UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES OBERGEFELL;
JOHN ARTHUR;
DAVID BRIAN MICHENER; and
ROBERT GRUNN;

Plaintiffs – Appellees,

v.

LANCE D. HIMES, in his official capacity as the Interim Director of the Ohio Department of Health;

Defendant – Appellant,

and

CAMILLE JONES;

Defendant.

No. 14-3057

REPLY BRIEF IN FURTHER SUPPORT OF MOTION TO INTERVENE AND PARTICIPATE IN ORAL ARGUMENT

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Preliminary Statement

The Proposed Intervenors are far more representative of the wide range of real-life, practical interests and circumstances likely to be impacted by a decision in this case than Plaintiffs-Appellees who seek recognition of their out-of-state marriages for purposes of a death certificate. After all, Equality Ohio was founded in 2005 in direct response to the Ohio constitutional amendment passed in 2004 that is at issue in this litigation, and remains a key voice in advancing the rights of all gay Ohioans, whether married or not. Indeed, no one has disputed nor could dispute that the four unmarried gay couples seeking to intervene in this litigation—not to mention the thousands of LGBT individuals who are members of Equality Ohio—are fully representative of the life experiences of gay couples living in Ohio today. The Proposed Intervenors include couples who seek pension and health benefits, couples who want to have children, and couples who would like to file joint state tax returns. The Proposed Intervenors deserve to have their voices heard when this Court considers issues that no one disputes will dramatically impact their lives in the years ahead.

The opposition briefs filed by the parties in this case are actually far more significant for what they do not say, rather than what they do. More specifically, neither party in this case can deny the compelling interest of the

Proposed Intervenors in the outcome of this litigation, and neither can identify with any degree of specificity any prejudice that could possibly result from allowing intervention here. At best, Plaintiffs-Appellees and Defendant-Appellant offer the kind of vague, unspecified assertions of potential prejudice and delay that have properly been rejected by courts in other cases. *See, e.g., Bd. of Trs. of the Cleveland Asbestos Workers Pension Fund* v. *Berry Pipe & Equip. Insulation Co.*, No. 1:08-CV-01082, 2008 WL 4619748, at *3 (N.D. Ohio Oct. 16, 2008). But there will be no delay since the Proposed Intervenors have already complied with the schedule set by the Court, and no one has suggested that they will not continue to do so. And, as discussed below, the motion to intervene was timely since it was based on Plaintiffs-Appellees' own actions. Significantly, neither party even articulates the likely true motivation behind their opposition since it is the only practical difference between *amicus curiae* status and intervention—the parties' presumed preference not to have the Proposed Intervenors participate in oral argument. But given the obvious significance of this case for many thousands of gay Ohioans, that would not be a valid reason for denying intervention either.

I. The Motion to Intervene is Timely

Although both Plaintiffs-Appellees and Defendant-Appellant argue

that the motion to intervene is untimely (Appellees Opp. at 3; Appellant Opp. at 4), the timeliness of a motion to intervene "should be evaluated in the context of all relevant circumstances." *United States* v. *Tennessee*, 260 F.3d 587, 592 (6th Cir. 2001). One of the key factors that the Sixth Circuit considers in determining whether a request to intervene is timely is "the length of time preceding the application during which *the proposed intervenor knew or reasonably should have known* of his interest in the case." *Id.* (emphasis added).

Here, the Proposed Intervenors filed their notice of intent to intervene on April 17, 2014, only two days after Plaintiffs-Appellees in this case sought to prevent initial *en banc* review by the Sixth Circuit in *Deboer* v. *Snyder*. Brief for Obergefell et al. as Amici Curiae Supporting Plaintiff-Appellees, *DeBoer* v. *Snyder*, No. 14-1341 (6th Cir. April 15, 2014), ECF No. 34 ("Obergefell Amicus"). Until that time, it was not clear that the instant case, which was ostensibly limited in scope to the recognition of out-of-state-marriages on death certificates, would reach the broader constitutional issues that are so important to the Proposed Intervenors. But in that filing, Plaintiffs-Appellees made it manifestly clear that they believed that "[w]hile *Obergefell* is a recognition case and *DeBoer* involves the right to marry, the legal principles overlap." (Obergefell Amicus at 2.)

According to Plaintiffs-Appellees, both the *DeBoer* and *Obergefell* cases "flow from the same bedrock principles including a fundamental right to marry and a right to equal protection under the law." (Obergefell Amicus at 8–9.)

Given these explicit statements, it immediately became clear to the Proposed Intervenors that the interests of Equality Ohio and the four living gay Ohio couples who seek to intervene "overlap" as well. In fact, as soon as it became apparent Plaintiffs-Appellees were asserting that these broader legal issues would be before this Court, the Proposed Intervenors moved expeditiously to vindicate their rights by seeking to intervene only two days later. That is all that the law requires. *See Jansen* v. *City of Cincinnati*, 904 F.2d 336, 341 (6th Cir. 1990) (approving intervention when "two weeks elapsed between the time in which the proposed intervenors learned of their need to intervene and when they filed their motion to intervene").

II. The Proposed Intervenors Have Substantial Interests Justifying Intervention

The Proposed Intervenors also have a substantial legal interest in this appeal, stemming from the wide range of harms and indignities being inflicted every day on gay people throughout Ohio. While both parties now assert that this "broader array of harms" is not at issue in this case, that is belied by the explicit language of their briefs, as discussed above.

Moreover, a decision by the Sixth Circuit on the equal protection claims raised—even on the "narrow" issue of the recognition of an out-of-state gay marriage on an Ohio death certificate—will likely implicate the extension of all of the other state-conferred rights and responsibilities of marriage to committed gay couples in Ohio.[1] In fact, participation in this case by the Proposed Intervenors is the only way for this Court to hear and consider the myriad Ohio statutory provisions that are implicated by the Ohio constitutional amendment at issue in violation of the United States Constitution's guarantee of equal protection.

Contrary to Plaintiffs-Appellees' assertion, (Appellees Opp. at 9), there is no "broader" Sixth Circuit case that will necessarily address the Proposed Intervenors' equal protection arguments since no other case currently pending before the Sixth Circuit addresses Ohio law. The pending appeals from Kentucky and Tennessee, like the instant appeal, merely address the recognition of out-of-state gay marriages in those states. *See* *Bourke* v. *Beshear*, No. 3:13-CV-750, 2014 WL 556729 (W.D. Ky. Feb. 12,

[1] Although both Plaintiffs-Appellees and Defendant-Appellant argue that intervention should be denied because this Court has already denied *en banc* review (Appellees Opp. at 6; Appellant Opp. at 2), this Court need not sit *en banc* to find that heightened scrutiny analysis applies to laws like those at issue here which discriminate against gay people. Moreover, as discussed in the Proposed Intervenors' moving papers and above, that was not the only ground articulated by the Proposed Intervenors for intervention here.

2014), No. 14-5291 (6th Cir.); *Tanco* v. *Haslam*, No. 3:13-CV-1159, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014), No. 14-5297 (6th Cir.). While it is true that *DeBoer* concerns the right of gay couples to marry in Michigan, rather than solely the recognition of out-of-state marriages, the language and implications of the Michigan constitutional amendment differ significantly from the Ohio amendment at issue here.[2]

III. The Parties Fail to Articulate Any Prejudice

Despite the assertion in vague terms that granting intervention would "prejudice adjudication of [their] rights," (Appellees Opp. at 11), Plaintiffs-Appellees nowhere identify with any precision what particular interest would be prejudiced by the Proposed Intervenors' intervention, as is required by the case law. In other words, their brief "does not sufficiently explain . . . *which rights in particular* it would prejudice." *Liberte Capital Grp., LLC* v. *Capwill*, 126 F. App'x 214, 221 (6th Cir. 2005) (emphasis added).

While Defendant-Appellant does argue that "expand[ing] the scope of

[2] Specifically, the Michigan amendment does not contain language analogous to Ohio's explicit withdrawal of benefits from gay couples. *Compare* Mich. Const. art. I, § 25 ("[T]he union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose."), *with* Ohio Const. art. V, § 11 ("This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals *that intends to approximate the design, qualities, significance or effect of marriage*." (emphasis added)).

this case so broadly" (Appellant Opp. at 6) would cause it to be prejudiced, as explained above, it is not the Proposed Intervenors who expanded the scope of this case. Any such expansion occurred *either* at the explicit behest of Plaintiffs-Appellees themselves (Obergefell Amicus at 2, 8–9), *or* as a matter of logic simply by virtue of the broad constitutional equal protection and due process principles that have been raised for this Court to determine. Moreover, emphasizing the wider range of rights and responsibilities withheld from gay couples in Ohio as a result of the challenged laws does not expand this case; it instead properly explains more fully both the text and implications of the Ohio statutes and constitutional amendment at issue.

The only conceivable prejudice to the parties is one that is not actually articulated anywhere in the parties' opposition briefs—participation in oral argument by the Proposed Intervenors. But again, it is difficult (if not impossible) to contend that there will be prejudice to the parties from permitting the leading gay rights organization in Ohio to present its arguments to this Court with the counsel of its choice in such a significant case. After all, the Sixth Circuit is currently scheduled to hear argument in at least four separate cases from Ohio, Michigan, Tennessee, and Kentucky, all raising similar issues. It is hard to see how adding one more party could materially harm this Court's consideration of the issues. To the contrary,

participation by the Proposed Intervenors could only assist the Court in its consideration of these important issues. *See In re Pennie & Edmonds LLP*, 323 F.3d 86, 101 n.12 (2d Cir. 2003) ("Courts should exercise special caution when deciding important issues without the benefit of the full airing of the issues that results from the adversary process.").

IV. Intervention Will Not Cause Delay

Curiously, both Plaintiffs-Appellees and Defendant-Appellant contend that granting intervention would "unduly delay" the resolution of this case. (Appellees Opp. at 11; *see also* Appellant Opp. at 8.) There is no legitimate basis, however, for any such concern here.[3]

With respect to the briefing schedule (Dkt. No. 28), this Court has already *denied* Plaintiffs-Appellees' motion for an expedited briefing schedule (Dkt. No. 27), and the Proposed Intervenors have and will comply with any schedule to be determined by this Court. Indeed, although Plaintiffs-Appellees' principal brief was due—and was not expected to be submitted prior to—May 13, 2014, *see* Dkt. No. 28, the Proposed

[3] It is important to note that delay is not the *sine qua non* of whether intervention should be allowed in any event. Rather, courts must engage in a "balancing of undue delay, prejudice to the original parties, and any other relevant factors." *Mich. State AFL-CIO* v. *Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997). Under this permissive standard, courts may allow intervention even where—unlike here—there is a clear risk of some delay. *See, e.g.*, *Vassalle* v. *Midland Funding LLC*, 708 F.3d 747, 760 (6th Cir. 2013) (allowing intervention "a mere three weeks prior to the . . . hearing").

Intervenors nonetheless timely submitted their brief as *amici curiae* on May 1, 2014 when doing so was necessitated by Plaintiffs-Appellees' (somewhat unusual) decision to submit their merits brief several weeks early. In addition, both parties have already been apprised of the Proposed Intervenors' arguments through the filing of their brief *amici curiae*. Given this procedural history, the parties cannot credibly suggest that the Proposed Intervenors will do anything other than continue to comply with any and all applicable deadlines and not cause any delay whatsoever.

As for both parties' arguments about the "record" (Appellees Opp. at 13; Appellant Opp. at 4), the Proposed Intervenors fully agree that the record in this case is closed. Not only will the Proposed Intervenors not seek any additional discovery, but such discovery is entirely unnecessary in order for the Court to rule on the Proposed Intervenors' legal and factual arguments here. Thus, the fact that discovery is closed—as is true for all cases at the appellate stage—is of no moment here. *Compare Capwill*, 126 F. App'x at 221 (finding no undue delay or prejudice where, *inter alia*, proposed intervenors "assert[ed] that they [did] not intend to take discovery"); *with Johnson* v. *City of Memphis*, 73 F. App'x 123, 133 (6th Cir. 2003) (intervention would cause undue delay "insofar as the proposed intervenors will have to be given additional time to conduct discovery, file motions, and

review and respond to the original parties' prior pleadings.").

Finally, while Plaintiffs-Appellees suggest that the Proposed Intervenors should "file their own case" or instead wait for the case recently initiated by their counsel to proceed through the courts (Appellees Opp. at 9 (citing *Gibson* v. *Himes*, No. 14-347 (S.D. Ohio filed Apr. 30, 2014)), that of course would result in precisely the type of "piecemeal litigation" that this Court understandably discourages since it would be wasteful of both the litigants' and the judiciary's resources. *Jansen*, 904 F.2d at 341 ("[all] parties' interests are better served by having *all* relevant interests represented . . . because piecemeal litigation is likely to be avoided." (emphasis in original)). Moreover, as a practical matter, any such case would likely be stayed pending the resolution of the appeals currently before this Court and, as Plaintiffs-Appellees concede, its disposition would likely be governed by the currently pending appeals in any event. (Appellees Opp. at 9.)

Conclusion

For all of the reasons discussed above as well as those in our original moving brief, the Proposed Intervenors' motion to intervene and to participate in oral argument should be granted.

Dated: May 8, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th of May, 2014, a true, correct and complete copy of the foregoing was filed with the Court and served upon all counsel of record on the same day via the Court's ECF system:

/s/ Roberta A. Kaplan