Alliance Defense Fund *amicus* brief describing "recent events in which donors to [traditional marriage] were blacklisted, threatened, or otherwise targeted for retaliation"); *id.* at 481 (Thomas, J., concurring in part and dissenting in part (noting that supporters of California's marriage amendment "suffered property damage, or threats of physical violence or death" after their names and addresses were published in campaign finance reports); *Doe v. Reed*, 561 U.S. 186, 205 (2010) (Alito, J., concurring) (noting the "widespread harassment and intimidation suffered by supporters of California's Proposition 8"), must such individuals seek to intervene in their own name, or may the membership

organization devoted to the issues involved in the litigation and in which they are members intervene on their behalf, pursuant to this Court's third-party standing decision in *NAACP v. Alabama*?

The holding in *Hollingsworth* that initiative proponents do not have standing to defend an initiative adopted by the people over the objection of their state elected officials has invited non-defense abdication by state attorneys general across the country, not just in this case but in Virginia, Kentucky, Pennsylvania, Nevada, and elsewhere. That trend now threatens to undermine the initiative process itself, and the democratic self-government principles that it reflects, which this Court has just recently reaffirmed in strong terms. *See Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1637 (2014) (rejecting respondents insistence "that a difficult question of public policy must be taken from the reach of the voters" as "inconsistent with the underlying premises of a responsible, functioning democracy" and because it "is demeaning to the democratic process to presume that the voters are not capable of deciding [a sensitive issue] on decent and rational grounds").

It also poses serious challenges to the "case or controversy" jurisdiction of the lower courts, and this case presents the most egregious example because the Attorney General here was not only *not defending* Oregon's marriage law but was actually *not enforcing* half of it as well. *Cf. Windsor*, 133 S. Ct. at 2686-87 (noting jurisdictional importance of fact that DOJ was still enforcing even though not

defending DOMA). Oregon's constitutional definition of marriage provides "that only a marriage between one man and one woman shall be valid *or legally recognized* as a marriage." Ore. Const. Art. XV, § 5a (emphasis added). Two of the Plaintiffs in this case had been legally married in Canada and sought to have that marriage recognized in Oregon. First Amended Complaint (Dkt. #8) ¶ 12. The day after the complaint was filed, the Deputy Attorney General of Oregon announced that the State would recognize same-sex marriages performed in other states or other countries, contrary to the unambiguous language of the Oregon Constitution. Letter to Michael Jordan, Chief Operating Officer of the Oregon Department of Administrative Services, October 16, 2013 (Dkt. #10). Defendants in this case ratified that position at the outset of the litigation, State Defendants' Answer to First Amended Complaint ¶ 26 and Ex A (Dkt. #9), depriving the district court of jurisdiction to do anything but (at most) enter a default judgment for those plaintiffs. *Moore v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 47, 91 S. Ct. 1292, 1293 (1971); *see also Windsor*, 133 S. Ct. at 2686 ("It would be a different case if the Executive had taken the further step of paying Windsor the refund to which she was entitled under the District Court's ruling" and was therefore no longer enforcing the law). But the district court proceeded anyway to issue a permanent injunction, purportedly with statewide effect. DCt. Dkt. #119 (enjoining "defendants and their officers, agents, and employees" from enforcing Oregon's marriage laws). This Court's concern in *Windsor* that the peculiar actions by the Department of Justice and the jurisdictional problems they created not become the

norm, 133 S. Ct. at 2688, is in fact becoming the norm. *Hollingsworth* recognizes that there is a constitutional bar to dealing with the problem, but if there is a constitutional way around *Hollingsworth*—and NOM believes that it has identified several in its claim for intervention as of right—then it is extremely important that such efforts be sanctioned by this Court in order to prevent the lower courts from erroneously treating *Hollingsworth* as a broader barrier than it is, as the district court did here.

II. There is a strong likelihood that the district court's decisions denying intervention and enjoining Oregon's marriage laws will be overturned.

If the Ninth Circuit affirms and this Court ultimately grants review, there is likewise a strong prospect that a majority will vote to overturn the district court's denial of intervention and its holding that Oregon's longstanding marriage laws violate the Equal Protection Clause.

A. *Windsor* itself strongly suggests that the States retain the authority to define marriage in a way that recognizes its gender complementarity and procreative purpose.

As the State of Utah noted in its application for a stay pending appeal in *Herbert v. Kitchen*, No. 13A687, the various opinions in *Windsor* clearly indicate a strong likelihood that the district court's judgment on the merits will be overruled. As previously noted, the majority's decision to invalidate Section 3 of DOMA, which implemented a federal policy of defining marriage as between a man and a woman for purposes of federal law, even when state laws had redefined marriage to include same-sex unions—was based in significant part on federalism concerns.

For example, the majority emphasized that, "[b]y history and tradition the definition and regulation of marriage … has been treated as being within the authority and realm of the separate States." 133 S. Ct. at 2689-90. Citing this Court's earlier statement in *Williams* v. *North Carolina,* 317 U.S. 287, 298 (1942), that "[e]ach state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders," the *Windsor* majority noted that "'[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.'" 133 S. Ct. at 2691 (quoting *Williams,* 317 U.S. at 298) (alteration in original). The *Windsor* majority further observed that "[t]he significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for 'when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.'" *Id.* (quoting *Ohio ex ref. Popovici* v. *Agler,* 280 U.S. 379, 383-84 (1930)). And the majority concluded that DOMA's refusal to respect the State's authority to define marriage as it sees fit represented a significant—and in the majority's view, unwarranted—"federal intrusion on state power." *Id.* at 2692.

Here, as previously noted, the district court not only refused to accommodate Oregon's definition for purposes of federal law, it altogether *abrogated* the decision of the People of Oregon, acting through their constitutional

power of initiative as well as through their legislative representatives, to define marriage in the traditional way. The district court's decision was therefore a far greater "federal intrusion on state power" than the intrusion invalidated in *Windsor*.

Moreover, although none of the Justices in the *Windsor* majority expressly tipped their hands on the precise question presented here, four of the dissenting Justices clearly indicated a belief that the States can constitutionally retain the traditional definition of marriage. *See* 133 S. Ct. at 2707-08 (Scalia, J., dissenting, joined in relevant part by Thomas, J.); *id.* at 2715-16 (Alito, J., joined in relevant part by Thomas, J.); *id.* at 2697 (Roberts, C.J., dissenting). Indeed, Chief Justice Roberts pointedly emphasized that "while '[t]he State's power in defining the marital relation is of central relevance' to the majority's decision to strike down DOMA here, … that power will come into play on the other side of the board in future cases about the constitutionality of state marriage definitions. So too will the concerns for state diversity and sovereignty that weigh against DOMA's constitutionality in this case." *Id.* By themselves, the views expressed by these four Justices—without any contrary expression from the Court's other members—creates a strong prospect that, if the Ninth Circuit does not do so, this Court will reverse the district court's decision and vacate the injunction in this case.

Another indication of a good prospect of reversal by this Court is that the district court's decision squarely conflicts with this Court's decision in *Baker* v.

Nelson, 409 U.S. 810 (1972). There, this Court unanimously dismissed, for want of a substantial federal question, an appeal from the Minnesota Supreme Court squarely presenting the question of whether a State's refusal to recognize same-sex relationships as marriages violates the Due Process or Equal Protection Clauses of the Fourteenth Amendment. *Id.; see also Baker* v. *Nelson,* No. 71-1027, Jurisdictional Statement at 3 (Oct. Term 1972); *Baker* v. *Nelson,* 191 N.W.2d 185 (Minn. 1971). This Court's dismissal of the appeal in *Baker* was a decision on the merits that constitutes "controlling precedent unless and until re-examined by *this Court." Tully* v. *Griffin, Inc.,* 429 U.S. 68, 74 (1976) (emphasis added).

The district court here refused to follow *Baker,* believing it had been substantially undercut by subsequent doctrinal developments, including this Court's decision in *Windsor. See* Slip. Op. at 2 n.1 (Dkt. #119). But putting aside the fact that *Baker* wasn't even discussed by the *Windsor* majority, the district court's analysis overlooks that the precise issue presented in *Windsor*—whether the *federal* government can refuse to recognize same-sex marriages performed in States where such marriages are lawful—was very different from the question presented in *Baker, i.e.,* whether a *State* may constitutionally decline to *authorize* same-sex marriages under State law. Because the issues presented were different, this Court simply had no occasion to address whether *Baker* was controlling or even persuasive authority in *Windsor;* it obviously was not.

In this case, however, *Baker* is controlling because it decided the very issue presented here. To be sure, a dismissal of the sort at issue in *Baker* "is not … 'of

the same precedential value as would be an opinion of this Court treating the question on the merits.'" *Tully,* 429 U.S. at 74 (quoting *Edelman* v. *Jordan,* 415 U.S. 651, 671 (1974)). But that implies, and practice confirms, that even in this Court it remains of *some* "precedential value." And in the lower courts, it has binding effect. *Hicks*, 422 U.S. at 345. The district court's rejection of *Baker* did not even mention *Hicks*, much less *Hick*'s holding that "the lower courts are bound by summary decisions by this Court 'until such time as the Court informs (them) that (they) are not.'" *Hicks*, 422 U.S. at 344-45; *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"). Nor did it mention any of the appellate court decisions recognizing *Baker's* binding effect, including a decision from the Ninth Circuit. *See, e.g., Massachusetts v. U. S. Dep't of Health & Human Servs.*, 682 F.3d 1, 8 (1st Cir. 2012) ("*Baker*…limit[s] the arguments to ones that do not presume or rest on a constitutional right to same-sex marriage"); *Citizens for Equal Protection*, 455 F.3d at 870-871 (*Baker* mandates "restraint" before concluding "a state statute or constitutional provision codifying the traditional definition of marriage violates the Equal Protection Clause or any other provision of the United States Constitution"); *Adams v. Howerton*, 673 F.2d 1036, 1039 n.2 (9th Cir. 1982) (*Baker* is "a decision on the merits"); *Donaldson v. State*, 292 P.3d 364, 371 n.5 (Mont. 2012) (Rice, J.,

concurring) ("The U.S. Supreme Court's action in *Baker* has been described as binding precedent"). Instead, the district court below relied on the decision from the District of Utah (and three other district court decisions that followed it) rejecting *Baker* as binding, despite the fact that this Court has already stay that Court's judgment.

Accordingly, even if the *logic* of *Windsor* (or other decisions of this Court) suggested an opposite outcome—which it does not—there is at least a reasonable prospect that a majority of this Court will elect to follow *Baker,* because of its precedential value if nothing else. And that outcome is even more likely given the *Windsor* majority's emphasis on respect for State authority over marriage.

A final reason to believe there is a strong likelihood this Court will ultimately invalidate the district court's injunction, also noted by Utah in its stay application, is the large and growing body of social science research contradicting the central premise of the district court's equal protection holding: *i.e.,* its conclusion that defining marriage as a one-man/one-woman institution has no "rational relationship to any legitimate government interest."[4] Slip Op. at 3. That research—some of it cited in Justice Alito's *Windsor* opinion, 133 S. Ct. at 2715 & n. 6 (Alito, J., dissenting)—confirms what the State, its citizens, and indeed virtually

---

[4] In citing this research, we do not mean to suggest that the State has the burden of proving, through admissible evidence that its views on marriage are correct or sound. To the contrary, a government has no duty to produce evidence to sustain the rationality of a statutory classification. *Heller v. Doe*, 509 U.S. 312, 320-21 (1993). And indeed "a legislative choice … may be based on rational speculation unsupported by evidence or empirical data. *FCC v. Beach Communications*, 508 U.S. 307, 315 (1993). The research discussed here briefly sketches what Oregon and its citizens could rationally believe about the benefits of limiting marriage to man-woman unions.

all of society have until recently believed about the importance of providing unique encouragement and protection for man-woman unions: (1) that children do best across a range of outcomes when they are raised by their father and mother (biological or adoptive), living together in a committed relationship; and 2) that limiting the definition of marriage to man-woman unions, though it cannot guarantee that outcome, substantially increases the *likelihood* that children will be raised in such an arrangement. Indeed, these are the core "legislative facts" on which legislatures and voters throughout the Nation have relied in repeatedly defining marriage to reflect the biological reality that underlies man-woman unions. And even when contested by other evidence, they are not subject to second-guessing by the judiciary without a showing that no rational person could believe them. *See*, *e.g., Vance* v. *Bradley,* 440 U.S. 93, 112 (1979) ("It makes no difference that the [legislative] facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety." (internal quotation marks omitted)).

Among the wealth of social science analysis supporting the traditional definition of marriage, a substantial body of research confirms that children generally fare best when reared by their two biological parents in a loving, low-conflict marriage. Although there are many exceptions, *on average* children navigate developmental stages more easily, perform better academically, have fewer emotional disorders, and become better functioning adults when reared in

that environment.[5] But even when children are not reared by their own married biological fathers and mothers, children who live with a married mother and father, one of whom is an adoptive parent, do almost as well (again, on average) as children raised by both biological parents.[6]

Research also establishes that, for whatever reasons,[7] mothers and fathers tend on average to parent differently and thus make unique contributions to the

---

[5] See generally W. BRADFORD WILCOX, *ET AL.*, WHY MARRIAGE MATTERS (2d ed. 2005) (collecting the results of numerous studies); KRISTIN ANDERSON MOORE, *ET AL.*, CHILD TRENDS, MARRIAGE FROM A CHILD'S PERSPECTIVE: HOW DOES FAMILY STRUCTURE AFFECT CHILDREN AND WHAT CAN WE DO ABOUT IT? 1-2 (June 2002); SARA MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS 45 (1994).

[6] Mark D. Regnerus, "Parental Same-Sex Relationships, Family Instability, and Subequent Life Outcomes for Adult Children: Answering Critics of the New Family Structures Study with Additional Analysis," 41 SOC. SCI. RES. 1367 (2012). Although proponents of redefining marriage to include same-sex relationships, including the Utah respondents in their opposition to Utah's stay application, Mem. in Opp. to Stay App. at 22 n.6, *Herbert v. Kitchen*, No. 13A687, have sought to discredit Regnerus's study, studies by advocates of same-sex marriage reaching opposite conclusions have themselves been discredited. *See, e.g.*, Richard E. Redding, "It's Really About Sex: Same-Sex Marriage, Lesbigay Parenting, and the Psychology of Disgust," 15 DUKE J. GENDER L. & POL'Y 127, 193 (2008) (noting that "[t]he most detailed and persuasive methodological critique" of the studies finding no difference in outcomes of children raised by same-sex parents studies "are deeply flawed, and '"offer no basis for that conclusion."' (quoting ROBERT LERNER & ALTHEA K. NAGAI, NO BASIS: WHAT THE STUDIES DON'T TELL US ABOUT SAME-SEX PARENTING 9 (2001)). It is precisely because the evidence is so hotly contested that courts should defer to legislative judgments finding one body of expert evidence more persuasive than another. *Vance*, 440 U.S. at 112.

[7] For example, some researchers have concluded that males and females have significant innate differences that flow from differences in genes and hormones. According to these researchers, these biochemical differences are evident in the development of male and female brain anatomy, psyche, and even learning styles. *See* LEONARD SAX, WHY GENDER MATTERS: WHAT PARENTS AND TEACHERS NEED TO KNOW ABOUT THE EMERGING SCIENCE OF SEX DIFFERENCES (2005). But whether differences in parenting styles are the result of inherent differences between the

child's overall development.[8] The psychological literature on child development has long recognized the critical role that mothers play in their children's development.[9] But recent research also reveals that in the aggregate children suffer when fathers are absent: On average, girls without fathers perform more poorly in school, are more likely to be sexually promiscuous, and are more likely to become pregnant as teenagers, while boys raised without fathers have higher rates of delinquency, violence, and aggression.[10]

A recent study of adults conceived by donated sperm confirms the psychological benefits of being raised by both biological parents. The study found that, compared to adopted adults and adults raised by their biological parents, and "controlling for socio-economic factors, gamete donor offspring are significantly more likely than their peers raised by their biological parents to manifest delinquency, substance abuse, and depression. Gamete donor offspring are 1.5 times more likely to suffer from mental health problems."[11]

---

sexes or other factors, there is no question that fathers tend to parent differently from mothers and that both mothers and fathers have important roles to play in the development of their children.

[8] *Id.*; DAVID BLAKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM (1995).

[9] *E.g.,* BRENDA HUNTER, THE POWER OF MOTHER LOVE: TRANSFORMING BOTH MOTHER AND CHILD (1997).

[10] BLAKENHORN, *supra* note 7.

[11] Matthew O'Brien, "Why Liberal Neutrality Prohibits Same Sex Marriage: Rawls, Political Liberalism, and the Family," 2012 BRIT. J. AM. LEGAL STUD. 411, 446-48 2012).

In short, gender diversity or complementarity among parents—what one scholar has called "gender-differentiated parenting[12]—can provide enormous benefits to children.[13] Accordingly, it is at least rational for a State to conclude as a matter of "legislative fact" that gender complementarity is important and to *try* to promote it wherever it can through encouragement and other non-coercive means. Indeed, it is difficult to imagine a governmental interest more compelling. *See, e.g., Lofton* v. *Secretary of the Dep't of Children & Family Servs.,* 358 F.3d 804, 819 (11th Cir. 2004) ("It is hard to conceive an interest more legitimate and more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society").

---

[12] DAVID POPENOE, LIFE WITHOUT FATHER: COMPELLING NEW EVIDENCE THAT FATHERHOOD & MARRIAGE ARE INDISPENSABLE FOR THE GOOD OF CHILDREN & SOCIETY 146 (1996) ("The burden of social science evidence supports the idea that gender-differentiated parenting is important for human development and that the contribution of fathers to childrearing is unique and irreplaceable").

[13] A recent small body of research has suggested that there are likely to be no differences in child outcomes between children raised by married husband and wife couples and those raised by same-sex couples, but this research is typically based on non-random, non-representative samples with few participants (most with less than 100 participants). *See* Loren D. Marks, "Same-Sex Parenting and Children's Outcomes: A Closer Examination of the American Psychological Association's Brief on Lesbian and Gay Parenting," 41 SOC. SCI. RES. 735, 736-38 (2012). More recent studies, using more rigorous methodologies and with larger samples, find significant differences between children raised by married mothers and fathers and those raised in other family structures, including those raised by same-sex couples. Mark D. Regnerus, "How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Study," 41 SOC. SCI. RES. 752 (2012); Regnerus, *supra* note 5; Douglas W. Allen, "High School Graduation Rates Among Children of Same-Sex Households," 11 REV. ECON. HOUSEHOLD 635 (2013).

How does maintaining the traditional definition of marriage advance the State's powerful interest in promoting such gender complementarity in parenting? It obviously does not guarantee that every child will be raised in such a household. But by holding up and encouraging man-woman unions as the *preferred* arrangement in which to raise children, the State can increase the likelihood that any given child will in fact be raised in such an arrangement. In holding that the State lacks any "rational" reason for preferring the traditional definition of marriage, the district court ignored this fundamental reality—even as it placed itself in conflict with decisions of several state supreme courts (or equivalents), which have held that encouraging gender complementarity in parenting provides a legitimate, rational basis for limiting marriage to man-woman unions. *E.g., Hernandez* v. *Robles,* 855 N.E.2d 1, 7 (N.Y. 2006) (plurality) ("Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like"); *In re Marriage of JB. & HB.,* 326 S.W.3d 654, 678 (Tex. App. Dallas 2010) ("The state also could have rationally concluded that children are benefited by being exposed to and influenced by the beneficial and distinguishing attributes a man and a woman individually and collectively contribute to the relationship"); *Andersen* v. *King County,* 138 P.3d 963, 983 (Wash. 2006) (en banc) ("[T]he legislature was entitled to believe that providing that only opposite-sex couples may marry will encourage procreation and child-rearing in a 'traditional' nuclear family where children tend to thrive"); *see also Bowen v. Gilliard,* 483 U.S. 587, 614 (1987)

(Brennan, J., dissenting) ("'The optimal situation for the child is to have both an involved mother and an involved father'") (quoting HENRY B. BILLER, PATERNAL DEPRIVATION 10 (1973)). The fact that these courts have found a rational basis for limiting marriage to man-woman unions enhances the likelihood that a majority of this Court will do so as well.

By contrast, a State that allows same-gender marriage necessarily loses much of its ability to encourage gender complementarity as the preferred parenting arrangement. And it thereby substantially increases the likelihood that any given child will be raised *without* the everyday influence of his or her biological mother and father—indeed, without the everyday influence of a father or a mother at all.

To be sure, *Windsor* holds that a State is constitutionally *permitted* to decide that this risk is offset, for example, by the risk that children being raised in families headed by same-sex couples will feel demeaned by their families' inability to use the term "marriage." *See* 133 S. Ct. at 2694. But the *Windsor* majority does not suggest—and we think the Court unlikely to hold, after carefully considering the manifest benefits of gender complementarity—that a sovereign State is constitutionally *compelled* to make that choice. To hold that the Constitution allows a federal court to second-guess such a fundamental (and sometimes difficult) policy choice, lying as it does at the very heart of the State's authority over matters of domestic relations, would be a remarkable "federal

intrusion on state power," *id.* at 2692—one that would make a mockery of the *Windsor* majority's federalism rationale for invalidating Section 3 of DOMA.

Accordingly, there is a good probability that the Court will avoid that result and, accordingly, reject the district court's analysis and (if it is not overturned by the Ninth Circuit) invalidate the injunction at issue here.

B. Because this Court has recognized that even post-judgment intervention is timely when necessary to protect appellate rights, and because at least some of NOM's members have protectable interests in this litigation, this Court would likely overturn the denial of intervention, particularly when intervention was necessary to solidify the lower court's jurisdiction.

Similarly, there is good reason to believe that this Court will overturn the district court's denial of the motion to intervene. This Court has already raised a cautionary flag lest refusal by government officials to defend a law's constitutionality become a "common practice." *Windsor*, 133 S.Ct. at 2688. As noted above, this Court's recognition in *Hollingsworth* that the Constitution imposes a barrier to initiative proponents stepping in to provide the defense that would avoid the prudential and jurisdictional problems identified in *Windsor*, makes it extremely important that this Court sanction intervention by parties who do not face the same constitutional barrier. The district court's denial of intervention resulted in the very risk about which this Court expressed concern in *Windsor*, namely, "that instead of a 'real, earnest and vital controversy,' the Court faces a 'friendly, non-adversary, proceeding . . . [in which] 'a party beaten in the legislature [seeks to] transfer to the courts an inquiry as to the constitutionality of

the legislative act.'" *Windsor*, 133 S. Ct. at 2687 (quoting *Ashwander v. TVA*, 297 U. S. 288, 346 (1936) (Brandeis, J., concurring) (quoting in turn *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U. S. 339, 345 (1892))). *See also id.* ("Even when Article III permits the exercise of federal jurisdiction, prudential considerations demand that the Court insist upon 'that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" (quoting *Baker v. Carr*, 369 U. S. 186, 204 (1962)).

This Court has previously recognized that even post-judgment motions to intervene are timely if necessary to protect appellate review, and even if first filed in the Court of Appeals. *See United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977); *see also Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991); *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). A fortiori, NOM's effort to intervene before any judgment had been rendered by the district court, in order to protect appellate access in the event of an adverse judgment, was therefore timely as well. Indeed, as the Sixth Circuit has recognized, 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).

Moreover, the district court's finding that the motion to intervene was untimely failed to credit NOM's factual allegations as true, as governing precedent from the Ninth Circuit required. *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 819 (9th Cir. 2001) ("a district court is required to accept as true the nonconclusory allegations made in support of an intervention motion"). For that reason alone, the Ninth Circuit is likely to overturn the district court's finding that the motion to intervene was untimely, but if it does not, given the profound jurisdictional and prudential concerns noted by this Court in *Windsor* that have come to fruition here, this Court would likely do so.

This Court is likewise likely to overturn the district court's holding that none of NOM's members have protectable interests in the litigation. That holding is based on an erroneous, overbroad reading of *Hollingsworth*, and it raises constitutional impediments to protection of the initiative process that were simply not envisioned by that case. It settled a question left open by the *Hollingsworth* litigation, for example, namely, whether a county clerk, whose duties include the issuance of marriage licenses, have standing to defend a state's marriage laws when state officials refuse to do so. Elsewhere, county clerks have even been deemed "necessary parties" in such litigation, *see Bishop v. Oklahoma*, 333 F. App'x 361, 365 (10th Cir. 2009). At the very least, therefore, this Court is likely to hold that they have a right to a seat at the litigation table.

The district court's decision denying intervention also guts this Court's third-party standing doctrine from *NAACP v. Alabama*, and to some extent its vote dilution/vote negation line of cases as well, *see, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966); *Bush v. Gore*, 531 U.S. 98, 104-05 (2000). For that reason alone, this Court is likely to reverse the decision below.

III. Absent a stay, there is a likelihood of irreparable harm.

The injunction also imposes certain—not merely likely—irreparable harm on the people of Oregon, just as the injunction issued in the Utah case, stayed by this Court, imposed irreparable harm on the people of Utah. Members of this Court, acting as Circuit Justices, repeatedly have acknowledged that "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.,* 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *accord Maryland v. King,* 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (granting a stay); *Planned Parenthood of Greater Texas Surgical Health Servs.* v. *Abbott,* 134 S. Ct. 506, 506 (2013) (Scalia, J., concurring in denial of application to vacate stay). That same principle supports a finding of irreparable injury in this case. For the district court's order enjoins the State from enforcing not only an ordinary statute, but a constitutional provision approved by the people of Oregon in the core exercise of their sovereignty, and it does so contrary to binding precedent of this Court.

That States have a powerful interest in controlling the definition of marriage within their borders is indisputable. Indeed, the *Windsor* majority acknowledged that "'[e]ach state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders,'" *Windsor,* 133 S. Ct. at 2691 (quoting *Williams,* 317 U.S. at 298), and emphasized that "[t]he recognition of civil marriages is *central* to state domestic relations law applicable to its residents and citizens." *Id.* (emphasis added). Every single marriage performed between persons of the same sex as a result of the district court's injunction—and in defiance of Oregon law—is thus an affront to the sovereignty of the People of Oregon. Each such marriage openly flouts the State's sovereign interest in controlling "the marital status of persons domiciled within its borders," *id.,* based on the unreviewed judgment of a single district court, decided in a non-adversarial proceeding.

Oregon's sovereign interest in determining who is eligible for a marriage license is bolstered by the principle of federalism, which affirms the State's constitutional authority over the entire field of family relations. As the *Windsor* majority explained, "'regulation of domestic relations' is 'an area that has long been regarded as a *virtually exclusive* province of the States.'" 133 S. Ct. at 2691 (quoting *Sosna* v. *Iowa,* 419 U.S. 393, 404 (1975)) (emphasis added). The district court's decision breaches the principle of federalism by exerting federal control over the definition of marriage—a matter within Oregon's "virtually exclusive province." *Id.*

A federal intrusion of this magnitude not only injures the State's sovereignty, it also infringes the right of Oregonians to government by consent within our federal system. For, as Justice Kennedy has explained:

> The Constitution is based on a theory of original, and continuing, consent of the governed. Their consent depends on the understanding that the Constitution has established the federal structure, which grants the citizen the protection of two governments, the Nation and the State. Each sovereign must respect the proper sphere of the other, for the citizen has rights and duties as to both.

United States v. *Lara,* 541 U.S. 193, 212 (2004) (Kennedy, J., concurring in the judgment).

Here, the district court's decision to overturn Oregon's marriage laws—and its refusal even to stay its decision denying intervention to someone who would defend them, pending appellate review—places in jeopardy the democratic right exercised by more than a million Oregonians to choose for themselves what marriage will mean in their community.

Overturning Oregon's marriage laws also has grave practical consequences. Marriage licenses have already been issued to same-sex couples in Oregon, contrary to the express policy judgment of the people of Oregon. Many more couples are expected to apply for licenses in the coming year before this Court's expected ruling in one of the several marriage cases currently working their way to this Court. Assuming the Ninth Circuit and/or this Court ultimately holds Oregon's Marriage Amendment to be valid (or upholds one of the nearly identical Marriage Amendments being challenged in other states), as NOM strongly maintains it

should, the State inevitably will confront the thorny problem of whether and how to unwind the marital status of same-sex unions performed before reversal of the district court's decision. Considerable administrative and financial costs will be incurred to resolve that problem, and the State's burden will only increase as the number of marriage licenses issued to same-sex couples continues to grow. *See Legalization Assistance Project,* 510 U.S. at 1305-06 (O'Connor, J., in chambers) (citing the "considerable administrative burden" on the government as a reason to grant the requested stay). Only a stay can prevent or at least mitigate that indefensible result. And since this Court's stay pending appeal of the district court judgment in Utah, no other State is dealing with the kind of uncertainty now confronted by Oregon.

IV. The balance of equities favors a stay.

Although the case for a stay is not "close," here too, "the relative harms to the applicant and to the respondent" strongly tilt the balance of equities in favor of a stay. *Hollingsworth,* 558 U.S. at 190.

As previously explained, the sovereign authority of the people of Oregon will suffer irreparable injury from halting the enforcement of Oregon's definition of marriage: Every marriage performed based on a judicially-imposed redefinition of marriage is an affront to the sovereignty of the State and to the democratically expressed will of the people of Oregon, and the State may incur ever-increasing administrative and financial costs to deal with the marital status of same-sex

unions performed before this case is finally resolved. Either of these injuries qualifies as irreparable. Together they establish exceptional harm.

Against all this, Respondents have previously recited the rule that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns,* 427 U.S. 347, 373 (1976). That rule is inapposite here: While violation of an *established* constitutional right certainly inflicts irreparable harm, that doctrine does not apply where, as here, Respondents seek to establish a novel constitutional right through litigation, particularly one that has already been rejected by still-binding precedent of this Court. Because neither constitutional text nor any decision by a court of last resort yet establishes their sought-after federal right to same-sex marriage, Respondents suffer no constitutional injury from awaiting a final judicial determination of their claims before having marriage redefined to a genderless institution. *See Rostker,* 448 U.S. at 1310 (reasoning that the "inconvenience" of compelling Respondents to register for the draft while their constitutional challenge is finally determined does not "outweigh[ ] the gravity of the harm" to the government "should the stay requested be refused").

Moreover, Plaintiffs here waited nearly a decade after Oregon adopted Measure 36 before bringing this suit. Further, because state officials in Oregon are currently not enforcing Oregon's constitutional ban on "recognize[ing]" same-sex marriages performed out-of-state (albeit erroneously, in NOM's view), same-sex couples seeking to marry can be married elsewhere and, at least for now, have that

marriage recognized by state agencies in Oregon—as two of the plaintiffs in this case have already done. Allowing the litigation to run its course, through proper appellate review, is therefore not a sufficient harm to outweigh the profound policy judgment that the people of Oregon codified in their constitution.

Strongly tipping the balance in favor of a stay is the public's overwhelming interest in maintaining the status quo pending a regular and orderly review of Respondents' claims by the Court of Appeals and this Court. *See Hollingsworth,* 558 U.S. at 197 (granting a stay, in part, because its absence "could compromise the orderly, decorous, rational traditions that courts rely upon to ensure the integrity of their own judgments"). A stay will serve the public interest by preserving this Court's ability to address matters of vital national importance *before* additional irreparable injury is inflicted on the State and its citizens.

For all these reasons, the balance of equities favors a stay.

CONCLUSION

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

Respectfully submitted,

Roger K. Harris
HARRIS BERNE CHRISTENSEN LLP
5000 SW Meadows Road, Suite 400
Lake Oswego, OR 97035
(503) 968-1475
(503) 968-2003
roger@hbclawyers.com

John C. Eastman
Counsel of Record
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
c/o Chapman Univ. Fowler School of Law
One University Dr.
Fax (877) 855-3330
(714) 844-4817 Fax
jeastman@chapman.edu

Counsel for Applicant National Organization for Marriage, Inc.

Appendix A

Opinion of District Court on Motions for Summary Judgment

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

DEANNA L. GEIGER and JANINE M. NELSON; ROBERT DUEHMIG and WILLIAM GRIESER,

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 WALRUFF, in his official capacity as Multnomah County Assessor,

Defendants.

Case No. 6:13-cv-01834-MC (lead case)

OPINION

PAUL RUMMELL and BENJAMIN WEST; LISA CHICKADONZ and CHRISTINE TANNER; BASIC RIGHTS EDUCATION FUND, Plaintiffs, 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 WALRUFF, in his official capacity as Multnomah County Assessor, Defendants.	Case No. 6:13-cv-02256-MC (trailing case)

MCSHANE, Judge:

The plaintiffs include four Oregon couples seeking marriage in Multnomah County. Although they meet the legal requirements of civil marriage in all other respects, their requests for marriage licenses have been or would be denied because each couple is of the same gender. I am asked to consider whether the state's constitutional and statutory provisions ("marriage laws") that limit civil marriage to "one man and one woman" violate the United States Constitution.[1] Because Oregon's marriage laws discriminate on the basis of sexual orientation

[1] In 1972, the Supreme Court found a lack of "substantial federal question" in the appeal of two men seeking to marry one another after the Minnesota Supreme Court rejected their equal protection and due process claims. *Baker v. Nelson*, 409 U.S. 810, *dismissing appeal from* 191 N.W.2d 185 (1971). Considering 40 years of Supreme Court decisions, the Court's summary order in *Baker* yields no lasting precedential effect in 2014. *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1194-95 (D. Utah 2013) ("[D]octrinal developments in the Court's analysis of both the Equal Protection Clause and the Due Process Clause as they apply to gay men and lesbians demonstrate that the Court's summary dismissal in *Baker* has little if any precedential effect today."); *accord DeBoer v. Snyder*, No. 12–CV–10285, 2014 WL 1100794, at *15 n.6 (E.D. Mich. Mar. 21, 2014); *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1277 (N.D. Okla. 2013); *De Leon v. Perry*, No. SA–13–CA–00982–OLG, 2014 WL 715741, at *10 (W.D. Tex. Feb. 26, 2014); *Bostic v. Rainey*, No. 2:13cv395, 2014 WL 561978, at *10 (E.D. Va. Feb. 13, 2014); *but see*

without a rational relationship to any legitimate government interest, the laws violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

THE PARTIES

All of the plaintiffs[2] share in the characteristics that we would normally look to when we describe the ideals of marriage and family. They present in the record as loving and committed couples who have established long-term relationships. Each has solemnized that relationship in the presence of their families and friends. One couple legally married in Canada, and others temporarily obtained marriage licenses in Multnomah County in 2004. Three of the four couples are parents, and are involved in their children's schools and activities. They support each other financially and emotionally and, by all accounts, their lives have become more meaningful in the single life that they share together.

All of the plaintiffs have worked in Oregon to support each other and their children. They are a highly educated and productive group of individuals. Many of the plaintiffs work in the field of medicine and the health sciences. Mr. Griesar is a teacher. Mr. Rummell is a veteran of the United States Air Force. They pay taxes. They volunteer. They foster and adopt children who have been neglected and abused. They are a source of stability to their extended family, relatives, and friends.

Despite the fact that these couples present so vividly the characteristics of a loving and supportive relationship, none of these ideals we attribute to marriage are spousal prerequisites under Oregon law. In fact, Oregon recognizes a marriage of love with the same equal eye that it recognizes a marriage of convenience. It affords the same set of rights and privileges to Tristan

---

Sevcik v. Sandoval, 911 F. Supp. 2d 996, 1003 (D. Nev. 2012) ("[T]he present challenge is in the main a garden-variety equal protection challenge precluded by *Baker*.").

[2] Plaintiff Basic Rights Education Fund is a "civil rights organization dedicated to education about and advocacy for equal rights for lesbian, gay, bisexual, and transgender Oregonians[.]" Rummell Mem. Supp. Mot. Summ. J., 5, ECF No. 33.

and Isolde that it affords to a Hollywood celebrity waking up in Las Vegas with a blurry memory and a ringed finger. It does not, however, afford these very same rights to gay and lesbian couples who wish to marry within the confines of our geographic borders.

The defendants include the State Registrar, the Governor, and the Attorney General of Oregon, as well as the Assessor for Multnomah County. The defendants concede that Oregon's marriage laws banning same-gender marriage are unconstitutional and legally indefensible, but state they are legally obligated to enforce the laws until this court declares the laws unconstitutional.[3] The case, in this respect, presents itself to this court as something akin to a friendly tennis match rather than a contested and robust proceeding between adversaries.

BACKGROUND

I. Same-Gender Marriage in Oregon and Measure 36

Article I, § 20 of the Oregon Constitution prohibits granting privileges or immunities to any citizen or class of citizens that are not equally available on the same terms to all citizens. In 1998, recognizing that same-gender couples were not permitted to marry, the Oregon Court of Appeals concluded Article I, § 20 of the Oregon Constitution prohibited the state from denying insurance benefits to unmarried domestic partners of homosexual employees. *Tanner v. Oregon Health Sci. Univ.*, 157 Or. App. 502, 525. The state responded by providing benefits to same-gender couples who are able to demonstrate they share a committed relationship similar to a marital relationship.

During this same period, challenges regarding the rights available to same-gender couples began to appear in the national spotlight. In 2003, the Supreme Judicial Court of Massachusetts

[3] The record must reflect that Multnomah County concluded 10 years ago that denying marriage licenses to same-gender couples violated the Oregon Constitution. Waldruff's Resp. Mot. Summ. J. 1, ECF No. 59. ("The County is proud to have stood firm on this core civil rights issue a decade ago when backing marriage rights for all was neither easy nor politically safe."). Still, due to the State's marriage laws, Multnomah County requires a court order to resume issuing marriage licenses to same-gender couples.

concluded that Massachusetts's same-gender marriage ban violated their state constitution. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969. With that ruling, Massachusetts became the first state to legalize same-gender marriage.

On March 3, 2004, Multnomah County determined that its failure to issue marriage licenses to same-gender couples violated Article I, § 20 of the Oregon Constitution. *Li v. State*, 338 Or. 376, 383-84 (2005). In the following weeks, approximately 3000 gay and lesbian couples received marriage licenses in Multnomah County. *Id.* at 384. At the Governor's direction, the State Registrar refused to register the same-sex marriages and several same-gender couples brought a legal challenge to decide the inclusivity of Oregon's marriage laws. *Id.*

Before the Supreme Court of Oregon weighed in on the issue, Oregon voters provided their independent judgment on the question by approving a 2004 ballot initiative known as Measure 36. That measure amended the state constitution to define marriage as a union composed of "one man and one woman." Or. Const. art. 15, § 5A. Measure 36 embedded constitutionally what the Oregon Supreme Court would later conclude the state's statutes had already required. *Li*, 338 Or. at 386 ("[A]lthough nothing . . . expressly states that marriage is limited to opposite-sex couples, the context . . . leaves no doubt that, as a statutory matter, marriage in Oregon is so limited."). Nearly a year after Multnomah County began issuing marriage licenses to same-gender couples, those licenses were deemed invalid. *Id.* at 398.

In 2007, the Oregon State Legislature passed the Oregon Family Farness Act, allowing same-gender couples to register their domestic partnerships to receive certain state benefits. Oregon Family Fairness Act, 2007 Or. Laws, ch. 99, § 2 (codified at Or. Rev. Stat. § 106.305). Domestic partnerships provided "more equal treatment of gays and lesbians and their families," § 106.305(6), by granting domestic partners similar rights and privileges to those enjoyed by

married spouses, § 106.305(5). The Legislature acknowledged, however, that domestic partnerships did not include the magnitude of rights inherent in the definition of marriage. § 106.305(7) (noting "that numerous distinctions will exist between these two legally recognized relationships"). In the declarations submitted to this court, the plaintiffs maintain domestic partnerships have contributed greater confusion and expense to the lives of gay and lesbian couples and their families.

Last summer, the United States Supreme Court declared § 3 of the Defense Against Marriage Act (DOMA) unconstitutional. *United States v. Windsor*, 133 S. Ct. 2675, 2695-96 (2013). As discussed below, DOMA defined marriage as a "union between one man and one woman," 1 U.S.C. § 7 (2012), thereby prohibiting the federal government from extending marriage benefits to legally wed, same-gender spouses, *Windsor*, 133 S. Ct. at 2683. The Court noted marriage regulations were traditionally a matter of state concern and that New York sought to protect same-gender couples by granting them the right to marry. DOMA violated due process and equal protection principles because it impermissibly sought to injure a class of persons New York specifically sought to protect. *Windsor*, 133 S. Ct. at 2693. The Court concluded "[t]he Act's demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law." *Id.* at 2693-94.

Following the landmark decision in *Windsor*, Oregon concluded its own agencies must recognize same-gender marriages lawfully entered into in other jurisdictions. State Defs.' Answer & Affirmative Defenses to Pls.' Am. Compl. Ex. A, ECF No. 58-1.[4] The state also joined an *amicus curiae* brief to the Ninth Circuit Court of Appeals, which has been asked to

[4] The State's recognition of out-of-state same-gender marriages is limited to administrative agencies, and does not apply to the court system, local governments, or the private sector. Or. Admin. R. 105-010-0018 (2013).

invalidate a same-gender marriage ban in Nevada. Brief of Massachusetts, et al., as *Amici Curiae* in Supp. Mot. App. 2, *Sevcik v. Sandoval* (No. 12-17668). In lending its support, the state endorsed the contention that "same-sex couples form families, raise children, and avail themselves of the benefits and abide by the obligations of marriage in the same manner as different-sex couples." *Id.* In so doing, the state effectively acknowledged that its legitimate interest in sustaining both families and communities would be furthered if gay and lesbian couples were able to marry. *Id.*

II. The Harm Caused to Plaintiffs by the State's Marriage Laws

The state's marriage laws impact the plaintiffs in a myriad of ways. The laws frustrate the plaintiffs' freedom to structure a family life and plan for the future. Mr. Rummell did not receive a low-interest veteran loan to aid in purchasing a home because his income was not considered together with Mr. West's income. Ms. Geiger had to ask her employer to extend spousal relocation benefits to Ms. Nelson; a benefit that automatically vests with married couples. When Ms. Chickadonz gave birth to her and Ms. Tanner's children, they encumbered adoption expenses in order for Ms. Tanner to be the legal parent of her own children.

Domestic partnerships pledged to gay and lesbian couples rights and responsibilities approximating those afforded to married couples. Or. Rev. Stat. §§ 106.340(1)-(4). The plaintiffs submit that time has tarnished the promise of domestic partnerships. The plaintiffs explain that a general confusion persists regarding domestic partnerships. They encounter institutional obstacles when lawyers, courts, and health care and funerary service providers are unfamiliar with the rights that domestic partners are entitled to under the law. Domestic partners must draft advance medical directives to ensure they will be able to make important medical decisions on their partner's behalf should the necessity arise. *See* § 127.635(2). Such rights and protections

pass automatically to married couples. § 127.635(2)(b). Likewise, domestic partners must draw up legal devices to imitate marriage's estate-planning benefits. *See* §§ 112.025, .035. Domestic partners are not guaranteed the same treatment at retirement as married couples. §§ 106.340(6)-(8).

Oregon's marriage laws foreclose its same-gender couples (even those registered as domestic partners) from enjoying newly available federal recognition and benefits. They cannot file joint federal income tax returns. Rev. Rul. 13-17, 2013-38 I.R.B. 204. Instead, unmarried gay and lesbian couples pay for costly measures that account for their mutual incomes, expenses, and assets. Decl. Clift 4, ECF No. 56. Oregon's marriage laws also foreclose the pathway to citizenship that a non-national can access by import of their marriage to a United States citizen. Employer-provided health insurance benefits covering unwed partners is federally taxable income. *See* 26 U.S.C. §§ 105(b), 106(b). Establishing joint ownership over an unwed couple's assets may trigger federal gift taxation. *See* Rev. Rul. 13-17 at 203; § 2503(b). Domestic partnership dissolution is taxable, unlike in marriage, *see* § 1041, as are the spousal-support payments arising from such dissolutions, *see* § 71. As compared to divorce, federally qualified retirement plans are indivisible among separating domestic partners. *See* I.R.S. Notice 2008-30, 2008-12 I.R.B. 638. Gay and lesbian couples waiting for the right to marry in Oregon risk a surviving partner being found ineligible for a deceased partner's Social Security benefits. *See* Soc. Sec. Admin., SSA Pub. No. 05-10084, Social Security: Survivors Benefits 5 (2013). Financial aid packages for the children of gay and lesbian families are calculated only on the basis of one parent's income. *See* § 1087nn(b).

Oregon's marriage laws weigh on the plaintiffs in ways less tangible, yet no less painful. The laws leave the plaintiffs and their families feeling degraded, humiliated, and stigmatized.

Plaintiffs consider the time, energy, and sacrifice they devote to building a meaningful life with their loved ones, but find their efforts less worthy in the eyes of the law. They face a tiered system of recognition that grants greater legal status to married felons, deadbeat parents, and mail-order brides. They see no rationale for such treatment, and are angered by what they perceive as state-sanctioned discrimination against them. Accordingly, the plaintiffs request that the state's laws withholding civil marriage from same-gender couples be found unconstitutional.

STANDARD OF REVIEW

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

DISCUSSION

I. A State's Right to Define Marriage within Constitutional Bounds

> [M]arriage is often termed . . . a civil contract . . . [but] it is something more than a mere contract. . . . It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.

Maynard v. Hill, 125 U.S. 190, 210-11 (1888).[5] Society's significant interest in marriage is manifest by a state's "rightful and legitimate concern" for its citizens' marital statuses. *Williams v. North Carolina*, 317 U.S. 287, 298 (1942); *see also Li*, 338 Or. at 391-92 (quoting *Dakin v. Dakin*, 197 Or. 69, 72 (1952) ("The marital relationship [is] 'one in which the state is deeply concerned and over which it exercises a jealous dominion.'"). As the state eloquently notes:

---

[5] It might be more helpful to think of marriage as just marriage – a relationship out of which spring duties to both spouse and society and from which are derived rights, [] such as the right to society and services and to conjugal love and affection – rights which generally prove to be either priceless or worthless, but which none the less the law sometimes attempts to evaluate in terms of money.

Williams v. North Carolina, 317 U.S. 287, 317 (1942) (Jackson, J., dissenting).

> Simply put, marriage matters. It matters not only for the individuals who decide to enter into the civil union, but also for the state. This is why the state links so many rights and protections to the decision to marry. Strong, stable marriages create unions in which children may be raised to become healthy and productive citizens, in which family members care for those who are sick or in need and would otherwise have to rely on government assistance, and through which community is built and strengthened.

State Defs.' Resp. Mot. Summ. J. 1, ECF No. 64.

A state's concern in regulating marriage includes the power to decide what marriage is and who may enter into it. *Windsor*, 133 S. Ct. at 2691. This principal role reflects the state governments' longstanding monopoly over marital relations, an arrangement prevailing even at the time of the Federal Constitution's adoption. *Id.*

The federal government defers to state marriage authority, accepting that marital policies may vary from state to state. *Id.* Those variations reflect the dynamics of our federal system, which empowers citizens to "seek a voice in shaping the destiny of their own times," *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011), and to "form[] a consensus respecting the way [they] treat each other in their daily contact and constant interaction with each other," *Windsor*, 133 S. Ct. at 2692. Although states have wide latitude in regulating marriage, any such laws must abide by the Constitution. *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967).

The Constitution commands that no state may "deny to any person . . . the equal protection of the laws." U.S. Const. amend. XIV, § 1. This pledge of equal protection ensures "that all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). The clause presumes that one class of citizens will remain entitled to the same benefits and burdens as the law affords to other classes. Yet, this presumption is tempered by "the practical necessity that most legislation classifies for one purpose or another," granting a degree of favor to some and disadvantage to others. *Romer v. Evans*, 517 U.S. 620, 631 (1996). The courts balance the constitutional principle with practical

reality by tolerating laws that classify groups and individuals only if such laws are rationally related to a legitimate state purpose. *Id.*

States can and do rationally regulate marriage. A state may, for example, permit eighteen year olds to marry, but not twelve year olds. *See* Jonathan Todres, *Maturity*, 48 Hous. L. Rev. 1107, 1143 (2012). A state may not, however, prevent a "white" adult from marrying a "non-white" adult, *Loving*, 388 U.S. at 11 (overturning one such anti-miscegenation law in Virginia), nor may it withhold marriage from either the destitute, *Zablocki v. Redhail*, 434 U.S. 374, 387-88 (1978) (overturning a Wisconsin law conditioning marriage on a non-custodial parent's ability to satisfy existing child-support obligations), or the incarcerated, *Turner v. Safley*, 482 U.S. 78, 96-99 (1987) (overturning Missouri's requirement that inmates receive a warden's permission to wed), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, § 3, 114 Stat. 804. One lesson to borrow from these and similar precedents is that laws regulating marriage must advance legitimate state interests, and not a mere desire to harm a particular class of its citizens.

II. The *Windsor* Decision and its Applicability to the Plaintiffs' Claims

As noted, DOMA was a federal attempt to regulate marriage. That law defined "marriage" and "spouse" to encompass opposite-gender couples only. *See* 1 U.S.C. § 7. The definition's effect was to make legally married same-gender couples less equal than married opposite-gender couples by depriving the former of numerous federal marital benefits. *Windsor*, 133 S. Ct. at 2694. That result frustrated New York's rightful decision to confer the dignity and privilege of marriage upon gay and lesbian couples. *Id.* at 2695-96. In striking down the federal definition, the Supreme Court explained that the law's "principal purpose and . . . necessary

effect" was "to demean" legally married gay and lesbian couples. *Id.* at 2695. "[N]o legitimate purpose" behind DOMA could overcome such injury. *Id.* at 2696.

The case before me is not a reproduction of *Windsor*. There, the Supreme Court invalidated a federal act that impinged New York's ability to afford gay and lesbian couples the full entitlements of marriage. *Id.* at 2693 ("[DOMA] . . . impose[s] a disadvantage, a separate status . . . upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."). Here, the plaintiffs challenge not federal but state law, one which reserves civil marriage to the exclusive enjoyment of opposite-gender couples. This and similar state marriage laws elsewhere are simply beyond the ambit of the *Windsor* ruling. *See Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d. 1252, 1278 (N.D. Okla. 2013) ("*Windsor* does not answer whether a state may prohibit same-sex marriage in the first instance.").

Windsor may be distinguished from the present case in several respects. Yet, recounting such differences will not detract from the underlying principle shared in common by that case and the one now before me. The principle is one inscribed in the Constitution, and it requires that the state's marriage laws not "degrade or demean" the plaintiffs in violation of their rights to equal protection. *See Windsor*, 133 S. Ct. at 2695.

III. The State's Marriage Laws Violate the Plaintiffs' Rights to Equal Protection

As discussed above, although states may regulate marriage, such laws must pass constitutional muster. Plaintiffs argue the state's marriage laws violate their rights to equal protection. When analyzing a law under the Equal Protection Clause of the Fourteenth Amendment, the court first determines the appropriate level of scrutiny to apply.

Strict scrutiny, the most exacting level of scrutiny, is reserved for "suspect" classifications such as race or national origin. *Johnson v. California*, 543 U.S. 499, 505-06

(2005). Because suspect classifications "raise special fears that they are motivated by an invidious purpose," courts must engage in a "searching judicial inquiry" to ferret out any illegitimate uses of such classifications. *Id.* Under this level of review, the government has the burden of demonstrating the classifications are narrowly tailored to further a compelling government interest. *Id.* at 505.

Other classifications, such as those based on gender or illegitimacy, are subject to heightened scrutiny. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985). Under this level of review, the classification must be "substantially related to a sufficiently important government interest." *Id.* at 441.

Most classifications are presumed to be valid and receive less-exacting judicial scrutiny, known as rational basis review.

> Under rational basis review, the Equal Protection Claus is satisfied if: (1) there is a plausible policy reason for the classification, (2) the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and (3) the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

Bowers v. Whitman, 671 F.3d 905, 917 (9th Cir. 2012) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)) (internal quotations omitted).

A. Discriminatory Classification

Plaintiffs argue the state's marriage laws discriminate based on gender, and therefore must receive heightened scrutiny. This argument reasons that because men may not marry other men, and women may not marry other women, the classification is necessarily one based on gender. Stated another way, if either person in a specific couple happened to be of the other gender, the couple could in fact marry. Because the classification impacts each couple based

solely on the gender of each person, plaintiffs argue the classification must be categorized as one based on gender. I disagree.

The state's marriage laws discriminate based on sexual orientation, not gender. In fact, the ban does not treat genders differently at all. Men and women are prohibited from doing the exact same thing: marrying an individual of the same gender. The ban does not impact males and females differently. Instead, the state's marriage laws classify same-gender couples differently than opposite-gender couples. While opposite-gender couples may marry a partner of their choice, same-gender couples may not.

Plaintiffs argue the Supreme Court has rejected government arguments based on "equal application" of laws that discriminate based on suspect classes. *See Loving*, 388 U.S. at 8-9. The discriminatory laws in *Loving*, however, are not applicable to Oregon's marriage laws. First, the Court specifically noted the anti-miscegenation laws at issue there—because they involved racial classifications—could not survive an "equal application" explanation. *Id.* Second, the anti-miscegenation laws there were "invidious racial discriminations," with proffered purposes of "preserv[ing] the racial integrity of its citizens" and preventing "the corruption of blood[.]" *Id.* at 7 (quoting *Naim v. Naim*, 87 S.E. 2d 749, 756 (Va. 1955)).

There is no such invidious gender-based discrimination here. The state's marriage laws clearly were meant to, and indeed accomplished the goal of, preventing same-gender couples from marrying. The targeted group here is neither males nor females, but homosexual males and homosexual females. Therefore, I conclude the state's marriage laws discriminate on the basis of sexual orientation, not gender. *See Sevcik*, 911 F. Supp. 2d at 1005 (analyzing a similar Nevada law, the court concluded the law was not directed toward any one gender and did not affect one

gender in a way demonstrating any gender-based animus, but was intended to prevent homosexuals from marrying).

B. Applicable Level of Scrutiny

That the state's marriage laws discriminate based on sexual orientation does not answer the question of what level of scrutiny applies. For the past quarter century, laws discriminating on the basis of sexual orientation received rational basis review in the Ninth Circuit. *High Tech Gays v. Def. Indus. Sec. Clearance Off.*, 895 F.2d 563, 574 (9th Cir. 1990). In *High Tech Gays*, a class of plaintiffs challenged the Department of Defense's policy of "refusing to grant security clearances to known or suspected gay applicants" on equal protection grounds. *Id.* at 565. The court had to determine whether homosexuals were a "suspect" or "quasi-suspect" class justifying the classifications to heightened review. The court inquired whether homosexuals:

> 1) Have suffered a history of discrimination; 2) exhibit obvious immutable, or distinguishing characteristics that define them as a discrete group; and 3) show that they are a minority or politically powerless, or alternatively show that the statutory classification at issue burdens a fundamental right.

Id. at 573. The court concluded that although homosexuals suffered a history of discrimination, they did not meet the other criteria required of suspect classes. Therefore, classifications based on sexual orientation received rational basis review. *Id.* at 574.

A Ninth Circuit panel recently considered whether *High Tech* Gays remains good law in light of *Windsor*. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 480-84 (9th Cir. 2014). After noting that *Windsor* was silent as to the precise level of scrutiny applied to the sexual orientation discrimination at issue there, the *SmithKline* court looked at what *Windsor* "actually did" in analyzing that equal protection claim. *Id.* at 480. After a thorough and persuasive analysis, the court concluded:

> In its words and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than

> rational basis review. In other words, *Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation.

Id. at 481.

No mandate issued from *SmithKline* and, although neither party requested a rehearing en banc, at least one active judge of the Ninth Circuit made a *sua sponte* call for a rehearing en banc. March 27, 2014 Order (No. 11-17357, ECF No. 88). "An appellate court's decision is not final until its mandate issues." *Beardslee v. Brown*, 393 F.3d 899, 901 (9th Cir. 2004); *accord United States v. Ruiz*, 935 F.2d 1033, 1037 (9th Cir. 1991) (citation and internal quotations omitted) ("[T]he legitimacy of an expectation of finality of an appellate order depends on the issuance or not of the mandate required to enforce the order."). Absent a mandate's issuance, the circuit "retains jurisdiction of the case and may modify or rescind its opinion." *Ruiz*, 935 F.2d at 1037; *accord Carver v. Lehman*, 558 F.3d 869, 878 (9th Cir. 2009).

In other words, the panel's decision in *SmithKline* is not yet a truly final and binding decision. The opinion may be modified, rescinded, or receive a majority vote for en banc review. I could independently conclude the Supreme Court did what *SmithKline* persuasively concluded it did. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (circuit panels and district courts may reject a prior panel's opinion when that opinion is "effectively overruled" by higher court). That is unnecessary here, as the state's marriage laws cannot withstand even the most relaxed level of scrutiny.

C. Rational Basis Review

As described above, it is beyond question that Oregon's marriage laws place burdens upon same-gender couples that are not placed upon opposite-gender couples. This classification implicates the Equal Protection Clause. *Romer v. Evans*, 517 U.S. 620, 633 (1996) ("A law declaring that in general it shall be more difficult for one group of citizens than for all others to

seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."). The Equal Protection Clause does not allow classifications drawn solely for the purpose of disadvantaging a particular group intentionally singled out for unequal treatment. *Id.* For this reason, courts inquire whether the classification is rationally related to a legitimate government interest. *Id.* at 632-33. Courts presume the classification is valid, declaring it unconstitutional only when "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Vance v. Bradley*, 440 U.S. 93, 97 (1979). That a majority of Oregon voters enacted Measure 36 in order to constitutionally embed such classifications makes no difference to this analysis. *Romer*, 517 U.S. at 635.

As noted by the state, justifications offered in enacting Measure 36 are similar to those offered by other states in defending other bans on same-gender marriage. One such justification is protecting traditional definitions of marriage. Another is protecting children and encouraging stable families. As discussed below, only the latter justification is a legitimate state interest. Especially when viewed in light of the state's other official policies, many of which are unique to Oregon, the state's ban on same-gender marriage is clearly unrelated to protecting children and encouraging stable families. The marriage laws place the plaintiffs and other gay and lesbian couples seeking to marry in Oregon at a disadvantage, and the laws do so without any rationally related government purpose.

i. Tradition

Marriage has traditionally been limited to opposite-gender couples. That the traditional definition of marriage excluded same-gender couples, however, does not end the inquiry. *See Heller v. Doe,* 509 U.S. 312, 326 (1993) ("Ancient lineage of a legal concept does not give it

immunity from attack for lacking a rational basis."). If tradition alone was sufficient to withstand rational basis review, the right to equal protection would be quite hollow. "Tradition" would simply turn rational basis review into a rubber stamp condoning discrimination against longstanding, traditionally oppressed minority classes everywhere. Limiting civil marriage to opposite-gender couples based only on a traditional definition of marriage is simply not a legitimate purpose. *Golinski v. Off. of Pers. Mgmt.*, 824 F. Supp. 2d 968, 998 (N.D. Cal. 2012) ("[T]he argument that the definition of marriage should remain the same for the definition's sake is a circular argument, not a rational justification. Simply stating what has always been does not address the reasons for it. The mere fact that prior law, history, tradition, the dictionary and the Bible have defined a term does not give that definition a rational basis, it merely states what has been.").

Certain traditions may reflect personal religious and moral beliefs. Such beliefs likely informed the votes of many who favored Measure 36. However, as expressed merely a year before Measure 36's passage, "[m]oral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be 'drawn for the purpose of disadvantaging the group burdened by the law.'" *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring in the judgment) (quoting *Romer*, 517 U.S. at 633). That year, the Supreme Court concluded a Texas law criminalizing private, consensual, sexual acts between two adults was unconstitutional. The Court explicitly adopted Justice Stevens' dissent in *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986), another case involving laws criminalizing homosexual conduct. *Lawrence*, 539 U.W. 577-78. Over a vigorous dissent from Justice Scalia, the Court adopted Justice Stevens' earlier conclusion that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is

not a sufficient reason for upholding a law prohibiting the practice[.]" *Id.* at 577. This remains the law of the land, that mere moral disapproval of a particular group of citizens is not a legitimate reason for intentionally withholding rights and benefits from that group.

To be clear, this case deals with civil marriage. The state recognizes that marriage is a civil contract. Or. Rev. Stat. § 106.010. It is that right, to enter into a civil contract of marriage, and the right to share in the benefits and obligations flowing from that civil contract, that are at issue here. Judge John G. Heyburn II of the Western District of Kentucky, one of an ever-increasing—and so far unanimous—number of state and federal judges to strike down similar state bans following *Windsor,* put it very well:

> Our religious and social traditions are vital to the fabric of society. Though each faith, minister, and individual can define marriage for themselves, at issue here are laws that act outside that protected sphere. Once the government defines marriage and attaches benefits to that definition, it must do so constitutionally. It cannot impose a traditional or faith-based limitation upon a public right without a sufficient justification for it. Assigning a religious or traditional rationale for a law, does not make it constitutional when that law discriminates against a class of people without other reasons.
>
> The beauty of our Constitution is that it accommodates our individual faith's definition of marriage while preventing the government from unlawfully treating us differently. This is hardly surprising since it was written by people who came to America to find both freedom of religion and freedom from it.

Bourke v. Beshear, 3:13-750, 2014 WL 556729, at *10 (Feb. 12, 2014).

Overturning the discriminatory marriage laws will not upset Oregonians' religious beliefs and freedoms.[6] As tradition alone does not provide a legitimate state interest supporting

[6] The New Mexico Supreme Court succinctly noted what religious impact allowing same-gender marriage would have: "Our holding will not interfere with the religious freedom of religious organizations or clergy because (1) no religious organization will have to change its policies to accommodate same-gender couples, and (2) no religious clergy will be required to solemnize a marriage in contravention of his or her religious beliefs." *Griego v. Oliver*, 316 P.3d 865, 871 (2013); *see also Kitchen*, 961 F. Supp. 2d at 1214 ("[T]he court notes that its decision does not mandate any change for religious institutions, which may continue to express their own moral viewpoints and define their own traditions about marriage.").

classifications based on sexual orientation, I turn to other possible justifications for the state's marriage laws.

ii. Protecting Children and Encouraging Stable Families

Supporters of Measure 36, and defenders of similar marriage laws throughout the country, often turn to variations of the state's interest in protecting children and families in supporting such laws. These arguments range from state interests in encouraging responsible and "natural" procreation to arguments that children fare better in opposite-gender families. Although protecting children and promoting stable families is certainly a legitimate governmental interest, the state's marriage laws do not advance this interest—they harm it.

Although the state has a legitimate interest in promoting stable families, its interest does not stop with families of opposite-gender couples. By enabling gay and lesbian couples to enter domestic partnerships, the state acknowledged the value and importance such families can provide. Specifically, the Oregon Legislature, in enacting the Oregon Family Fairness Act, found that "[t]his state has a strong interest in promoting stable and lasting families, including the families of same-sex couples and their children. All Oregon families should be provided with the opportunity to obtain necessary legal protections and status and the ability to achieve their fullest potential." § 106.305(4). The legislature also found that "[m]any gay and lesbian Oregonians have formed lasting, committed, caring and faithful relationships with individuals of the same sex, despite long-standing social and economic discrimination. These couples live together, participate in their communities together and often raise children and care for family members together, just as do couples who are married under Oregon law." § 106.305(3). With this finding, the legislature acknowledged that our communities depend on, and are strengthened by, strong, stable families of all types whether headed by gay, lesbian, or straight couples.

Yet, because the state is unable to extend to opposite-gender relationships the full rights, benefits, and responsibilities of marriage, it is forced to burden, demean, and harm gay and lesbian couples and their families so long as its current marriage laws stand. Although the state created domestic partnerships to "ensure[e] more equal treatment of gays and lesbians and their families," § 106.305(6), it also recognized domestic partnerships are not equal to civil marriage, § 106.305(7). Recognizing domestic partnerships are not equal to marriage simply states the obvious. In *Windsor*, Justice Kennedy recently pointed out rather dramatically these inequalities. Justice Kennedy recognized that prohibiting same-gender couples from joining in marriage "humiliates" children being raised by same-gender couples and "makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and their daily lives." 133 S. Ct. at 2694. Creating second-tier families does not advance the state's strong interest in promoting and protecting all families.

Nor does prohibiting same-gender marriage further Oregon's interest in protecting all children. For example, the state's interest in protecting children concerns more than just those children created in wedlock. § 109.060 (relationship between child and parents is the same regardless of parents' marital status). The state has an interest in protecting all children, including adopted children. § 109.050 (relationship of adoptive child and adoptive parents is the same as would exist if the child had been the adoptive parents' biological child). And the state does not treat "naturally and legitimately conceived" children any different than children conceived in other ways. § 109.243 (rights between a child produced by artificial insemination and a mother's husband are the same as those that exist in a naturally conceived birth). When the state seeks homes to provide security and support for vulnerable children, it does so without asking if the adults in such households are married, same-gender partnered, or single. St. Defs.'

Resp. Mot. Summ. J. 22, ECF No. 64. The state's policies clearly demonstrate its interest in supporting all children, including children raised by same-gender couples.

The above policies make perfect sense. Oregon's policies accept that children fare the same whether raised by opposite-gender or same-gender couples. *See DeBoer v. Snyder*, No. 12-10285, 2014 WL 1100794, at *12 (E.D. Mich. March 21, 2014) (noting approximately 150 sociological and psychological studies confirm "there is simply no scientific basis to conclude that children raised in same-sex households fare worse than those raised in heterosexual households."); *De Leon v. Perry*, No. SA-13-CA-00982-OLG, 2014 WL 715741, at *15 (W.D. Tex. Feb. 26, 2014) ("[S]ame-sex couples can be just as responsible for a child's welfare as the countless heterosexual couples across the nation."); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 479 (E.D. Va. 2014) ("Same-sex couples can be just as responsible for a child's existence as the countless couples across the nation who choose, or are compelled to rely upon, enhanced or alternative reproduction methods for procreation."); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 980 (N.D. Cal. 2010) (finding "[t]he gender of a child's parent is not a factor in a child's adjustment. The sexual orientation of an individual does not determine whether that individual can be a good parent. Children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted. The research supporting this conclusion is accepted beyond serious debate in the field of developmental psychology."). The realization that same-gender couples make just as good parents as opposite-gender couples is supported by more than just common sense; it is also supported by "the vast majority of scientific studies" examining the issue. *See* Brief of the Am. Psychol. Ass'n, et al. as Amici Curia, *United States v. Windsor*, 133 S. Ct. 2675, 2695-96 (2013) (12-307), 2013 WL 871958, at *19 (listing studies).

Some argue the state's interest in responsible procreation supports same-gender marriage bans. Procreation, however, is not vital to the state's interest in marriage. Procreative potential is not a marriage prerequisite. § 106.010 (marriage is a civil contract between males and females at least 17 years of age). There is no prohibition to marriage as to sterile or infertile persons, or upon couples who have no desire to have children. The only prohibited marriages, other than those between same-gender couples, are those involving first cousins or those in which either party is already married. § 106.020.

Additionally, any governmental interest in responsible procreation is not advanced by denying marriage to gay a lesbian couples. There is no logical nexus between the interest and the exclusion. *See Bishop*, 962 F. Supp. 2d. at 1291 ("[T]here is no rational link between excluding same-sex couples from marriage and the goals of encouraging 'responsible procreation' . . . ."). Opposite-gender couples will continue to choose to have children responsibly or not, and those considerations are not impacted in any way by whether same-gender couples are allowed to marry. Nothing in this court's opinion today will effect the miracle of birth, accidental or otherwise. A couple who has had an unplanned child has, by definition, given little thought to the outcome of their actions. The fact that their lesbian neighbors got married in the month prior to conception seems of little import to the stork that is flying their way.

The logical nexus between the state's interest in "natural" procreation and denying marriage to same-gender couples is as unpersuasive as the argument in favor of responsible procreation. Oregon law plays no favorites between "naturally and legitimately conceived" children and those conceived via artificial insemination. § 109.243 (so long as the husband consented to the artificial insemination, the child will have the same rights and relationship as

between naturally conceived children). The state's interest is in a child's well-being regardless of the means of conception. There is simply no rational argument connecting this interest to the prohibition of same-gender marriage.

Although protecting children and promoting stable families is a legitimate governmental purpose, prohibiting same-gender couples from marrying is not rationally related to that interest. To justify classifications singling out a particular class of persons, the law must, at a minimum, contain some "factual context" tying the classification to the purpose sought to be achieved. *Romer*, 517 U.S. at 632-33. There is no such factual context here. In fact, the relationship between prohibiting same-gender couples from marrying and protecting children and promoting stable families is utterly arbitrary and completely irrational. The state's marriage laws fly in the face of the state's "strong interest in promoting stable and lasting families, including the families of same-sex couples and their children." § 106.305(4).

Expanding the embrace of civil marriage to gay and lesbian couples will not burden any legitimate state interest. The attractiveness of marriage to opposite-gender couples is not derived from its inaccessibility to same-gender couples. *See Perry*, 704 F. Supp. 2d at 972 ("Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages."). The well-being of Oregon's children is not enhanced by destabilizing and limiting the rights and resources available to gay and lesbian families. *See Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 994-95 (S.D. Ohio 2013) ("The only effect the bans have on children's well-being is harming the children of same-sex couples who are denied the protection and stability of having parents who are legally married.").

The state's marriage laws unjustifiably treat same-gender couples differently than opposite-gender couples. The laws assess a couple's fitness for civil marriage based on their sexual orientation: opposite-gender couples pass; same-gender couples do not. No legitimate state purpose justifies the preclusion of gay and lesbian couples from civil marriage.

CONCLUSION

I am aware that a large number of Oregonians, perhaps even a majority, have religious or moral objections to expanding the definition of civil marriage (and thereby expanding the benefits and rights that accompany marriage) to gay and lesbian families. It was these same objections that led to the passage of Measure 36 in 2004. Generations of Americans, my own included, were raised in a world in which homosexuality was believed to be a moral perversion, a mental disorder, or a mortal sin. I remember that one of the more popular playground games of my childhood was called "smear the queer"[7] and it was played with great zeal and without a moment's thought to today's political correctness. On a darker level, that same worldview led to an environment of cruelty, violence, and self-loathing. It was but 1986 when the United States Supreme Court justified, on the basis of a "millennia of moral teaching," the imprisonment of gay men and lesbian women who engaged in consensual sexual acts. *Bowers*, 478 U.S. at 197 (Burger, C.J., concurring), *overruled by Lawrence*, 539 U.S. at 578. Even today I am reminded of the legacy that we have bequeathed today's generation when my son looks dismissively at the sweater I bought him for Christmas and, with a roll of his eyes, says "dad . . . that is so gay."

It is not surprising then that many of us raised with such a world view would wish to protect our beliefs and our families by turning to the ballot box to enshrine in law those traditions

[7] The game entailed boys tackling one another "until one survivor remained standing." *Frazier v. Norton*, 334 N.W.2d 865, 866 (S.D. 1983). Children today continue to play the game, now known as "kill the carrier."

we have come to value. But just as the Constitution protects the expression of these moral viewpoints, it equally protects the minority from being diminished by them.

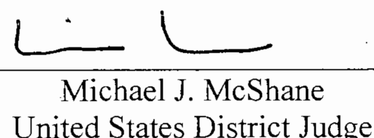
It is at times difficult to see past the shrillness of the debate. Accusations of religious bigotry and banners reading "God Hates Fags" make for a messy democracy and, at times, test the First Amendment resolve of both sides. At the core of the Equal Protection Clause, however, there exists a foundational belief that certain rights should be shielded from the barking crowds; that certain rights are subject to ownership by all and not the stake hold of popular trend or shifting majorities.

My decision will not be the final word on this subject, but on this issue of marriage I am struck more by our similarities than our differences. I believe that if we can look for a moment past gender and sexuality, we can see in these plaintiffs nothing more or less than our own families. Families who we would expect our Constitution to protect, if not exalt, in equal measure. With discernment we see not shadows lurking in closets or the stereotypes of what was once believed; rather, we see families committed to the common purpose of love, devotion, and service to the greater community.

Where will this all lead? I know that many suggest we are going down a slippery slope that will have no moral boundaries. To those who truly harbor such fears, I can only say this: Let us look less to the sky to see what might fall; rather, let us look to each other . . . and rise.

ORDER TO FOLLOW.

DATED this 19 th day of May, 2014.



Michael J. McShane
United States District Judge

Appendix B

District Court Order Granting Summary Judgment, Declaring Unconstitutional and Permanently Enjoining Enforcement of Article 15, Section 5a of the Oregon Constitution

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

DEANNA L. GEIGER and JANINE M. NELSON; ROBERT DUEHMIG and WILLIAM GRIESER, 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 WALRUFF, in his official capacity as Multnomah County Assessor, Defendants.	Case No. 6:13-cv-01834-MC (lead case) ORDER

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

Plaintiffs,

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 WALRUFF, in his official capacity as Multnomah County Assessor,

Defendants.

Case No. 6:13-cv-02256-MC
(trailing case)

MCSHANE, Judge:

The Court, having considered the Plaintiffs' Motions for Summary Judgment (ECF Nos. 23 and 42), the Defendants' Responses (ECF Nos. 48 and 64), the oral arguments made by all parties on April 23, 2014, and the briefs filed by amicus (ECF Nos. 66, 70, and 79), GRANTS summary judgment in favor of Plaintiffs.

The Court finds that there is no legitimate state interest that would justify the denial of the full and equal recognition, attendant rights, benefits, protections, privileges, obligations, responsibilities, and immunities of marriage to same-gender couples solely on the basis that those couples are of the same gender.

NOW, THEREFORE,

The Court GRANTS the Motions for Summary Judgment (ECF Nos. 23 and 42) filed by the plaintiffs in each of the consolidated cases.

The Court hereby DECLARES that Article 15, section 5A, of the Oregon Constitution violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and that as such it is void and unenforceable. Defendants and their officers, agents, and employees are PERMANENTLY ENJOINED from enforcing Article 15, section 5A, of the Oregon Constitution.

The Court also DECLARES that ORS 106.010, ORS 106.041(1), and ORS 106.150(1) violate the Equal Protection Clause and are unenforceable to the extent that they would prohibit a person from marrying another person of the same gender, or would deny same-gender couples the right to marry with full and equal recognition, attendant rights, benefits, privileges, obligations, responsibilities, and immunities of marriage, where the couple would be otherwise qualified to marry under Oregon law. Defendants and their officers, agents, and employees are PERMANENTLY ENJOINED from enforcing or applying those statutes—or any other state or local law, rule, regulation, or ordinance—as the basis to deny marriage to same-gender couples otherwise qualified to marry in Oregon, or to deny married same-gender couples any of

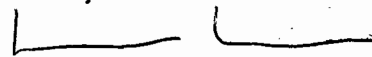
the rights, benefits, privileges, obligations, responsibilities, and immunities that accompany marriage in Oregon.

The Court DECLARES that the Equal Protection Clause requires recognition of marriages of same-gender couples legally performed in other jurisdictions, where those marriages are in all other respects valid under Oregon law, and that no state or local law, rule, regulation, or ordinance can deny recognition of a same-gender couple's marriage validly performed in another jurisdiction. The Court PERMANENTLY ENJOINS Defendants and their officers, agents, and employees from denying that recognition.

This Order shall be effective immediately upon filing.

IT IS SO ORDERED.

DATED this 19 th day of May, 2014.



Michael J. McShane
United States District Judge

Appendix C

District Court Judgment

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

DEANNA L. GEIGER and JANINE M. NELSON; ROBERT DUEHMIG and WILLIAM GRIESER, 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 WALRUFF, in his official capacity as Multnomah County Assessor, Defendants.	Case No. 6:13-cv-01834-MC (lead case) JUDGMENT

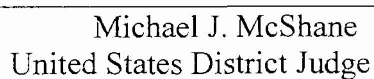
PAUL RUMMELL and BENJAMIN WEST; LISA CHICKADONZ and CHRISTINE TANNER; BASIC RIGHTS EDUCATION FUND, Plaintiffs, JOHN KITZHABER, in his official capacity as Governor of Oregon; ELLEN ROSENBLUM, in her official capacity as Attorney General of Oregon; JENNIFER WOODWARD, in her official capacity as State Registrar, Center for Health Statistics, Oregon Health Authority, and RANDY WALRUFF, in his official capacity as Multnomah County Assessor, Defendants.	Case No. 6:13-cv-02256-MC (trailing case)

MCSHANE, Judge:

Based on the record, judgment for plaintiffs.

IT IS SO ORDERED.

DATED this 19 th day of May, 2014.



Michael J. McShane
United States District Judge

Appendix D

Ninth Circuit Order Denying Stay

FILED

MAY 19 2014

MOLLY C. DWYER, CLERK
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.,

Defendants - Appellees,

v.

NATIONAL ORGANIZATION FOR MARRIAGE, INC., Proposed Intervenor; on behalf of their Oregon Members,

Movant - Appellant.

No. 14-35427

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

ORDER

Before: LEAVY, CALLAHAN, and HURWITZ, Circuit Judges.

Appellant's emergency motion to stay district court proceedings pending appeal is denied. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

The briefing schedule established previously remains in effect.

AS/MOATT

CERTIFICATE OF SERVICE

I certify that I served a true and complete copy of the foregoing **APPLICATION FOR STAY**, via e-mail **and** via Federal Express overnight delivery on May 27, 2014, to each of the parties and at each parties' regular address as shown in the attached service list.

DATED this 27th day of May, 2014.

Roger K. Harris
HARRIS BERNE CHRISTENSEN LLP
5000 SW Meadows Road, Suite 400
Lake Oswego, OR 97035
Tel: (503) 968-1475
Fax: (503) 968-2003
roger@hbclawyers.com

John C. Eastman
Counsel of Record
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
c/o Chapman Univ. Fowler School of Law
One University Dr.
Orange, CA 92866
Tel: (877) 855-3330
Fax: (714) 844-4817
jeastman@chapman.edu

Counsel for Applicant National Organization for Marriage, Inc.

SERVICE LIST

Lea Ann Easton
1 SW Columbia St Suite 400
Portland, OR 97258
leaston@dorsayindianlaw.com
T: 503-790-9060
F: 503-790-9068

Lake James H. Perriguey
1906 SW Madison Street
Portland, Oregon 97205
lake@law-works.com
T: (503) 227.1928
F: (503) 334.2340

Kevin Diaz
506 SW 6th Avenue, Suite 700
Portland, OR 97204
PO Box 40585
Portland, OR 97240-0585
kdiaz@aclu-or.org
T: 503-227-6928
F: 503-227-6948

Amanda C. Goad
1313 W. Eighth St
Los Angeles, CA 90017
agoad@aclu.org
T: 213-977-9500
F: unknown

Kristina J. Holm
1120 NW Couch St, 10th Fl
Portland, OR 97209-4128
KJHolm@perkinscoie.com
T: 503-727-2157
F: 503-346-2176

Misha Isaak
1120 NW Couch St, 10th Fl
Portland, OR 97209-4128
misaak@perkinscoie.com
T: 503-727-2157
F: 503-346-2086

Thomas R. Johnson
1120 NW Couch St, 10th Fl
Portland, OR 97209-4128
TRJohnson@perkinscoie.com
T: 503-727-2157
F: 503-346-2176

Jennifer Middleton
975 Oak Street, Suite 1050
Eugene, OR 97401
jmiddleton@jjlslaw.com
T: 541-683-2506
F: 541-484-0882

Mary Hazel Williams
5625 SW California St
Portland, OR 97219
mary_h_williams@msn.com
T: 503-407-9048
F: unknown

Anna Joyce
1162 Court St NE
Salem, OR 97301
anna.joyce@doj.state.or.us
T: 503-378-4402
F: 503-378-6306

Jenny M. Madkour
501 SE Hawthorne Blvd. Ste. 500
Portland, OR 97214
jenny.m.madkour@multco.us
T: 503-988-3138
F: 503-988-3377

Katharine von Ter Stegge
501 SE Hawthorne Blvd., Suite 500
Portland, OR 97214
katharine.von.terstegge@co.multnomah.or.us
T: 503-988-3138
F: 503-988-3377