No. 14-3057

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES OBERGEFELL, et al.,	:	On Appeal from the United States
	:	District Court for the Southern District
Plaintiffs-Appellees,	:	of Ohio, Western Division
	:	
v.	:	District Court Case No. 13-cv-0501
	:	
LANCE D. HIMES,	:	
	:	
Defendant-Appellant.	:	

RESPONSE OF APPELLANT LANCE D. HIMES,
INTERIM DIRECTOR OF THE OHIO DEPARTMENT OF HEALTH,
TO PROPOSED INTERVENORS' MOTION TO INTERVENE

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Proposed Intervenors—Equality Ohio, Equality Ohio Education Fund, and four same-sex couples—ask this Court to take the unusual step of letting them intervene in this litigation *after* it has reached a final judgment in the trial court, *after* one side has appealed, *after* a briefing schedule has been set, *after* briefing has begun, and (by the time of this response) *after* at least two-thirds of the briefing is complete (and perhaps all briefing by the time the Court rules on the motion). Other courts have rejected similarly belated attempts by similar proposed intervenors to join other existing cases as full parties. *See, e.g.*, *Kitchen v. Herbert*, No. 13-4178, Order Denying Intervention (10th Cir. Feb. 3, 2014). This Court should do the same. Appellant Lance D. Himes ("Ohio") respectfully requests that the Court deny intervention.[1]

Proposed Intervenors offer only one excuse for why they arrived so late: They claim that the specter of *initial* en banc review in this case, which no party here sought, arose recently when the Plaintiffs in this case responded in a separate

[1] Ohio acknowledges that its counsel initially *mis*communicated, by e-mail, with Proposed Intervenors on this score. *See* Doc.44, Mot. at Page ID #9. Proposed Intervenors emailed as such "requesting consent from the parties to participate in oral argument." Ohio's counsel mistakenly misread the request as referring to *amicus* participation, as one of other such requests in this case, and said it did not object. Realizing the confusion when Proposed Intervenors filed their motion, Ohio's counsel promptly clarified by email that it opposed intervention. Ohio apologizes for this mistake, which caused no prejudice where Plaintiffs had also opposed the intervention.

Michigan case about en banc review in that case. Doc.44, Mot. at Page ID #15-16. That possibility is now gone, as initial en banc review has been denied in the Michigan case. That fact alone is reason to deny intervention. Even if Proposed Intervenors could justify their delay in moving to intervene on grounds other than the initial en banc non-possibility, however, they cannot overcome the prejudice their intervention would cause the parties. Proposed Intervenors hope to expand the scope of this case because they "seek more than the recognition of out-of-state marriages for the limited purposes sought by plaintiffs." Doc.44, Mot. at Page ID #17. But the parties had no chance to litigate those broader issues below, or in their briefs to this Court, and it would be unfair to grant party status to latecomers who seek to make these new arguments now. The Court should deny intervention.

Proposed Intervenors' main argument is moot. Proposed Intervenors justify their attempt at late entry principally on the ground that "the issue of en banc review by the Sixth Circuit did not arise until April 15, 2014," at which point they moved to intervene "due to the issue of en banc review." Doc.44, Mot. at Page ID #15-16. They raise no other argument why they waited to express their interest until after a final judgment, after Ohio appealed, and after one-third (now two-thirds) of the appellate briefing was complete. They claim only that they "acted quickly and decisively to preserve their rights" once "the potential of en banc review" became "fully present." *Id*. at Page ID #16.

But that possibility of en banc review—which was always remote, at best, because no party moved for en banc review *in this case*—has now passed entirely. This Court denied the petition for initial en banc review in the *other case* that Proposed Intervenors claim prompted their "quick[ ] and decisive[ ]" response. *See DeBoer v. Snyder*, No. 14-1341, Order Denying Initial Hearing En Banc (6th Cir. April 28, 2014).

Moreover, that en banc denial not only undercuts Proposed Intervenors' purported excuse for delay, but also erases the centerpiece of their substantive claim for intervention. They claim that they should be a party so that they can raise a certain standard-of-review argument, which they say requires en banc review. Doc.44, Mot. at Page ID #11. With even the outside prospect of initial en banc review now extinguished, Proposed Intervenors cannot show why their motion to intervene is timely or otherwise justified, and that ends the matter.

To the extent Proposed Intervenors offer any other arguments to justify intervention, not tied to en banc review, they fail. This Court assesses motions to intervene under Federal Rule of Civil Procedure 24. *See Ne. Ohio Coal. for the Homeless v. Blackwell*, 467 F.3d 999, 1007 n.2 (6th Cir. 2006).

Intervention as of Right. Under Rule 24, a third party can intervene as of right by showing (1) that the party has filed a timely application, (2) that the party has a substantial legal interest in the case, (3) that the party would be impaired in

the absence of intervention, and (4) that the party's interest may be inadequately represented by the parties before the court. Fed. R. Civ. P. 24(a)(2); *see Ne. Ohio Coal.*, 467 F.3d at 1007. Proposed Intervenors have not satisfied these conditions.

First, their motion is untimely. Five factors inform the timeliness analysis, *Jordan v. Mich. Conf. of Teamsters Welfare Fund*, 207 F.3d 854, 862 (6th Cir. 2000), but Proposed Intervenors fail them all. (1) *The point to which the suit has progressed*. This case is past final judgment and well into appellate briefing, so the record is established and the scope of the legal issues settled. (2) *The purpose for which intervention is sought.* Proposed Intervenors seek to raise different constitutional arguments known to them from the start of the case at the district court. (3) *The length of time preceding the application during which intervening party knew or should have known of an interest*. Proposed Intervenors should have known of their interests since the outset of the case. After all, this case received wide press attention from day one, and Proposed Intervenors' counsel have been involved in other marriage-related cases around the country. (4) *The prejudice to the parties due to the proposed intervenor's failure to apply promptly for intervention*. The intervention would cause significant prejudice, as Proposed Intervenors seek to change the nature of this case by affirmatively arguing for a right to marry in Ohio, rather than the right to have out-of-state marriages recognized, which is the only constitutional issue the parties litigated below or in

their appellate briefing. (5) *The existence of unusual circumstances militating against or in favor of intervention*. None exists.

None of these factors warrants Proposed Intervenors' delay in expressing interest in this case. The constitutional question, including what level of scrutiny to apply, has been an issue from the outset of this litigation. Doc.3, Mot. for Temp. Restraining Order, at Page ID #24 n.2; Doc.11, Resp., at Page ID #79-80. Proposed Intervenors include two advocacy groups and four couples who have been in relationships since before this case began. The import of this litigation should have been apparent to Proposed Intervenors at the trial level, and if they wished to intervene, they could have attempted to do so in the district court. *See NAACP v. New York* , 413 U.S. 345, 367-68 (1973); *see also United States v. Tennessee*, 260 F.3d 587, 592 (6th Cir. 2001) (party must seek to intervene "as soon as it is reasonably apparent that it is entitled to intervene). Instead, they waited until the case had gone to judgment, been appealed, and appellate briefing begun. *Id*. ("If the litigation has 'made extensive progress in the district court before the appellants moved to intervene' then this factor weighs against intervention."). Their attempted entry now comes far too late.

Second, the only substantial interest Proposed Intervenors set forth is one that is beyond the scope of this litigation, and thus prejudicial to the parties at this late stage. This case has always been about recognizing out-of-state, same-sex

marriages for the limited purposes of death certificates. Compl., Doc.1, Page ID #1-2. Proposed Intervenors, however, point to "a greater array of interests" they allegedly plan to assert. Doc.44, Mot. at Page ID #17. They request the ability to marry in Ohio, rather than to have their out-of-state marriages recognized. *Id*. at Page ID #27, 34. They seek "the overturning of all Ohio laws that discriminate against gay people," *id*., allegedly including laws governing taxes, employee benefits, adoption, inheritance, and medical consent, *id*. at Page ID #18-19 & nn.1-5. Their theory of this case, then, is actually a theory of a *new* case not pleaded here—one that raises challenges broader than those that Plaintiffs have raised, broader than those both sides briefed below, broader than those that the parties litigated and that the district court decided, and broader than those that the parties have briefed here. Allowing these late applicants to expand the scope of this case so broadly would prejudice the parties, who have had no opportunity here to litigate the issues that Proposed Intervenors propose. *See Tennessee*, 260 F.3d at 594 (risk of prejudice to parties existed where proposed intervenors raised issues that "went beyond the scope of the suit's initial focus").

Third, Proposed Intervenors' interest in presenting their view of the case is fully satisfied by *amicus* participation, which Ohio does not oppose. *See Bradley v. Milliken*, 828 F.2d 1186, 1194 (6th Cir. 1987) (holding that the denial of intervention was not an abuse of discretion where district court took steps to

protect proposed intervenors' interests by inviting *amicus* briefing). Indeed, they have *already* filed an *amicus* brief in this case fully setting forth their views. Doc.74.

Fourth, Proposed Intervenors cannot show that their interests are inadequately represented because they cannot "overcome the presumption of adequate representation that arises when they share the same ultimate objective as a party to the suit." *United States v. Michigan*, 424 F.3d 438, 443-44 (6th Cir. 2005). As to the issues *actually* raised by this suit, Proposed Intervenors do not identify different interests than Plaintiffs, and, in their motion to intervene, they raise arguments similar to those Plaintiffs have raised. Doc.44, Mot. at Page ID #10-11, 17 (arguing that the standard of review should be strict scrutiny, but also arguing they can prevail under rational-basis review). Proposed Intervenors point to no evidence that Plaintiffs would inadequately defend those arguments here.

In response, Proposed Intervenors point to two possible inadequacies. For one thing, as noted, they plan to "represent a far broader array of interests than the current plaintiffs." Doc.44 Mot. at Page ID #20. But, as already explained, expanding the case to include different issues prejudices the parties, and that attempted expansion asks this Court to grant relief that exceeds the pleadings and the final judgment. For another, they point to the fact that Plaintiffs opposed initial

en banc review, and they advocate for it. But, as already explained, initial en banc review is now out of the question.

Permissive Intervention. The Court also should not grant Proposed Intervenors the permissive intervention they request. Before exercising the discretion to grant permissive intervention courts "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24 (b)(3). Here, as already explained, granting intervention would prejudice the original parties to this case. Proposed Intervenors plan to raise new claims that the parties had no opportunity to review in the lower court or even present in the briefing to this Court. They cannot go back and seek in effect to amend Plaintiffs' complaint and the nature of the proceedings below. And if they intervene, the schedule in this Court, which has already been set, might have to change—thereby delaying the Court's resolution of this case.

In sum, either view of this case leads to a denial of intervention. Viewed as a potential en banc case, the "need" for intervention is gone. Viewed as a regular case, Proposed Intervenors have no excuse for delay and no justification for trying to reshape this case into something entirely different.

CONCLUSION

The Court should deny the Proposed Intervenors' Motion to Intervene.

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CERTIFICATE OF SERVICE

I certify that a copy of this brief has been served through the court's electronic filing system on this 5th day of May, 2014. Electronic service was therefore made upon all counsel of record on the same day.

/s/ *Bridget E. Coontz*
BRIDGET E. COONTZ