Case No. 14-3057

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES OBERGEFELL *ET AL*.
Plaintiffs – Appellees

v.

LANCE D. HIMES, In his official capacity as the Interim Director of the Ohio Department of Health
Defendant – Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF OHIO (WESTERN DIVISION CINCINNATI)
CIVIL CASE NO. 1:13-CV-00501

PLAINTIFFS-APPELLEES' OPPOSITION TO MOTION TO INTERVENE AND PARTICIPATE IN ORAL ARGUMENT

(Counsel Listed on Next Page)

Alphonse A. Gerhardstein (0032053)
Trial Attorney for Plaintiffs-Appellees
Jennifer L. Branch (0038893)
Jacklyn Gonzales Martin (0090242)
GERHARDSTEIN & BRANCH CO. LPA
432 Walnut Street #400
Cincinnati, Ohio 45202
Phone: (513) 621-9100
Fax: (513) 345-5543
agerhardstein@gbfirm.com
jbranch@gbfirm.com
jgmartin@gbfirm.com
Attorneys for Plaintiffs-Appellees

Chase B. Strangio
James D. Esseks
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St.
New York, New York 10004
Phone: (212) 549-2500
Fax: (212) 549-2650
cstrangio@aclu.org
jesseks@aclu.org
Attorneys for Plaintiffs-Appellees

Lisa T. Meeks (0062074)
Newman & Meeks Co., LPA
215 E. Ninth Street, Suite 650
Cincinnati, OH 45202
Phone: 513-639-7000
Fax: 513-639-7011
lisameeks@newman-meeks.com
Attorneys for Plaintiffs-Appellees

Drew Dennis (0089752)
ACLU of Ohio, Inc.
4506 Chester Ave.
Cleveland, OH 44103
Phone: 212-472-2220
Fax: 216-472-2210
ddennis@acluohio.org
Attorney for Plaintiffs-Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

INTRODUCTION

Plaintiffs-Appellees oppose the motion to intervene filed by Equality Ohio, the Equality Ohio Education Fund, and four gay and lesbian couples who live in Ohio (the "Movants"). Motions to intervene filed for the first time on appeal are rarely granted. The motion is untimely because it was filed nine months after the case was filed in the District Court, three months after the notice of appeal was docketed and eight weeks after the appellate briefing schedule was issued.

Even if the motion were timely, Movants cannot meet the other requirements for either intervention as of right or permissive intervention. The Movants seek to intervene to argue that heightened equal protection scrutiny is warranted for sexual orientation classifications, which is an argument that the Plaintiffs-Appellees are already making, see Br. of Appellees 28-35, and which the Plaintiffs won in the District Court. Final Order, RE65, Page ID#1068-78. The Movants also seek to intervene to bring different claims than those brought by the Plaintiffs, which have not been addressed by the parties or decided by the District Court. Plaintiffs-Appellees have the utmost respect for Equality Ohio and the four unmarried couples and their counsel and the important interests they represent. However, Plaintiffs-Appellees should be entitled to continue to litigate the case that they initiated in July of last year without the disruption and prejudice that would flow from new claims and parties at this late stage.

BACKGROUND

Plaintiff Jim Obergefell and his now-deceased husband, John Arthur, filed this case on July 19, 2013, challenging Ohio's marriage recognition bans as applied to the non-recognition of out-of-state marriages on death certificates. Complaint, RE1, Page ID#1. At the time, John was in hospice and the couple wanted to ensure that John's death certificate would accurately reflect his marriage to Jim and list Jim as his surviving spouse. On July 22, 2013, the District Court entered a temporary restraining order enjoining the enforcement of the State's marriage recognition bans as applied to the eventual issuance of John's death certificate. Order, RE13, Page ID#105.

The Complaint was amended to add Plaintiff David Michener when his spouse, William Herbert Ives, died unexpectedly on August 27, 2013. Final Order, RE65, Page ID#1050. Like the other plaintiffs, David sought a death certificate for his spouse that accurately reflected their marriage and the District Court entered a temporary restraining order granting such relief on September 3, 2013. *Id*. On September 19, 2013, the Complaint was amended to add Plaintiff Robert Grunn, a licensed funeral director in the state of Ohio who wanted to be able to record on death certificates the marriages and surviving spouses of decedents who were married to a spouse of the same sex. Second Amended Compl., RE33, Page ID#215.

On December 23, 2013, the District Court permanently enjoined the enforcement of Ohio's marriage recognition bans in the context of the death certificates for Ohioans with lawful marriages to a spouse of the same sex, holding that the laws were unconstitutional as applied in such circumstances. Final Order, RE65, Page ID#1054. In its opinion, the District Court concluded that heightened equal protection scrutiny for sexual orientation classifications was warranted but held that the laws failed even rational-basis review under the Equal Protection Clause. *Id.* #1078-79.

On January 16, 2014, then Defendant Wymyslo filed a timely Notice of Appeal. This Court issued a briefing letter on February 26, 2014. This motion to intervene was filed eight weeks later on April 23, 2014.

ARGUMENT

I. THE MOTION TO INTERVENE IS NOT TIMELY.

Both motions to intervene as of right and motions for permissive intervention must be timely. Fed. R. Civ. P. 24; *NAACP v. New York*, 413 U.S. 345, 366-67 (1973). "An entity that is aware that its interests may be impaired by the outcome of the litigation is obligated to seek intervention as soon as it is reasonably apparent that it is entitled to intervene." *United States. v. Tennessee*, 260 F.3d 587, 594 (6th Cir. 2001); *see also Stotts v. Memphis Fire Dep't*, 679 F.2d 579, 584, 590 n.3 (6th Cir. 1982)(applicants "should have attempted to intervene

when they first became aware of the action, rather than adopting a 'wait-and-see' approach").

> The obvious reason for the rule against belated intervention is that it is unduly disruptive and places an unfair burden on the parties to the appeal. After a case has been fully litigated, the positions of all interested parties have been fixed . . . It would be entirely unfair, and an inexcusable waste of judicial resources, to allow a potential intervenor to lay in wait until after the parties and the trial and appellate courts have incurred the full burden of litigation before deciding whether to participate in the judicial proceedings.

Amalgamated Transit Union Int'l v. Donovan, 771 F.2d 1551, 1553 (D.C. Cir. 1985).

Here, Movants never sought to intervene at the District Court. They filed their motion to intervene on appeal on April 23, 2014 – over three months after the Notice of Appeal was filed on January 16, 2014; eight weeks after a briefing schedule was issued on February 26, 2014; and two weeks after the appellant's brief was filed. By contrast, in the one case cited by Movants allowing intervention on appeal, the motion to intervene was filed "within hours" of the Notice of Appeal. *See Ne. Ohio Coal. for Homeless & Serv. Employees Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1007 (6th Cir. 2006).[1]

[1] Additionally, in that case, the proposed intervenor had moved to intervene at the District Court and filed a subsequent motion to intervene on appeal after the first motion was denied. With the exception of *Northeast Ohio Coalition for Homeless*, all of the cases cited by Movants in support of intervention involve motions to intervene filed at the District Court. *See, e.g.*, *Hatton v. Cnty. Bd. of Educ. of Maury Cnty., Tenn.*, 422 F.2d 457, 461 (6th Cir. 1970) (motion to intervene denied in the district court and decision appealed); *Antilles Cement Corp.*

The Movants knew or reasonably should have known of their interest in this case long before April 23, 2014. *Jordan* v. *Mich. Conference of Teamsters Welfare Fund*, 207 F.3d 854, 862 (6th Cir. 2000) ("the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case" is relevant in determining timeliness). This case has garnered significant media attention since the District Court issued the first temporary restraining order in July of 2013. Movant Equality Ohio publicly discussed the case as early as July 24, 2013, when a spokesperson from the group was quoted in a news article discussing the importance of the case. *See* Chris Johnson, "Ohio Couple 'Blown Away' By Impact of Marriage Lawsuit, Washington Blade, July 24, 2013, http://www.washingtonblade.com/ 2013/07/24/ohio-couple-blown-away-by-impact-of-marriage-lawsuit/ ("Grant Stancliff, a spokesperson for Equality Ohio, said the legal recognition of [Jim and John's] marriage is 'huge' and 'brought Ohio couples who are legally married in other states a ray of hope.'"). See also Equality Ohio, Jim & John: Thanks (August 2, 2013), http://www.equalityohio.org/jim-a-john-thanks/ (thanking Jim and John for their courage in challenging the denial of marriage equality).

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v. Acevedo Vila, 408 F.3d 41, 45 (1st Cir. 2005) (motion to intervene granted by the district court for the purpose of prosecuting an appeal); *Associated Builders & Contractors, Saginaw Valley Area Chapter v. Perry*, 115 F.3d 386, 389 (6th Cir. 1997) (motion to intervene for the purpose of appeal denied in the district court and appealed).

The only explanation for the delay offered by the Movants is that the "issue of *en banc* review by the Sixth Circuit did not arise until April 15" when the *Obergefell* Plaintiffs filed an *amicus curiae* brief in opposition to the petition for initial hearing *en banc* filed by the State of Michigan on April 4, 2014, in *DeBoer v. Snyder*, No. 14-1341, a separate case pending before this Court. *Amici* Memorandum of Obergefell et al., *Deboer v. Snyder*, No. 14-1341 (April 14, 2014), Doc. No. 36. The *en banc* petition in *DeBoer* no longer provides an ostensible reason for untimely intervention in *Obergefell* since the petition was denied on April 28, 2014.

Even if the *en banc* petition had not been denied, briefing concerning initial *en banc* review in another case does not determine whether the Court will initially hear *this case en banc*. If Movants believe initial *en banc* review is necessary in this case, the possibility of such review did not "arise" on April 15. Under Federal Rule of Appellate Procedure 35(c) and Local Rule 35, Movants could have moved to intervene to petition for *en banc* review as soon as this case reached the Sixth Circuit on January 16, 2014.[2] Movants have cited no case suggesting that the

[2] Even if this Court were to accept Movants' argument that somehow the timeliness clock restarted on April 15th, the motion is still not timely. Whereas the State of Ohio filed its motion for intervention in *Northeast Ohio Coalition for the Homeless* within hours of the Notice of Appeal, here the proposed intervenors waited eight days after the *Obergefell* Plaintiffs filed an *amicus* brief in *DeBoer* and nineteen days after the State of Michigan petitioned for an initial hearing *en banc* to file their motion.

months of delay here should be overlooked.

As discussed fully below, *see* Point II.B., intervention at this late stage in the case would greatly prejudice the parties. The motion to intervene should be denied because it is not timely and there is no legitimate basis for the delayed filing. The Court should deny both parts of Movants' motion simply based on timeliness and need not address the remaining requirements. Fed. R. Civ. P. 24; *NAACP*, 413 U.S. at 366-67.

II. EVEN IF THE MOTION HAD BEEN TIMELY, MOVANTS DO NOT SATISFY THE OTHER REQUIREMENTS FOR INTERVENTION

A. Movants Do Not Satisfy the Standard for Intervention as of Right

This Court requires a proposed intervenor to establish: "(1) timeliness of the application to intervene, (2) the applicant's substantial legal interest in the case, (3) impairment of the applicant's ability to protect that interest in the absence of intervention, and (4) inadequate representation of that interest by parties already before the court." *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). In addition to this motion being untimely, Movants also cannot demonstrate that their interests would be impaired absent intervention or that their interests are not adequately represented before the Court.[3]

[3] Plaintiffs do not dispute that Movants, like all same-sex couples in Ohio, share an interest in having the Ohio marriage bans struck down. Whether that is sufficient to establish a "substantial legal interest" to intervene in a case need not be decided because a "failure to meet one of the [four factors] will require that the

i. Movants' interests will not be impaired in the absence of intervention.

The Movants' interest in this suit will not be impaired if they are denied intervention. The Movants argue that the following interests will be impaired if they are not permitted to intervene: 1) an interest in obtaining initial *en banc* review to address whether heightened constitutional scrutiny should be applied to sexual orientation classifications; and 2) an interest in adding a greater array of injuries that flow from Ohio's marriage bans than recognition of out-of-state marriages in the context of death certificates.

The first interest – that sexual orientation classifications warrant heightened scrutiny – is already being addressed by Plaintiffs-Appellees. Plaintiffs made this argument at the District Court, where it was accepted. Final Order, RE65, Page ID#1068-1078. And they have extensively briefed this issue before this Court. See Br. of Appellees, 28-35.[4] Moreover, contrary to Movant's assertions, initial *en banc* review is not necessary because the appropriate standard of scrutiny for sexual orientation classifications after *Windsor* has not yet been decided by this Court.

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motion to intervene be denied." *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir.1989).

[4] This alleged interest is also moot because Appellees have already filed their brief so any petition for initial hearing *en banc* would be untimely. Fed. R. App. P. 35(c).

As to Movants' interest in addressing a broader array of harms than the recognition of marriages on Ohio death certificates – and Plaintiffs-Appellees share Movants' belief that those broader harms constitute critically important problems – they are simply not the claims raised in this case, which from the beginning has focused on the specific issue of marriage recognition on death certificates. Denial of the intervention here will not impair Movant's interest in redressing those broader harms both because other pending cases already raise broader claims and because Movants could file their own case to address the claims that they see as central, but which have not been litigated in *Obergefell*. For instance, in *Henry v. Himes* the District Court issued a permanent injunction on April 14, 2014, holding the Ohio marriage recognition bans unconstitutional in all respects. *Henry v. Himes*, No. 14-129, 2014 WL 1418395 (S.D. Ohio, April 14, 2014). Moreover, counsel in this case just filed a case on April 30, 2014 raising the right to marry claims on behalf of unmarried couples in Ohio. *Gibson v. Himes*, No. 14-347 (S.D. Ohio April 30, 2014). And *DeBoer v. Snyder*, which is already pending in the Sixth Circuit, also addresses the broader right to marry claims that Movants seek to inject for the first time into this case. Movants should not be permitted to introduce the broader marriage issues into *Obergefell* when those issues have not been litigated here and are pending in other cases within the Circuit.

ii. Movants' interests are adequately represented by existing parties.

Movants have made no showing of inadequate representation by existing parties. This Court has held that there is a "presumption of adequate representation that arises when [proposed intervenors] share the same ultimate objective as a party to the suit." *United States v. Michigan*, 424 F.3d 438, 443-44 (6th Cir. 2005). An applicant for intervention fails to meet the burden of demonstrating inadequate representation "'when no collusion is shown between the representatives and an opposing party, when the representative does not have or represent an interest adverse to the proposed intervenor, and when the representative has not failed in its fulfillment of his duty.'" *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987)(*quoting Wade v. Goldschmidt*, 673 F.2d 182, 186n.7 (7th Cir. 1982)). The Movants have failed to meet their burden. There is no allegation of collusion in this case between Plaintiffs and Defendants, nor could there be. The Plaintiffs do not have an interest adverse to the proposed intervenors. In fact, the Plaintiffs-Appellees have advanced the legal arguments that Movants raise here. Finally, Plaintiffs' counsel has extensive experience litigating the precise questions presented here.

To the extent Movants argue that the current parties do not adequately represent their interests in litigating claims that were not raised in the District Court, that argument is unavailing. Decisions about which claims to include in

litigation are strategy questions about which adequate representatives can differ. But "[a] mere disagreement over litigation strategy … does not, in and of itself, establish inadequacy of representation." *Id.* at 1192.

B. Permissive Intervention is Not Proper in This Case

When deciding a motion for permissive intervention under Fed. R. Civ. P. 24(b), in addition to addressing timeliness, a court "consider[s] two factors: (1) whether the proposed intervenor 'has a claim or defense that shares with the main action a common question of law or fact'; and (2) 'whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.'" *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 760 (6th Cir. 2013) (quoting Fed. R. Civ. P. 24(b)). As discussed above, this motion was not timely. Additionally, if the motion to intervene is granted, it will unduly delay and prejudice the original parties.

Granting intervention to Movants at this stage of the proceedings would unduly delay and prejudice adjudication of the rights of Plaintiffs-Appellees. Appellants' opening brief and Appellees' brief have already been filed and intervention would disrupt and delay the existing briefing schedule.

Further, Plaintiffs-Appellees made the litigation decision to bring a narrow case challenging only one application of the marriage recognition bans as that was

the immediate problem facing these plaintiffs that needed a prompt resolution. [5] Movants intend to greatly expand the case to seek "relief from a wide range of harms resulting from the discriminatory Ohio laws." Mot. to Intervene 12. In *Coal. to Defend Affirmative Action v. Granholm*, this Court affirmed the denial of intervention by the District Court where "the proposed intervenors w[ere] 'seek[ing] to file more claims, amend pleadings even further, and inject issues that may not lead directly to a resolution of the issues circumscribed by the present pleadings.'" 501 F.3d 775, 784 (6th Cir. 2007), *cert. denied sub nom Michigan Civil Rights Initiative Comm. v. Coal. to Defend Affirmative Action,* 555 U.S. 937 (2008); *see also* Order, *Kitchen v. Herbert*, No.13-4178 (10th Cir. Feb. 3, 2014), Doc. No. 01019196253 (denying motion to intervene in challenge to Utah's marriage bans that was filed for the first time on appeal by same-sex couples seeking to raise arguments that the existing plaintiffs had not raised below); *cf. Chandler & Price Co. v. Brandtjen & Kluge, Inc.*, 296 U.S. 53, 58 (1935) ("Issues tendered by or arising out of plaintiff's [complaint] may not by the intervener be so enlarged. It is limited to the field of litigation open to the original parties."). Similarly here, Movants are seeking to litigate a different case than the one brought

[5] In contrast, none of the proposed intervenor couples are married, which means that they could not bring the sole claim raised by the *Obergefell* plaintiffs: recognition of their out-of-state marriages in the death certificate context. Equality Ohio has offered no declaration about any members with an interest in having their marriage recognized on the death certificate of a spouse.

by the Plaintiffs. With the case now on appeal, the benefit of factual development passed, and briefing nearly complete before this Court, it would be an unparalleled burden on the parties to permit the Movants to change the scope of the case now.

The only case cited by Movants in support of permissive intervention is an unreported District of Maine case in which the Court noted that intervention at the District Court is favored where "likely to make a significant and useful contribution to the development of the underlying factual and legal issues." *Penobscot Nation v. Mills*, 12-cv-254, 2013 WL 3098042, at *5 (D. Me. June 18, 2013). This case is already on appeal, so there is no opportunity to develop the factual record and as discussed above, the Plaintiffs-Appellees have addressed the legal arguments raised by Movants.

The Movants can adequately address their interests as *amici curiae* without causing delay and prejudice to the parties. *See, e.g.*, *Stupak-Thrall v. Glickman*, 226 F.3d 467, 475-76 (6th Cir. 2000) (finding that the party seeking intervention could have adequate opportunity to ensure its arguments would be before the court by filing an *amicus* brief); *Brewer v. Republic Steel Corp.*, 513 F.2d 1222, 1225 (6th Cir.1975) (affirming the district court's denial of motion for permissive intervention, reasoning that if "the [movant] accepts the District Court's invitation to participate in the litigation as an amicus curiae," it will afford movant "ample opportunity to give the court the benefit of its expertise"); *Thornton v. E. Tex.*

Motor Freight, Inc., 454 F.2d 197, 198 (6th Cir.1972) (affirming the denial motion to intervene but allowing participation as *amicus curiae*); *Bradley v. Milliken*, 828 F.2d 1186, 1194 (6th Cir. 1987) (can protect interests as *amicus curiae*). The Movants have filed a brief as *amici curiae* and Plaintiffs-Appellees welcome their support. Motion to Intervene and Participate in Oral Argument (April 23, 2014), Doc. No. 44.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellees urge the Court to deny the Movants' request for intervention.

/s/ Alphonse A. Gerhardstein
ALPHONSE A. GERHARDSTEIN
Trial Attorney for Plaintiffs-Appellees
Jennifer L. Branch (0038893)
Jacklyn Gonzales Martin (0090242)
GERHARDSTEIN & BRANCH CO. LPA
432 Walnut Street #400
Cincinnati, Ohio 45202
(513) 621-9100
(513) 345-5543 fax
agerhardstein@gbfirm.com
jbranch@gbfirm.com
jgmartin@gbfirm.com
Attorneys for Plaintiffs-Appellees

Lisa T. Meeks (0062074)
Newman & Meeks Co., LPA
215 E. Ninth Street, Suite 650
Cincinnati, OH 45202
phone: 513-639-7000
fax: 513-639-7011

lisameeks@newman-meeks.com
Attorneys for Plaintiffs-Appellees

Chase B. Strangio
James D. Esseks
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St.
New York, New York 10004
Phone: (212) 549-2500
Fax: (212) 549-2650
cstrangio@aclu.org
jesseks@aclu.org
Attorneys for Plaintiffs-Appellees

Drew Dennis (0089752)
ACLU of Ohio, Inc.
4506 Chester Ave.
Cleveland, OH 44103
Phone: 212-472-2220
Fax: 216-472-2210
ddennis@acluohio.org
Attorney for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I certify that a copy of this brief has been served through the Court's electronic filing system on this 2nd day of May, 2014. Electronic service was therefore made upon all counsel of record on the same day.

/s/ Alphonse A. Gerhardstein
Attorney for Plaintiffs-Appellees
Date: May 2, 2014