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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEANNA L. GEIGER; JANINE M.
NELSON; ROBERT DUEHMIG;
WILLIAM GRIESAR; PAUL
RUMMELL; BENJAMIN WEST;
LISA CHICKADONZ; 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; RANDY
WALDRUFF, in his official capacity as
Multnomah County Assessor,

Defendants - Appellees,

v.

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

Movant - Appellant.

U.S.C.A. No. 14-35427

MOTION TO DISMISS

State defendants Governor John Kitzhaber, Ellen Rosenblum, and Jennifer Woodward hereby move to dismiss the appeal because it is moot.

The National Organization for Marriage, Inc. (NOM) filed its notice of appeal from the denial of its motion to intervene in the underlying litigation on May 16, 2014. (D. Ct. Dkt. No. 117). That litigation challenged the constitutionality of Oregon's ban on same-sex marriage. Because NOM's motion to intervene was both untimely and failed to demonstrate that NOM had a significant protectable interest in the underlying litigation, the district court denied its motion to intervene. (D. Ct. Dkt. No. 114). NOM then sought, and this court denied, a stay on May 19, 2014. (9th Cir. Dkt. No. 15). That same day, the district court issued an opinion and order declaring Oregon's ban on same-sex marriage to be unconstitutional and enjoining the state defendants from enforcing it. (D. Ct. Dkt. Nos. 118, 119). The district court entered its judgment that day as well. (D. Ct. Dkt. No. 120). Defendants do not intend to appeal the district court's judgment.

The entry of the judgment in the litigation in which NOM sought to intervene renders their appeal of the denial of their motion to intervene moot. An appeal is moot where there exists no "present controversy as to which effective relief can be granted." *Outdoor Media Group, Inc. v. City of*

Beaumont, 506 F.3d 895, 900 (9th Cir. 2007) (internal citation omitted). A

proposed intervenor has the right of appeal from the denial of its motion to intervene, but where the district court subsequently decides the underlying litigation and issues final judgment, and no party appeals, that proposed intervenor's appeal is moot. *West Coast Seafood Processors Ass'n v. Natural Res. Def. Council, Inc.*, 643 F.3d 701 (9th Cir. 2011) (so holding). That is because no "effective relief" can be granted to the proposed intervenor. *See also United States v. Ford*, 650 F.2d 1141, 1143 (9th Cir. 1981) (dismissing as moot an appeal from the denial of a motion to intervene because the underlying litigation was voluntarily dismissed).

Here, the underlying litigation is complete, and no party will appeal. Therefore, because this court can grant NOM no effective relief, it should dismiss its appeal as moot.

Moreover, the capable of repetition yet evading review exception to the mootness doctrine cannot apply here. That doctrine applies only in extraordinary cases. *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 798 (9th Cir. 1999) (en banc). This is not the kind of extraordinary case in which the doctrine applies. The "capable of repetition" part of the inquiry focuses on whether NOM's appeal from its motion to intervene is likely to occur again. It will not. The Oregon ban on same-sex marriage has been struck down.

Therefore, it is highly unlikely that any further litigation over the validity of

that ban will occur again, and no further opportunity for NOM to intervene will likely be presented.

Finally, to the extent that NOM will continue as it has throughout the litigation to argue that its appeal should remain viable to permit it to appeal the underlying litigation, that argument too fails. NOM has asserted that it has three unidentified members who have a protected interest in the merits of the underlying litigation and in being able to appeal the district court's order on the merits, because the state defendants have determined that they will not appeal. Even if this court assumes that the three members of NOM have a concern about same-sex marriages in Oregon, they have failed to make any showing that they would have Article III standing to appeal. The member who voted for the same-sex marriage ban has no greater interest in the constitutional challenge to the ban than any other voter in Oregon and lacks standing to appeal.

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.”). A wedding planner who may or may not be asked to provide services to a same-sex couple seeking to celebrate their marriage lacks standing to challenge the constitutionality of that marriage. The same is true for a county clerk who may be asked to provide a license to a same-sex couple but who has

only a personal and not an official objection to same-sex marriage. For both the wedding planner and the individual who happens to be a county clerk, their objections may lead to other litigation concerning whether they have a right to not play a role in same-sex marriage, but they have no connection to plaintiffs' claims of a right to marry under the federal constitution.

In short, there is simply nothing left for this court to do with respect to NOM's appeal from the denial of its motion to intervene. The underlying litigation has concluded, and so too must NOM's appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2014, I directed the Motion to Dismiss to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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/s/ Anna M. Joyce

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