

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CARA PALLADINO, et al. : CIVIL ACTION
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THOMAS W. CORBETT, et al. : NO. 13-5641

MEMORANDUM

McLaughlin, J.

March 3, 2014

The plaintiffs in this action, a same-sex couple who were married in Massachusetts and are now residents of Pennsylvania, seek a declaration that both 23 Pa. Cons. Stat. § 1704, and Section 2 of the Defense of Marriage Act, 28 U.S.C. § 1738C, are unconstitutional. The plaintiffs also seek a permanent injunction directing the defendants to recognize their Massachusetts marriage, as well as the legal out-of-state marriages of similarly situated same-sex couples.

The Court considers here an application for leave to intervene filed by Mr. James D. Schneller, a resident of the Philadelphia suburbs, representing himself and the Philadelphia Metro Task Force ("Task Force," and together, "movants"). The Task Force is a "community organization formed to support and encourage upholding of family values and morality in government." Appl. ¶ 2, ECF No. 29. For the reasons that follow, the Court will deny the application.

I. Background¹

A. Procedural History

The plaintiffs filed their complaint on September 26, 2013. A motion to dismiss by Pennsylvania Governor Thomas Corbett was filed on November 25, 2013. A motion to dismiss by Pennsylvania Attorney General Kathleen Kane was filed on December 9, 2013. The plaintiffs' opposition to the motions to dismiss, and their motion for summary judgment, were filed on January 13, 2014. The movants filed their application for leave to intervene on January 17, 2014. The plaintiffs filed a response to that motion on February 3, 2014.

B. Application to Intervene²

The movants defend the Pennsylvania statute at issue in this case, but oppose the motion to dismiss of Attorney General Kane. See Appl. ¶ 50. The movants allege that the

¹ The Court must accept as true the non-conclusory allegations made in support of the motion to intervene. See Olympic Sports Data Servs., Ltd. v. Maselli, No. 07-117, 2008 WL 5377626, at *2 (E.D. Pa. Dec. 22, 2008).

² The movants attach to their application a document entitled "Response to Motion to Dismiss Action of Respondent Attorney General Kathleen Kane and [] Motion to Stay the Deadline." Appl., Ex., ECF No. 29-1. Because the Court denies the application to intervene, it will not consider this filing in opposition to Attorney General Kane's motion to dismiss.

plaintiffs have caused Norristown, Montgomery County, and the Philadelphia metropolitan region to endure "derogation of rights to comfort, and basic necessities like safety and well-being, and derogation of additional rights including rights to defend liberty and property; causing . . . emotional distress, [and] perception of failure of official duty." Id. ¶ 42.

The movants support their ability to intervene of right by their interests in "liberty, religious expression, freedom from seizure and confiscation, and other basic rights, and regarding property as well." Furthermore, movants state that "[r]everse discrimination" is threatened "amidst a continual omission of religious and moral freedom." Id. ¶ 38.

The movants contend that this case may impair and impede their ability to "protect their interests" and "to enjoy constitutionally guaranteed rights." Id. ¶ 3. Furthermore, the movants' interests differ from those of the defendants and are not likely to be fully protected by the existing parties to this litigation because "recent decisions . . . indicate a trend to omit or un-prioritize health-, moral- and traditional family-related considerations." Id. ¶¶ 3, 16.

The movants claim that any decision in favor of the plaintiffs would result in "practical impairment" of the movants' ability to protect their interests, "including

discrimination on basis of religious beliefs, on basis of moral beliefs, and on basis of ancestry," as well as age. Id. ¶ 41. The movants are concerned that they would be bound by disposition of this case and any resulting litigation, "certain to affect liberty, equal treatment, and free speech interests." Id. ¶ 43.

The movants seek to supplement the factual evidence in the case beyond what the defendants may present. Id. ¶¶ 5-7. For example, the movants state that they participated in municipal human relations commissions proceedings regarding a new protected class based on "sexual orientation," and so can assist in a "balanced factual presentation" in this case. Id. ¶ 8. The movants' intervention would "deeply affect the posture and merit" of both the motion for summary judgment and the motion to dismiss by Attorney General Kane. Id. ¶ 15.

The movants also state that no party will be prejudiced by their request to intervene at this stage in the litigation because motions to dismiss are pending, the United States may elect to intervene in this action or before March 14, 2014, and discovery has not yet begun. Id. ¶ 13.

The movants argue that they have standing to intervene because they are "Pennsylvania taxpayers objecting to what would be exorbitant expenditures of commonwealth principal, . . .

including administrative upheaval requiring voluminous changes to software, policy, and the justice system." Id. ¶ 54.

The plaintiffs argue that the movants lack standing to intervene to defend³ and the movants' filing does not comply with the requirements of Federal Rule of Civil Procedure 24.⁴

Specifically, the plaintiffs argue that the movants have not demonstrated that their interests are not adequately represented

³ District courts in the Third Circuit have determined that Article III standing is not a prerequisite for intervention as a matter of right. See Am. Farm Bureau Fed'n v. U.S. Env'tl. Prot. Agency, 278 F.R.D. 98, 111 n.6 (M.D. Pa. 2011); CSX Transp., Inc. v. City of Phila., No. 04-5023, 2005 WL 1677975, at *2 (E.D. Pa. July 15, 2005); see also Am. Auto. Ins. Co. v. Murray, 658 F.3d 311, 318 n.4 (3d Cir. 2011) (noting circuit split). Because the Court addresses, and denies, the motion to intervene on its merits, the Court does not determine whether the movants have Article III standing.

⁴ All motions to intervene under Rule 24 "must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c). The movants' application is not accompanied by any such pleading, nor does the motion itself set forth with any specificity the nature of the claims or defenses that the movants wish to assert, or against whom they would assert them. Nor does the movants' "Response to Motion to Dismiss Action of Respondent Attorney General Kathleen Kane and [] Motion to Stay the Deadline," attached as an exhibit to the application, set out "the claim or defense for which intervention is sought," as required under the Rules. Motions to intervene have been granted by courts within the Third Circuit, however, despite a movant's failure to adhere precisely to the requirements of Rule 24(c), where the purpose of intervening was sufficiently clear. See Porter v. T.D. Bank, N.A., No. 10-7243, 2011 WL 925734, at *2 (E.D. Pa. Mar. 14, 2011). Because Schneller is proceeding pro se, the Court declines to deny his motion to intervene on the basis of failure to comply with Rule 24(c).

by the existing parties. The plaintiffs take no position as to whether the movants should be allowed to participate as amicus curiae. Pls.' Opp'n at 2-5, ECF No. 30.

II. Legal Standard

Federal Rule of Civil Procedure 24 governs the two types of intervention in pending federal actions. Rule 24(a) provides the basis for intervention of right, while Rule 24(b) provides the basis for permissive intervention.

Although the application to intervene does not cite Rule 24 and makes no explicit argument as to intervention of right or permissive intervention, the Court analyzes the application under Rule 24. Cf. Appl. ¶ 38 (including the phrase "intervention of right").

A. Intervention of Right

Subsection (a) of Rule 24 provides:

On timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) 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.

Fed. R. Civ. P. 24(a).

The Third Circuit has interpreted Rule 24(a)(2) to require the intervenor applicant to prove the following four elements: (1) a timely application for leave to intervene; (2) a sufficient interest in the litigation; (3) a threat that the interest will be impaired or affected, as a practical matter, by the disposition of the action; and (4) inadequate representation of the prospective intervenor's interest by existing parties to the litigation. Kleissler v. U.S. Forest Serv., 157 F.3d 964, 969 (3d Cir. 1998).

The party seeking to intervene bears the burden of demonstrating that intervention is appropriate. See United States v. Alcan Aluminum, Inc., 25 F.3d 1174, 1181 n.9 (3d Cir. 1994) (burden of proving all four elements under Rule 24(a) "falls on the applicant"); see also Sch. Dist. of Phila. v. Pa. Milk Mktg. Bd., 160 F.R.D. 66, 68 (E.D. Pa. 1995) (failure to "satisfy any one of these requirements precludes an applicant from intervening as of right").

B. Permissive Intervention

Pursuant to Federal Rule of Civil Procedure 24(b), a person or an entity who is not a named party in an action may seek to intervene in the interested litigation. Rule 24(b) provides: "On timely motion, the court may permit anyone to

intervene who: . . . (B) has a claim or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b)(1).

A proposed intervenor must show that: (1) its motion is timely; (2) it has questions of law or fact in common with the anchoring suit; and (3) intervention will not cause undue delay or prejudice to the original parties. If a third party can satisfy these requirements, the court may, in its discretion, grant that third party permissive intervention. In re Johnson & Johnson Derivative Litig., 900 F. Supp. 2d 467, 478 (D.N.J. 2012).

III. Discussion

A. Intervention of Right⁵

The Court will deny the movants’ application to intervene of right because the movants do not identify a sufficient interest they might have at stake in this litigation, nor do they demonstrate why their interests are not adequately represented by an existing party.

⁵ The plaintiffs do not challenge the timeliness of the movants’ application. Pls.’ Opp’n at 4.

1. Legally Cognizable Interest

To justify intervention of right, the applicant must have an interest "relating to the property or transaction which is the subject of the action" that is "significantly protectable" and is "a legal interest as distinguished from interests of a general and indefinite character." Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc., 72 F.3d 361, 366 (3d Cir. 1995) (quoting Harris v. Pernsley, 820 F.2d 592, 601 (3d Cir. 1987)).

The Third Circuit has, however, recognized that no "'precise and authoritative definition' of the interest that satisfies Rule 24(a)(2)" exists. Kleissler, 157 F.3d at 969 (quoting Mountain Top Condo. Ass'n, 72 F.3d at 366). Indeed, there is no "pattern that will easily support or defeat intervention in all circumstances." Id. at 970. Instead, in determining motions to intervene, "courts should adhere to the 'elasticity that Rule 24 contemplates'" and "may examine pragmatic considerations." Imable-Mayorga v. Labrie, No. 09-3567, 2010 WL 3259785, at *2 (D.N.J. Aug. 17, 2010) (quoting Kleissler, 157 F.3d at 970).

As the Court in Kleissler stated,

[T]he polestar for evaluating a claim for intervention is always whether the proposed intervenor's interest is direct or remote. Due regard for efficient conduct

of the litigation requires that intervenors should have an interest that is specific to them, is capable of definition, and will be directly affected in a substantially concrete fashion by the relief sought. The interest may not be remote or attenuated

157 F.3d at 972.

The movants seek to intervene to protect their interests in "liberty, religious expression, [and] freedom from seizure and confiscation." Appl. ¶ 38. Ultimately, the movants seek to undermine the plaintiffs' arguments, add factual context to the record based on the movants' "family values" perspective, and defend the statute at issue. These interests are insufficiently direct or specific to movants to warrant intervention. See Sch. Dist. of Phila., 160 F.R.D. at 68 (holding that trade association of dairy farmers did not demonstrate direct interest in action challenging constitutionality of minimum milk resale prices where farmers would be unaffected by a successful action).

The movants claim that any decision favorable to the plaintiffs will impair their interests, resulting in "discrimination on [the] basis of religious beliefs, . . . moral beliefs, . . . ancestry," and age. Appl. ¶ 41. The movants would be bound by disposition of this case and any resulting litigation, "certain to affect liberty, equal treatment, and free speech interests." Id. ¶ 43. Movants also fear that

"[r]everse discrimination" is threatened "amidst a continual omission of religious and moral freedom." Id. ¶ 38.

These statements are conclusory at best and delineate only a general, attenuated interest that could presumably be raised by any other Pennsylvania citizen so inclined. Furthermore, the movants' application is unclear as to how any relief requested by the plaintiffs would directly affect those interests. Therefore, the Court determines that the movants do not have a sufficient interest in this litigation to intervene of right.

2. Inadequacy of Representation

Even if the Court were to conclude that the movants have a sufficient interest in this litigation, they have failed to establish that their interest is not adequately represented by an existing party. For this requirement, "[t]he burden, however minimal, . . . is on the applicant for intervention to show that his interests are not adequately represented by the existing parties." Hoots v. Pennsylvania, 672 F.2d 1133, 1135 (3d Cir. 1982).

Representation will be considered inadequate on any of the following three grounds: (1) that although the applicant's interests are similar to those of a party, they diverge

sufficiently that the existing party cannot devote proper attention to the applicant's interests; (2) that there is collusion between the representative party and the opposing party; or (3) that the representative party is not diligently prosecuting the suit. Brody ex rel. Sugzdinis v. Spang, 957 F.2d 1108, 1123 (3d Cir. 1992). A prospective intervenor need only show that representation may be inadequate, not that it is, in fact, inadequate. See Trbovich v. United Mine Workers of Am., 404 U.S. 528, 538 n.10 (1972).

In cases where the interest of the applicant is identical to that of one of the existing parties, or one of the existing parties is charged by law with representing the interests of the applicant, representation will be presumed adequate unless special circumstances are shown. 7C Charles Alan Wright et al., Federal Practice & Procedure: Civil § 1909, at 394-95 (3d ed. 2007). The cases in which a member of the public has been allowed to intervene in an action in which the United States, or some other governmental agency, represents the public interest are cases in which a very strong showing of inadequate representation has been made. Id. § 1909, at 429-30.

For example, the Third Circuit in Kleissler held that:

A government entity charged by law with representing national policy is presumed adequate for the task . . . particularly when the concerns of the

proposed intervenor, e.g., a "public interest" group, closely parallel those of the public agency. In that circumstance, the "would-be intervenor [must make] a strong showing of inadequate representation." . . . [B]ut the presumption notwithstanding, when an agency's views are necessarily colored by its view of the public welfare rather than the more parochial views of a proposed intervenor whose interest is personal to it, the burden is comparatively light.

157 F.3d at 972 (quoting Mausolf v. Babbitt, 85 F.3d 1295, 1303 (8th Cir. 1996)).

Similarly, a state government is presumed to adequately represent the interests of its citizens. See 7C Wright et al., supra, § 1909, at 418-22; see also Del. Valley Citizens' Council for Clean Air v. Pennsylvania, 674 F.2d 970, 972-74 (3d Cir. 1982); Coal. to Defend Affirmative Action v. Regents of Univ. of Mich., 701 F.3d 466, 490-91 (6th Cir. 2012) (finding that the state attorney general adequately represented the interests of a proposed intervenor in an action challenging a state constitutional amendment because both sought to validate the amendment, even though the state attorney general agreed to delay the amendment's application, but the intervenor wanted immediate enforcement), cert. granted, 133 S. Ct. 1633 (2013); Gonzalez v. Arizona, 485 F.3d 1041, 1051-52 (9th Cir. 2007) (affirming denial of motion to intervene where citizen group failed to demonstrate that the state's representatives would not adequately represent the group's interest in an action where

"[n]othing in the record . . . suggests that defendants are unwilling or unable to defend [the proposition] . . . [and] they have done so at every level of the federal courts"); Ingebretsen ex rel. Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274, 280-81 (5th Cir. 1996) (affirming denial of intervention as of right where organization's interest in action challenging a state statute involving public school prayer was adequately represented by the state attorney general who "can assert the rights of all [state citizens] affected by the law").

Throughout their application, the movants question whether Attorney General Kane will adequately represent their interests in defending the statute. However, the movants do not question whether Governor Corbett will defend the constitutionality of the Pennsylvania statute at issue. See Appl. ¶¶ 21, 25. The movants have not overcome the presumption that either, or both, of the state governmental officials named as defendants will adequately represent their interests, as Pennsylvania citizens, in "liberty, religious expression, freedom from seizure and confiscation, and other basic rights, and regarding property as well." Id. ¶ 38.⁶ Therefore, the

⁶ The Court notes that it does not decide whether the current defendants are the proper ones, which is at issue in the pending motions to dismiss.

movants have not shown that their interests are not adequately represented by the existing defendants.

B. Permissive Intervention

The movants make no clear argument in support of permissive intervention. The movants do not point to any common question of law or fact in their application. Furthermore, the movants have not demonstrated that their participation will not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

Based on the movants' actions thus far in this case, the Court is concerned that the movants would "seek 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." Coal. to Defend Affirmative Action v. Granholm, 501 F.3d 775, 784 (6th Cir. 2007). To the extent that the movants raise "reverse discrimination" or other "family values" issues, they could delay the action because those issues are only tangentially related to the plaintiffs' complaint.

Furthermore, the movants' application evinces only a general ideological interest in this lawsuit. The movants have stated ideological arguments in opposition to the plaintiffs' complaint, but they have not raised legal arguments persuasive

to this Court. The movants have also not identified how their ideological interests would be affected by this litigation in any concrete way. The generalized and attenuated harm suggested by the movants, whether as taxpayers or to their religious or moral beliefs, does not persuade the Court that permissive intervention is warranted here.

The Court finds persuasive the reasoning of Northland Family Planning Clinic, Inc. v. Cox, 487 F.3d 323 (6th Cir. 2007). There, the Sixth Circuit affirmed the district court's denial of permissive intervention by an advocacy organization opposing abortions in an action challenging the constitutionality of a statute that generally restricted physicians' performance of abortion. Because the organization was openly hostile to plaintiffs and took an ideological approach to the litigation, rather than making legal arguments, the Court determined that the organization's presence as an intervenor would seriously delay the adjudication of the matter. Id. at 346. Similarly, the movants request for permissive intervention here is denied.

C. Amicus Curiae

Although the movants have not explicitly requested to participate in this case as amicus curiae, the plaintiffs have

stated that they take no position as to whether the movants should be allowed to participate as amicus curiae in this matter. The Court denies the movants the ability to participate via amicus briefing. A district court has inherent authority to designate amici curiae to assist it in a proceeding. Liberty Res., Inc. v. Phila. Hous. Auth., 395 F. Supp. 2d 206, 209 (E.D. Pa. 2005) (citing cases).

The Third Circuit has held that even when an applicant is not entitled to intervene, it may still make its position heard in the position of friend of the court, or as intervenor for a limited purpose. Harris, 820 F.2d at 603. As the First Circuit stated in Strasser v. Doorley, 432 F.2d 567 (1st Cir. 1970):

We recognize that the acceptance of amicus briefs is within the sound discretion of the court, and that by the nature of things an amicus is not normally impartial. Furthermore, if an amicus causes the district court to make an error of law—an amicus who argues facts should rarely be welcomed—the error can be corrected on appeal. Nonetheless, we believe a district court lacking joint consent of the parties should go slow in accepting, and even slower in inviting, an amicus brief unless, as a party, although short of a right to intervene, the amicus has a special interest that justifies his having a say, or unless the court feels that existing counsel may need supplementing assistance.

Id. at 569 (footnotes omitted); see also Linker v. Custom-Bilt Mach. Inc., 594 F. Supp. 894, 897-98 (E.D. Pa. 1984).

Here, the movants argue that they will add to the factual context of this case and assist in "balanc[ing] the record." Appl. ¶ 5. Such factual assistance, however, is disfavored. There are no legal arguments made by the movants that would assist current counsel, and the Court cannot determine any "special interest" held by the movants that entitles them to participate in this action. None of the factors noted in Strasser support permitting the movants to appear as amicus, and the Court sees no benefit to be gained by permitting the movants to appear as amicus curiae.

IV. Conclusion

For the reasons stated above, the Court will deny both the movants' request to intervene of right and to permissively intervene. The Court will therefore deny the application to intervene in its entirety. An appropriate Order shall issue.

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ORDER

AND NOW, this 3rd day of March, 2014, upon consideration of the Application for Leave to Intervene (Docket No. 29), filed by James D. Schneller and the Philadelphia Metro Task Force, and the response filed by the plaintiffs (Docket No. 30), IT IS HEREBY ORDERED, for the reasons stated in a memorandum of law bearing today's date, that the application is DENIED.

IT IS FURTHER ORDERED that, in light of the above denial of the application to intervene, Schneller's Motion for Leave to Register as an ECF User (Docket No. 31) and Motion for More Definite Statement of, or to Strike, Response to Application to Intervene and Letter with Opinion Attached (Docket No. 37) are DENIED AS MOOT.

Schneller and the Philadelphia Metro Task Force have also requested a jury trial on the application to intervene and on the plaintiffs' complaint (Docket No. 36), as well as a

hearing or oral argument on the application to intervene. Those requests are accordingly denied.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.