Nos. 14-1167, 14-1169, 14-1173

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TIMOTHY BOSTIC, *et al.,*

Plaintiffs-Appellees,

v.

GEORGE E. SCHAEFER, III*, et al.,*

Defendants-Appellants.

HARRIS CLASS'S MOTION TO INTERVENE ON APPEAL ON THE SIDE OF PLAINTIFFS-APPELLEES AND FOR LEAVE TO FILE SEPARATE BRIEFS

On Appeal From the United States District Court
For The Eastern District of Virginia
Civ. No. 2:13-cv-00395

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MOTION TO INTERVENE ON APPEAL ON THE SIDE OF PLAINTIFFS-APPELLEES AND FOR LEAVE TO FILE SEPARATE BRIEFS

Pursuant to Local Rule 12(e), Joanne Harris, Jessica Duff, Christy Berghoff, and Victoria Kidd, on behalf of themselves and as class representatives in the pending litigation in *Harris v. Rainey*, No. 5:13cv00077 (W.D. Va.) for (1) all same-sex couples in Virginia who have not married in another jurisdiction and (2) all same-sex couples in Virginia who have married in another jurisdiction, (except for the same-sex couples who are plaintiffs in *Bostic v. Rainey* , 2:13cv00395 (E.D. Va.)), respectfully move for permission to intervene on the side of Plaintiffs-Appellees and for leave to file separate briefs. Such intervention will not only ensure that the interests of the *Harris* Class are represented before this Court by class counsel, but will also enable the Court to consolidate this appeal with the expected appeal in *Harris* with minimal disruption once the fully submitted summary judgment motions are decided in that case. Pursuant to Local Rule 27(a), counsel for the *Harris* Class have conferred with counsel for the parties to the appeal. Counsel for Appellant Rainey indicated that Rainey cannot consent at this time and will file a response, and counsel for the remaining parties indicated they do not consent.

STATEMENT OF FACTS

Last summer, two cases were filed in federal court challenging the constitutionality of Virginia's bans on allowing same-sex couples to marry or recognizing their legal marriages entered into in other jurisdictions. The *Bostic* case was filed in the Norfolk Division of the Eastern District of Virginia on July 18, 2013, and the *Harris* class action (which had been publicly announced as forthcoming, prior to the filing of the *Bostic* case) was filed in the Harrisonburg Division of the Western District of Virginia two weeks later, on August 1, 2013.

Although the initial *Bostic* complaint was filed two weeks before the *Harris* class action, the *Bostic* case was stayed pending the filing of an amended complaint with additional claims and plaintiffs, which was filed on September 3, 2013. These claims and plaintiffs were thus added just over a month after the *Harris* action was filed. *See Harris v. McDonnell*, No. 5:13cv00077, 2013 WL 5720355, at *4 (W.D. Va. Oct. 18, 2013).

The Plaintiffs in *Bostic* and *Harris* filed motions for summary judgment the same day, on September 30, 2013. *See id.* at *5. On January 31, 2013, the district court in *Harris* certified the case as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2) on behalf of a class consisting of (1) all same-sex couples in Virginia who have not married in another jurisdiction and (2) all same-sex couples

in Virginia who have married in another jurisdiction. *Harris v. Rainey*, No. 5:13cv077, 2014 WL 352188, at *12 (W.D. Va. Jan. 31, 2014).

The court also granted a request from the plaintiffs in *Bostic* to be excluded from the mandatory class so that the *Bostic* and *Harris* litigations could continue to proceed on parallel tracks. *Id.* In requesting to be excluded from the class, the *Bostic* plaintiffs assured the Court that: "amending the proposed class definitions to exclude the *Bostic* plaintiffs will not prejudice the *Harris* named plaintiffs or the other absent members of the putative class in any way. While a judgment against the *Harris* plaintiffs conceivably could bind absent class members throughout the Commonwealth (if the class certification motion were granted), a judgment entered against the *Bostic* plaintiffs would have no preclusive effect in the *Harris* action." *Harris v. Rainey*, No. 5:13cv077, ECF No. 38 at 3-4. The *Bostic* plaintiffs stated that they "want only to prosecute their own case, for their own families, with their own counsel, on their own terms, and to let the *Harris* plaintiffs do the same." *Id.* at 5.

On January 27, 2014, the Office of the Attorney General of Virginia, on behalf of Defendant Janet M. Rainey, filed a notice in the *Harris* case that it had changed its legal position in the case and would no longer defend the constitutionality of the Commonwealth's laws denying the right to marry to same-sex couples. *Harris v. Rainey*, No. 5:13cv077, ECF No. 110. On February 19,

2014, the Court held a status conference, during which it announced that it would take the case under advisement without oral argument on the summary judgment briefing conducted prior to the Commonwealth's change of legal position. *Harris v. Rainey*, No. 5:13cv077, ECF No. 127.

On February 24, 2014, the district court in *Bostic* entered judgment in favor of Plaintiffs, and Defendants filed notices of appeal. *Bostic v. Rainey*, No. 2:13cv00395, ECF Nos. 139-41, 143.

ARGUMENT

I. Permissive Intervention on Appeal Is Warranted When Third-Parties' Interests Could Be Impaired by the *Stare Decisis* Effects of a Pending Appeal.

Although the Federal Rules of Appellate Procedure do not expressly address motions to intervene on appeal, this Court has specifically authorized motions to intervene on appeal pursuant to Local Rule 12(e), and repeatedly has granted such motions in the past. *See, e.g.*, *North Carolina, ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291 (4th Cir. 2010); *CSX Transp., Inc. v. U.S. Cruises, Inc.*, 989 F.2d 492 (Table) (4th Cir. 1993); *Atkins v. State Bd. of Educ.*, 418 F.2d 874 (4th Cir.1969) (per curiam).

In determining whether to grant a motion to intervene on appeal, the Courts of Appeals consider the same factors that apply to motions to intervene in the district court pursuant to Federal Rule of Civil Procedure 24. *See Carter v. Welles-*

Bowen Realty, Inc., 628 F.3d 790, 790 (6th Cir. 2010). Under Rule 24(a), intervention as of right must be granted when a party files a "timely motion" and "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Under Rule 24(b), permissive intervention may be granted when a party files a "timely motion" and "has a claim or defense that shares with the main action a common question of law or fact." "[L]iberal intervention is desirable to dispose of as much of a controversy involving as many apparently concerned persons as is compatible with efficiency and due process." *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir.1986) (internal quotation marks and citations omitted).

Since Rule 24 was amended in 1966, it has been well established that in certain circumstances a party may be entitled to intervene as of right in order to protect its interests that would be affected by the *stare decisis* effects of an appellate decision. Indeed, "[t]he central purpose of the 1966 amendment was to allow intervention by those who might be practically disadvantaged by the disposition of the action and to repudiate the view, expressed in authoritative cases under the former rule, that intervention must be limited to those who would be

legally bound as a matter of res judicata." Wright & Miller, *Federal Prac. & Proc.* § 1908.2 (footnotes omitted).

Stare decisis may justify either intervention as of right or permissive intervention. In order to intervene as of right, however, the intervenor must demonstrate that its interests are not adequately represented by the existing parties. In contrast, "the *stare-decisis* effect on the absentee may tip the scales in favor of allowing permissive intervention even by one who is adequately represented." *Id.*at § 1911 (footnote omitted).

Here, the *Harris* Class does not question the qualifications or commitment of the *Bostic* plaintiffs or their counsel. Nevertheless, because of the likely *stare decisis* effect of this Court's decision in this case on all same-sex couples in Virginia, the *Harris* Class seeks permissive intervention to protect the legal interests of the *Harris* plaintiffs and the class of same-sex couples throughout Virginia whom they represent.

II. The *Harris* Class's Motion for Permissive Intervention is Timely.

The class's motion to intervene is timely because it has been filed only two days after the initial notices of appeal were filed and one day after the appeal was docketed in this Court. This Court has explained that, when determining whether a motion to intervene is timely, "[t]he most important consideration is whether the delay prejudiced the other parties. If a post-judgment motion did not result in

heightened prejudice to the parties or substantial interference with the process of the court, then the fact that judgment has been entered does not require the motion be denied." *Patterson v. Shumate*, 912 F.2d 463 (4th Cir. 1990) (table) (unpublished) (citing *Hill v. Western Elec. Co., Inc.*, 672 F.2d 381, 386-87 (4th Cir. 1982).

In this case, granting the *Harris* Class's motion to intervene on appeal would not prejudice the existing parties or delay the proceedings in any way. The *Harris* Class would abide by the scheduling order the Court has already issued in this case – or whatever expedited scheduling order the existing parties intend to propose – and would submit all filings on the same timetable as the existing plaintiffs.

III. The *Harris* Class Should Be Granted The Opportunity To Protect Its Own Interests.

The *Bostic* and *Harris* cases have progressed on parallel tracks throughout the past year. As noted above, the two cases were filed within two weeks of each other, and the plaintiffs in both cases submitted summary judgment briefs on the same day. Because the *Harris* Class is currently litigating precisely the same issues involved in this case – and doing so on behalf of a class of all same-sex couples in Virginia – permission to intervene should be granted so the *Harris* Class is not deprived of its day in court with respect to the critical legal questions that are likely to be resolved in this appeal.

"Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936). Accordingly, intervention on appeal is particularly appropriate when a plaintiff is currently prosecuting claims in a separate proceeding and the *stare decisis* effect of a pending appeal would control the outcome of the plaintiffs' litigation. *Georgia v. U.S. Army Corps of Engineers*, 302 F.3d 1242, 1258 (11th Cir. 2002) (granting intervention on appeal where "[b]ecause a final ruling in this case may adversely impact SeFPC's ongoing lawsuit against the Corps, we find that its interests could be impaired by the denial of intervention."); *Foster v. Gueory*, 655 F.2d 1319, 1324-25 (D.C. Cir. 1981) (intervention proper where intervenors and plaintiffs "have each contended that their respective rights under Title VII and under § 1981 have been violated by the same practices of the defendants"); *Hartman v. Duffy*, 158 F.R.D. 525, 534 (D.D.C. 1994) (intervention proper where "Petitioners assert that, because they are challenging the same discriminatory policy exhibited through the same or similar subjective hiring practices as those the Plaintiffs experienced, the potential *stare decisis* effects of a ruling denying intervention would, as a practical matter, impair their interests.").

In addition, intervention on appeal is particularly warranted in this case because the *Harris* litigation is being prosecuted on behalf of a class of all same-

sex couples in Virginia, and the *Harris* plaintiffs and their counsel have taken on a duty to represent the interests of the class as a whole. The *Harris* court granted the *Bostic* plaintiffs' request to be excluded from the class so they could pursue separate litigation in the Eastern District of Virginia without having their interests impaired by the *Harris* class action. But it did so based on assurances from the *Bostic* plaintiffs that they "want only to prosecute their own case, for their own families, with their own counsel, on their own terms, and to let the *Harris* plaintiffs do the same." *Harris v. Rainey*, No. 5:13cv077, ECF #38 at 3-4.

No matter how well-represented the *Bostic* plaintiffs may be, it would turn the principles of civil procedure on their heads if a litigation brought by four individuals were allowed to effectively preempt through *stare decisis* the ongoing litigation brought on behalf of all same-sex couples in Virginia. Such a course of action would effectively appoint the *Bostic* plaintiffs as de facto class representatives without any of the protections or duties of representation imposed by Rule 23. Granting permissive intervention for the *Harris* class to protect its own interests would prevent "the tail from wagging the dog" in this manner and allow both the *Bostic* plaintiffs and the *Harris* Class to litigate legal questions that are vitally important to both lawsuits – and to all same-sex couples in Virginia.

IV. Intervention Would Enable the Court to Consider the *Bostic* and *Harris* Appeals on the Same Schedule.

The summary judgment motion in *Harris* has been fully briefed and is awaiting decision. Once the district court issues a decision in *Harris*, and that decision is appealed to this Court, it will be in the interest of the parties and in the interest of judicial economy to consider those appeals at the same time, with coordinated briefing schedules and oral argument before the same panel. Granting permissive intervention to the *Harris* Class now will facilitate that process by enabling the parties to proceed with the same briefing schedule from the outset instead of setting an initial briefing schedule in *Bostic* and then potentially adjusting that schedule once a notice of appeal is filed in *Harris*. If Plaintiffs are allowed to intervene now and proceed with briefing on the same schedule as the *Bostic* parties, any future notice of appeal filed in *Harris* could then be consolidated with *Bostic* on appeal without disrupting the briefing schedule in either case. Granting intervention now would allow both cases to proceed expeditiously while still enabling the *Bostic* plaintiffs and the *Harris* Class to have their day in court.

V. The *Harris* Class Should Be Given Leave to File Separate Briefs

For substantially the same reasons that permissive intervention should be granted, the Court should also grant leave for the *Harris* Class to file separate briefs. As the district court in *Harris* noted when it certified the case as a class

action, "counsel has had significant experience in the field of civil rights class action lawsuits, particularly those brought on behalf of same-sex couples and gay and lesbian individuals." *Harris*, 2014 WL 352188, at *4. The *Harris* Class is represented by Lambda Legal Defense and Education Fund, Inc., the American Civil Liberties Union of Virginia Foundation, Inc., the American Civil Liberties Union Foundation, and Jenner & Block LLP, which all have decades of experience in representing lesbian, gay, bisexual, and transgender people and protecting their legal rights.

Relegating the *Harris* Class to joining the merits brief filed by the *Bostic* plaintiffs would effectively substitute counsel in *Bostic* as counsel for the entire class without any of the protections or duties of representation imposed by Rule 23. No matter how qualified the counsel for *Bostic* may be, the Class should have the opportunity to be represented by its appointed class counsel with the protections of Rule 23 and not be left to rely on the arguments made by private attorneys on behalf of individual plaintiffs who are not members of the Class.

In addition, without questioning the qualifications of counsel in *Bostic*, the counsel for the *Harris* Class bring a different perspective based on decades of work on behalf of same-sex couples seeking the freedom to marry. For example, *Harris* Class counsel has also been counsel for plaintiffs in, *inter alia*, *United States v. Windsor,* 133 S. Ct. 2675 (2013), which struck down the core of the federal

Defense of Marriage Act; federal court cases seeking the freedom to marry for same-sex couples currently pending in the Sixth and Ninth Circuits, *see Obergefell v. Wymslo*, No. 14-3057 (6th Cir.); *Sevcik v. Sandoval*, No. 12-17668 (9th Cir.), and state court cases in New Mexico, New Jersey, Iowa, and California holding that those state constitutions required same-sex couples be allowed to marry, *see Griego v. Oliver*, No. 34,306, 2013 N.M. LEXIS 414 (N.M. Dec. 19, 2013); *Garden State Equal. v. Dow*, 434 N.J. Super. 163 (Law Div. 2013); *Varnum v. Brien*, 763 N.W. 2d 862 (Iowa 2009)*; In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). Indeed, the organizations representing the *Harris* Class have been advocating for the freedom to marry for same-sex couples since *Baker v. Nelson*, 409 U.S. 810 (1972), and litigated the nation's leading case involving the freedom to marry in *Loving v. Virginia*, 388 U.S. 1 (1967).

Both the Court and the parties will benefit from briefing that reflects the different perspectives and emphases that counsel in *Bostic* and counsel for the *Harris* Class bring to the critically important legal issues in this case.

CONCLUSION

For the foregoing reasons, the motion to Intervene and for leave to file separate briefs should be granted.

Dated: February 26, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of February, 2014, I effected service upon counsel for Appellants and Appellees by electronically filing the foregoing with the Clerk of the Court using the CM/ECF system.

/s/ Rebecca K. Glenberg
REBECCA K. GLENBERG