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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.	U.S.C.A. No. 14-35427 REPLY TO RESPONSE TO MOTION TO DISMISS

Continued…

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 WALRUFF, 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.

This appeal concerns an attempt by the National Organization for Marriage (NOM) to intervene into litigation in which same-sex couples and the Basic Rights Education Fund (plaintiffs) challenged the constitutionality of Oregon's ban on same-sex marriage. As explained in the state defendants' Motion to Dismiss, the trial court rejected NOM's motion to intervene as untimely and also as having failed to establish that NOM had a significant protectable interest in the underlying litigation. The trial court then issued an opinion on the merits of the case, in which it found in favor of plaintiffs and enjoined the defendants from enforcing the state's same-sex marriage ban. The trial court entered its judgment on May 19, 2014, and the trial court matter is now closed. (Dist. Ct. Dkt. No. 120).

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On May 20, 2014, defendants moved to dismiss NOM's appeal as moot based on the entry of judgment and the fact that none of the parties to the litigation intend to appeal the district court's opinion and judgment. On May 22, 2014, NOM filed a "protective notice of appeal" from the judgment. (Dist. Ct. Dkt. No. 121). NOM now responds that its appeal from the denial of the motion to intervene is not moot because of that protective notice of appeal from the judgment.[1] NOM's Opp'n to Mot. to Dismiss at 3-9.

There is little disagreement about the legal issues at this point. NOM effectively concedes that its appeal from the denial of its motion to intervene would be moot but for its claim that the protective notice of appeal provides a basis for this court's review. *See* NOM's Opp'n at 7-8. And NOM appears to recognize that its protective notice of appeal of the underlying judgment does not provide any basis for this court's review of the denial of NOM's motion to intervene unless NOM has standing to appeal from the underlying judgment. *See* NOM's Opp'n at 3-5. Thus, the critical question for this court in addressing the motion to dismiss is whether NOM would have standing to

[1] NOM takes the state defendants to task for ignoring the case law regarding the effect of a protective notice of appeal on a claim that an appeal from a finalized judgment is moot. *See* NOM's Opp'n at 7. To be clear, NOM filed its protective notice of appeal after the state defendants filed the motion to dismiss NOM's appeal as moot. There was no reason for the state defendants to anticipate what NOM might do in the future and address something that had not occurred.

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appeal from the underlying judgment, should this court consider the merits of the current appeal and reverse the district court's denial of NOM's motion to intervene. NOM lacks the necessary standing to appeal the judgment and therefore this court should dismiss NOM's appeal on the intervention motion as moot.[2]

NOM's motion to intervene rested on the interests of certain unidentified members, each of whom is alleged to have a religious or other personal objection to same-sex marriage: a county clerk, one or more wedding services providers, and someone who voted in favor of Oregon's ban on same-sex marriage in 2004. None of those members meets the requirements for Article III standing to appeal the judgment in this case.

Article III standing requires "the litigant to prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). NOM claims in a footnote that "there is no dispute" that its members' alleged injuries meet the

[2] The state defendants intend to file a Motion to Dismiss the protective notice of appeal from the underlying judgment based on NOM's lack of standing to appeal.

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"fairly traceable" and "redressability" requirements. *See* NOM Opp'n at 11, n. 5. To the contrary, each of NOM's purported members faces the same hurdle to establishing standing to appeal the judgment because their objections are not traceable to the actual litigation between plaintiffs and the defendants in this case. And, whatever their purported injuries, they would not be redressed by a favorable judicial decision in the underlying litigation.

The litigation in which NOM seeks to intervene concerns the rights of plaintiffs under the federal constitution. The resolution of plaintiffs' specific legal claims is unconnected to the moral and religious objections of the members of NOM. The district court found in favor of plaintiffs—but there was no remedy for their injury that could be ordered against NOM or any of its members or carried out by NOM or its members. NOM's interests and those of its members were never at issue in the litigation. The remedy instead was addressed, appropriately, to the government defendants who were enforcing the same-sex marriage ban. A closer examination of the claims NOM asserts for each member demonstrates the lack of standing in this litigation and why the protective notice of appeal does not prevent this intervention appeal from being moot.

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A. A county clerk appearing in a personal capacity has no Article III standing to appeal the judgment in this case.

NOM's arguments on behalf of the county clerk member rest entirely on the professional duties of county clerks. *See* NOM Opp'n at 11-14. Whatever potential standing a county clerk acting in an official capacity might have in this litigation is beside the point. The district court found that the "clerk is not appearing in an official capacity as a representative of any particular county or local government." (Dist. Ct. Dkt. No. 115 p. 50). That finding is supported by the record, in that the clerk remains anonymous, his or her county a mystery, and the circumstances of the clerk's position unknown. As the district court also found, the clerk presented only "a generalized hypothetical grievance" that he or she "might have a moral or religious objection to" performing his or her duties. *Id*. The district court was correct to conclude that a clerk appearing in a purely personal capacity lacked a significant legal interest or standing to appeal the judgment because the clerk's personal concerns are not traceable to the issues addressed in the litigation.

The injury the clerk claims is that he or she might have to personally issue a marriage license to a same-sex couple and that doing so would be contrary to the clerk's personal views about same-sex marriage. The injury is purely hypothetical and not fairly traceable to the challenged conduct or likely

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to be redressed by a favorable judicial decision. To the extent the clerk has a personal objection to issuing a marriage license to a same-sex couple, the clerk might seek to have the county accommodate that objection by having a deputy clerk or some other county official issue the license that is now required by the district court's order in this case. If the county agrees, there is no injury to the clerk who is not required to perform any action in connection with a same-sex marriage. If the county disagrees, any injury the clerk suffers is not traceable to the same-sex couple seeking a license, but to the county's refusal to accommodate the clerk's personal objections to issuing that license. Thus, any purely personal discomfort the clerk would experience in carrying out his or her duties is unconnected to the right of plaintiffs and other same-sex couples to marry. The county clerk who happens to have a personal objection to same-sex marriage lacks Article III standing to appeal the underlying judgment in this case.

B. NOM's members who provide wedding services have no Article III standing to appeal the judgment in this case.

Similarly, a wedding planner who has religious or personal objections to providing services to a same-sex couple cannot establish a particularized injury that is fairly traceable to this litigation and is likely to be redressed by a favorable judicial decision. As the district court found, a wedding planner in

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Oregon might be asked to assist with an event to celebrate the marriage of a same-sex couple, with or without this litigation. The court concluded that the wedding planner's "general moral or religious objection to same-sex marriage" would not be affected by the issues in the litigation because any ruling the court would make would not alter the possibility that same-sex couples who could marry in other jurisdictions would seek to celebrate their marriages in Oregon and potentially seek out the services of a member of NOM. (Dist. Ct. Dkt. No. 115 pp. 50-51). A judicial decision that might be viewed as favorable to the wedding planner, *i.e.* one that upholds Oregon's ban on same-sex marriage, might minimize the number of potential same-sex clients who would seek the services of the wedding planner to plan a celebration of a same-sex marriage, but would not alter the possibility that the planner might be asked to provide those services.

If the wedding planner suffers any injury from a same-sex couple seeking to employ the planner to assist in planning a celebration of marriage, the injury is not fairly traceable to this litigation. Instead, any injury is entirely a function of Oregon's law prohibiting discrimination on the basis of sexual orientation in offering this type of service. *See* Or. Rev. Stat. § 659A.403 ("all persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation,

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without any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is 18 years of age or older"). This state statute requires the wedding planner to offer his or her services without regard to the sexual orientation of those seeking to obtain the services.

Thus, to the extent a wedding planner suffers any injury from being asked to provide wedding services to a same-sex couple, the injury does not spring from the ability of the couple to marry in Oregon. Instead, any injury comes from the state statute that prohibits discrimination in the provision of public accommodations. If a wedding planner believes the anti-discrimination law causes an injury, the planner could assert those rights in separate litigation challenging whether the state statute interferes with the planner's religious beliefs. *See Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014) (wedding photographer unsuccessfully challenged New Mexico's similar anti-discrimination provision based on the photographer's desire to refuse services to same-sex couples).

Nor is any injury to the wedding planner "concrete and particularized." To read the standing requirements as broadly as NOM would ask this court to construe them would open the floodgates to intervention and appeals by individuals or groups with only an indirect interest in the actual litigation. If a

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wedding planner is permitted to appeal from a judgment in this case on the off-chance that a same-sex couple who is now entitled to marry will seek out services from the wedding planner, it is easy to imagine a host of potential litigants who would similarly be entitled to appeal because they might be asked to play a minor role in a same-sex marriage celebration. The Supreme Court has made it clear that "Article III standing 'is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Hollingsworth*, 133 S. Ct. 2652, 2668 (2013) (quoting *Diamond*, 476 U.S. at 62).

C. NOM's members who voted in favor of Oregon's ban on same-sex marriage have no Article III standing to appeal the judgment in this case.

NOM argues that its member(s) who voted in favor of Oregon's ban on same-sex marriage have standing to appeal the judgment because the judgment negates their votes, along with the votes of the 1,028,545 others who voted in favor of the ban. NOM Opp'n at 15-16. The Supreme Court recently addressed a similar claim by the proponents of the California initiative that placed that state's marriage ban on the ballot and rejected their standing to appeal. *Hollingsworth*, 133 S. Ct. at 2668 ("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."). If

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the proponents of an initiative lack standing to appeal, it should be even more apparent that those who merely voted in favor of the initiative would also lack standing to appeal. As with the wedding planner argument, to accept NOM's arguments on behalf of the voter would broadly expand the standing doctrine so that anyone who voted in favor of an initiative could force litigants into prolonged litigation even when the state's chief legal officer determines that the litigation is not in the state's interest.

NOM asserts that the decision of the state defendants to carefully analyze the issues in this case and present that analysis to the district court somehow negates the votes of those who voted in favor of the state ban. NOM Opp'n at 16. In particular, NOM criticizes the decision of the state's Attorney General to present her careful analysis to the district court and to determine that an appeal would not be in the state's interest. *Id.* But the Attorney General is carrying out her duties as the state's chief legal officer to analyze plaintiffs' claims under the federal constitution and in light of other provisions of Oregon law that make it implausible that a justification could be offered in defense of the ban on same-sex marriage. Doing so does not dilute the vote of any Oregonian who voted in favor of the ban. Those votes were counted in 2004 and the initiative was declared passed and enacted into law. That it has now been challenged as violating the federal constitutional rights of same-sex couples does not alter the

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fact that the votes were properly counted at the time of the election. *See Hollingsworth*, 133 S. Ct. at 2663 (once a law is properly enacted, even the proponents of the law have "no 'personal stake' in defending its enforcement that is distinguishable from the general interest of every citizen of [the state].").

The case on which NOM relies, *League of United Latin American Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993)[3], is not on point for this litigation. *Clements* involved an election-law challenge in which voters—specifically, two judges attempting to protect their seats in an election—challenged the Texas system of electing state judges. The court was careful to distinguish the standing of voters to present a challenge in a voting rights case from the standing of voters to insert themselves into other types of litigation. *Id.* at 845 ("We agree that the standing of voters in a voting rights case cannot be gainsaid.").

NOM's arguments reflect NOM's true interest in this litigation. If an unconstitutional law is enacted, no one who voted in favor of it is injured when it is declared unconstitutional. NOM's argument throughout this proceeding—in the district court, this court, and the Supreme Court—has been directed at the Attorney General's analysis of plaintiffs' claims. NOM simply disagrees with

[3] NOM cites to an earlier challenge in the litigation in 1991 but the correct citation for the quote NOM includes in its brief is from the 1993 appeal.

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that analysis and wants to supplant the Attorney General in the litigation in order to present arguments the Attorney General has determined lack merit. Such a disagreement with the state's legal position should not permit a non-party to intervene and force an appeal in this or any other case where there is no direct injury to the intervening party. The Supreme Court has rejected the suggestion that an outsider should be permitted to intervene and appeal just because the actual litigants in the case have decided the case should not be appealed. *Clapper v. Amnesty Int'l, USA*, 133 S. Ct. 1138, 1154 (2013) ("The assumption that if [an organization has] no standing to sue, no one would have standing, is not a reason to find standing.") (citations omitted).

NOM's intervention is founded on a theory that when the Attorney General decides that a case should not be appealed, the door is kicked wide open to anyone with a peripheral interest in the litigation. That theory runs counter to the notion that standing is a meaningful bar to the insertion of those with nothing more than a strongly felt interest in the issues being litigated. In *Hollingsworth*, the Supreme Court rejected the notion that strongly held beliefs are sufficient to establish standing when the proper government defendants determine that a state law is unsupportable. The Court noted that standing "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Hollingsworth*, 133 S. Ct. at 2661 (quoting *Clapper*,

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133 S Ct. at 1146). The Court also made clear that simply disagreeing with the position taken by a party is not enough to satisfy the requirements of Article III. *Hollingsworth*, 133 S. Ct. at 2661 ("The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements." (quoting *Diamond v Charles*, 476 U.S. 54, 62 (1986)). NOM and its members offer nothing more than a disagreement with the position taken by the proper defendants in this litigation. That is insufficient to establish standing under Article III.

D. Conclusion

This court should grant the defendants' motion to dismiss the appeal as moot. NOM's desire to intervene in the litigation would have no impact even if NOM were to prevail on its appeal from the district court's denial of its motion

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to intervene because the litigation has reached its conclusion. NOM's protective notice of appeal from the judgment entered in this case does not change the analysis because NOM lacks standing to appeal the judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2014, I directed the Reply to Response to 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.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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