

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellees,

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,

v.

NATIONAL ORGANIZATION FOR
MARRIAGE, INC.,

Movant-Appellant

No. 14-35427

**REQUEST THAT THE COURT
NOT ISSUE A
TEMPORARY STAY**

D. Ct. Nos.

6:13-cv-01834-MC

6:13-cv-02256-MC

U.S. District Court for Oregon
Eugene Division

The National Organization for Marriage, Inc. (“NOM”) has filed an appeal of the denial of its motion to intervene. On Friday, May 16, 2014, the district court entered an order stating that it would issue a decision on the pending motions for summary judgment on Monday, May 19, 2014, at noon. NOM has moved in this Court for a stay of proceedings in the district court. Plaintiffs will file full briefing in opposition to that motion. With this short submission, Plaintiffs request that this Court not issue a temporary stay of proceedings during the pendency of NOM’s motion for stay.

A temporary stay of proceedings is unwarranted. The present appeal and stay motion were initiated by a non-party, which seeks review, not of the district court’s forthcoming merits decision, but of the denial of its motion to intervene. In this case, it is clear that there will be no appeal with a potential to alter the judgment.

This case differs substantially from *Latta v. Otter*, No. 14-35420 (9th Cir.), the case regarding marriage equality in Idaho that is also now before this Court. In *Latta*, the defendant state officials immediately appealed the district court’s opinion and sought a stay of its effect. Here, the Defendants have said that they will not appeal a favorable judgment for Plaintiffs. In fact, regardless of how the instant motion for stay is resolved, if Plaintiffs prevail on summary judgment at the district court, it is virtually certain that there will never be an appeal of that merits decision. This is because it is extraordinarily unlikely that the district court would reach a different result in this case if NOM were to participate. In considering the summary judgment motions, the district court evaluated arguments that NOM

might have raised by reviewing briefs submitted in defense of other states' marriage exclusion laws. In the past year, all 12 federal district courts to have decided challenges to state marriage exclusion laws have uniformly struck them down (and in all 12 of these other cases, one or more parties has sought to defend the constitutionality of the challenged laws). There is no reason to believe that NOM's participation would alter the district court's conclusion here.

Thus, even if NOM were to prevail in this appeal on the question of intervention, and this Court were to require the district court to review briefing from NOM in reconsidering plaintiffs' motions for summary judgment, the district court would almost certainly reach the same result. Significantly, NOM would have no standing to appeal from that judgment. Just last term, in a case substantially similar to this one, the Supreme Court held that a private intervenor lacked standing to appeal a district court's invalidation of a state's laws excluding same-sex couples from marriage. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013) ("We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here.").

Further, it is exceedingly unlikely that NOM will prevail in *this* appeal. Setting aside whether NOM satisfies the usual prerequisites for intervention, the district court denied NOM's motion because, among other things, its motion (made two days before the scheduled hearing on dispositive motions) was not timely. The district court's finding of untimeliness is reviewed for abuse of discretion. *See Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 658 (9th Cir. 1978) ("The question of

timeliness is addressed to the sound discretion of the trial court and will be overturned only when an abuse of discretion is shown.”). NOM has no serious argument that the district court abused its discretion here.

NOM’s purpose in filing this appeal is not to win. It is to delay Plaintiffs’ ability to marry in Oregon. The standards governing a stay, even a temporary stay pending consideration of a motion for stay, do not permit this tactic. *See Jimenez v. Barber*, 252 F.2d 550, 553 (9th Cir. 1958) (holding that a stay pending appeal is inappropriate where “the effect will be to give appellant the fruits of victory whether or not the appeal has merit”). Defendants, officials of the State of Oregon and Multnomah County who months ago publicly agreed with Plaintiffs in this case that Oregon’s exclusion of same-sex couples from marriage violated the U.S. Constitution, have affirmed that they stand ready to implement any decision of the district court in a comprehensive and orderly fashion. (D. Ct. Dkt. Nos. 59 p.3, 64 p.42.) Unlike in *Latta*, in *Kitchen v. Herbert*, No. 13-4178 (10th Cir.), and in other recent cases in which courts have stayed marriage equality decisions pending resolution of appeals, in this case it is clear that no appeal with a potential to alter the judgment is forthcoming.

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Plaintiffs respectfully request that this Court not issue a temporary stay pending its decision on NOM's motion for stay.

DATED: May 19, 2014

s/ Thomas R. Johnson

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