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Of Attorneys for Defendant Randy Waldruff

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

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

MOTION TO DISMISS

Continued...

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.

The National Organization for Marriage (NOM) attempted 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. 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, finding in favor of plaintiffs and enjoining 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). NOM then filed a notice of appeal. (Dist. Ct. Dkt. No. 117). 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). Defendants now move to dismiss that protective notice of appeal because NOM and its members lack the requisite Article III standing to appeal a judgment on the merits of this case.

To be clear at the outset, NOM seeks to appeal two different rulings: the order denying its late attempt to intervene in the underlying case, and the judgment on the merits in the underlying case. Defendants do not dispute that NOM has standing to bring its first appeal; rather, as explained in its motion to dismiss, that appeal is simply moot. Although NOM has standing to bring an appeal from the order denying its belated attempts to intervene, it does not similarly have standing to appeal from the judgment adjudicating the merits of the underlying litigation. NOM’s motion to intervene in the underlying case 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)). The litigation in which NOM sought to intervene concerns the rights of the individual 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, concomitantly, why its protective notice of appeal should be dismissed.

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. (Dist. Ct. Dkt. No. 115, p. 12).

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. 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 cannot establish a particularized injury that is fairly traceable to this litigation and is likely to be redressed by a favorable judicial decision.

Therefore, the anonymous clerk 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 any of the three requirements for Article III standing to appeal the underlying judgment. As the district court found, a wedding planner in 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, 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"). That 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 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 argued 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 others who voted in favor of the ban. (Dist. Ct. Dkt. No. 115, p. 37). 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 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.

D. NOM's disagreement with the Attorney General's position in the litigation does not provide it with Article III standing.

Finally, NOM has argued that it should be able to appear in this litigation to present arguments in support of the ban on same-sex marriage that the Attorney General has determined lack merit. (Dist. Ct. Dkt. No. 115, pp. 9, 25-26). Such a disagreement with the state's legal position does 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). 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 to bring an

appeal from the district court's judgment striking down Oregon's same-sex marriage ban.

E. Conclusion

This court should grant the defendants' motion to dismiss the appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 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.

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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