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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALMA MARIE TRICHE-WINSTON;
CHAREL WINSTON,

Plaintiffs - Appellants,

v.

CALIFORNIA DEPARTMENT OF
PUBLIC HEALTH; et al.,

Defendants - Appellees.

No. 07-15713

D.C. No. CV-06-00109-MCE

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Morrison C. England, Jr., District Judge, Presiding

Submitted August 26, 2008**

Before: SCHROEDER, KLEINFELD, and IKUTA, Circuit Judges.

Alma Marie Triche-Winston and Charel Winston appeal pro se from the

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

district court's judgment dismissing their action alleging violations of their constitutional rights and of Title II of the Americans with Disabilities Act ("ADA") in connection with the voiding of their same-sex marriage under *Lockyer v. City and County of San Francisco*, 95 P.3d 459 (Cal. 2004). We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal for failure to state a claim, *Lockhart v. United States*, 376 F.3d 1027, 1028 (9th Cir. 2004), and we consider sua sponte whether a claim is moot, *Bernhardt v. County of L.A.*, 279 F.3d 862, 871 (9th Cir. 2002). We affirm in part and dismiss in part.

The district court properly dismissed appellants' due process claim because *Lockyer* did not grant them a right to a hearing regarding their disabilities. *See Cassidy v. Hawaii*, 915 F.2d 528, 530 (9th Cir. 1990) (concluding that the plaintiff did not have a property interest under state regulations and thus failed to prove a due process violation).

The district court properly dismissed appellants' ADA claim because they did not show that they were denied the right to marry on the basis of their disabilities. 42 U.S.C. § 12132; *Weinreich v. L.A. County Metro. Transp. Auth.*, 114 F.3d 976, 978-79 (9th Cir. 1997) (concluding that the plaintiff failed to show that he was excluded from the public program on the basis of his disability).

Appellants' equal protection challenge fails because they did not allege facts

to support their assertion that defendants treated them differently than similarly situated non-disabled persons. *See Lee v. City of L.A.*, 250 F.3d 668, 686-87 (9th Cir. 2001) (setting forth requirements for an equal protection claim based on disability).

In light of the California Supreme Court's ruling in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), we dismiss as moot the appeal from the denial of injunctive and declaratory relief. *See Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 901 (9th Cir 2007) (holding that claims for declaratory and injunctive relief were mooted by repeal of the challenged ordinance).

AFFIRMED in part and DISMISSED in part.