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

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TIMOTHY B. BOSTIC, TONY C. LONDON, CAROL SCHALL, and MARY TOWNLEY,

Plaintiffs–Appellees,

v.

JANET M. RAINEY, in her official capacity as State Registrar of Vital Records, GEORGE E. SCHAEFER, III, in his official capacity as the Clerk of Norfolk City Circuit Court,

Defendants–Appellants,

and

MICHÈLE B. MCQUIGG, in her official capacity as the Clerk of Prince William County Circuit Court,

Intervenor-Defendant–Appellant.

On Appeal from the United States District Court
for the Eastern District of Virginia, Civ. No. 2:13-395

PLAINTIFFS-APPELLEES' OPPOSITION TO *HARRIS* CLASS'S MOTION TO INTERVENE ON APPEAL AND FOR LEAVE TO FILE SEPARATE BRIEFS

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INTRODUCTION

Timothy B. Bostic, Tony C. London, Carol Schall, and Mary Townley ("*Bostic* Plaintiffs") come to this Court with the district court already having determined that the defendants are violating their most precious and fundamental constitutional rights, but with relief from those violations and the damage, humiliation, and suffering they cause stayed pending the disposition of this appeal. The *Bostic* Plaintiffs therefore have sought expedition of this appeal and negotiated with all other parties to this appeal an agreed-upon accelerated briefing schedule that calls for the *Bostic* Plaintiffs to file their answering brief just two weeks after service of the briefs of Defendants George E. Schaefer, III, and Michèle B. McQuigg.

The *Bostic* Plaintiffs have the utmost respect for the *Harris* class representatives and their counsel, and the *Bostic* Plaintiffs enthusiastically welcome their support. But the *Harris* class's motion to intervene on appeal inescapably risks multiplying and delaying these proceedings. Granting the *Harris* class's motion moreover inevitably opens the door to motions to intervene from other parties to the several marriage-equality cases pending in the Circuit, all of whom could argue with equal force that the *stare decisis* effect of this Court's decision in this appeal will have an impact on the outcome of their pending cases.

The *Bostic* Plaintiffs cannot tolerate that risk of delay. Fundamental constitutional rights are at stake, here. Even a short delay in the adjudication of the appeal matters—and especially so to the teenage daughter of Plaintiffs Schall and Townley, who has only one legal parent because the Commonwealth of Virginia (even now, as it concedes the unconstitutionality of doing so) refuses to recognize their California marriage as valid.

Denial of intervention on appeal will cause the *Harris* class no prejudice. As the class acknowledges, *Harris* is a later-filed, parallel litigation in the Western District of Virginia before the Honorable Michael F. Urbanski; members of the class surely will have—indeed, already have had—"their day in court." What the *Harris* class understandably wants is to influence the outcome of this appellate proceeding so that it might control the outcome of its own case. But that cannot itself be an adequate basis for intervention on appeal; if it were, appellate courts throughout the country would be inundated with intervention requests, as parties to lower-court cases would seek to participate in appellate proceedings whenever such proceedings implicate questions of law that are potentially dispositive of claims in lower-court cases—which is to say all the time. The *Harris* class can accomplish its objective of ensuring that its perspective is considered, without delaying this appeal, by participating as an *amicus curiae*.

BACKGROUND

The *Bostic* Plaintiffs filed their complaint challenging the facial constitutionality of Article I, § 15-A of the Virginia Constitution, and Virginia Code §§ 20-45.2 and 20-45.3 ("Virginia's Marriage Prohibition") on July 18, 2013. *Bostic v. Rainey*, No. 13-395 (E.D. Va.), R. 1: Complaint. After one defendant named in the complaint moved to dismiss, the parties agreed to suspend briefing on that motion pending the filing of an amended complaint that would dismiss that defendant. *Bostic*, R. 14: Motion Staying Briefing. The parties further agreed to brief cross-motions for summary judgment on an expedited basis. *Bostic*, R. 17: Expedited Scheduling Order.

The *Harris* plaintiffs did not to seek to intervene in the *Bostic* action, but rather filed a parallel putative class action on August 1, 2013, in the Western District of Virginia challenging the constitutionality of the same laws. *Harris v. Rainey*, No. 13-00077 (W.D. Va.), R. 1: Complaint.

After the parties in *Bostic* had filed their agreed schedule for expedited briefing of cross-motions for summary judgment, the *Harris* plaintiffs filed a motion for class certification. The *Harris* plaintiffs sought to certify a mandatory statewide class comprising two subclasses: (1) "all persons residing in Virginia who are unmarried, and . . . wish to marry a person of the same sex, have applied for a marriage license in the Commonwealth with a person of the same sex, and have been

denied the license"; and (2) "all persons residing in Virginia who are validly married to a person of the same sex in another jurisdiction, and wish to have their marriage recognized by the Commonwealth." *Harris*, R. 27: Plaintiffs' Memorandum in Support of Motion to Certify Class at 4.

The *Bostic* Plaintiffs requested that they be excluded from the *Harris* plaintiffs' proposed class definition. They objected to the class definition on the ground that the *Harris* plaintiffs had requested a trial, and that subsuming the *Bostic* Plaintiffs within the *Harris* plaintiffs' proposed class risked delaying adjudication of the *Bostic* Plaintiffs' claims. *Harris*, R. 38: Notice Requesting that Proposed Class Definition be Amended to Exclude Four Individuals. The *Bostic* Plaintiffs also explained that a class action was not necessary to secure statewide relief—a fact that even the Commonwealth acknowledged. *Harris*, R. 30: State Defendants' Memorandum in Opposition to Motion to Certify Class at 6.

The *Harris* plaintiffs did not object to the exclusion of the *Bostic* Plaintiffs from their proposed class definition. *Harris*, R. 39: Plaintiffs' Reply to Response to Motion to Certify Class at 12. Nor did they dispute that a class action was unnecessary to secure statewide relief. *Id.* at 7. The class action device was necessary, they acknowledged, only to avoid the risk that "plaintiffs' claims might become moot before final judgment if they move out of state or their personal circumstances change." *Id.* at 8. Judge Urbanski granted the *Harris* plaintiffs' mo-

tion for class certification, certifying a class that excluded the *Bostic* Plaintiffs. *Harris v. Rainey*, No. 13-00077, 2014 WL 352188, at *1 (W.D. Va. Jan. 31, 2014).

On September 30, 2013, the parties in *Bostic* filed their cross-motions for summary judgment. On that same day, the *Harris* class abruptly changed course and, in the midst of discovery, filed its own motion for summary judgment. That motion is fully briefed, but remains pending. In response to the Attorney General's subsequent motion to stay the *Harris* action pending the resolution of *Bostic*, the *Harris* class reiterated its desire to litigate its case separately from *Bostic* and urged the court to issue a ruling in its case without regard to the outcome of the first-filed *Bostic* action. *See Harris*, R. 55: Plaintiffs' Response to Motion for Stay at 6 ("It is entirely appropriate for district courts in the same circuit to rule on the same constitutional question in parallel cases brought by different plaintiffs.").

After full briefing and a two-hour oral argument, on February 13, 2014, the *Bostic* district court granted the *Bostic* Plaintiffs' motion for summary judgment. The court held that Virginia's Marriage Prohibition deprives gay men and lesbians of the fundamental right to marriage, violates their equal protection rights, and lacks a rational relationship to any legitimate state interest. *Bostic*, R. 136: Amended Opinion and Order at 21–37. The court entered a judgment declaring that Virginia's Marriage Prohibition is "facially unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United

States Constitution." *Bostic*, R. 139: Judgment. The court further enjoined the defendants and all officers, agents, and employees of the Commonwealth of Virginia from enforcing Virginia's Marriage Prohibition. *Id.* The court, however, stayed all relief pending appeal to this Court. *Id.* at 2.

Thereafter the *Harris* district court held a status conference. *Harris*, R. 133: Status Hearing Transcript. Counsel for the *Harris* plaintiffs requested a prompt ruling on their motion for summary judgment so that the *Harris* class could be "represented up in the Fourth Circuit proceedings." *Id.* at 17. In response, however, Judge Urbanski inquired, "why does this Court in the Western District need to do anything," given that there is "one in Bostic that is going up to the Fourth Circuit." *Id.* at 6; *see also id.* at 10–11, 12–13. The Solicitor General of Virginia suggested that further action in *Harris* was not necessary because "the ruling in Bostic will bind the state, assuming it's affirmed on appeal." *Id.* at 13. The court concluded the status conference by saying, "We will do what we're going to do in this case in due course." *Id.* at 22.

A week later, the *Harris* class moved to intervene in these appeals in the *Bostic* action.

ARGUMENT

I. The *Harris* Class Cannot Satisfy This Court's Exacting Standard For Intervention On Appeal.

A. The *stare decisis* effect of an appeal on lower-court litigation does not constitute an exceptional circumstance.

The *Harris* class cannot meet the strict standard that this Court applies to requests to intervene for the first time on appeal. In this Circuit, "intervention on appeal will be granted only under exceptional circumstances." *Spring Const. Co., Inc. v. Harris*, 614 F.2d 374, 377 (4th Cir. 1980); *see also McKenna v. Pan. Am. Petro. Corp.*, 303 F.2d 778, 779 (5th Cir. 1962) (same). The *Harris* class never even acknowledges that exacting standard, but this Court routinely denies motions to intervene that do not satisfy it. *See, e.g.*, *S.E.C. v. Dunlap*, 253 F.3d 768, 774 (4th Cir. 2001) (denying motion to intervene on appeal); *Blakeney v. Fairfax Cnty. Sch. Bd.*, 334 F.2d 239, 240 (4th Cir. 1964) (same); *Consol. Gas Elec. Light & Power Co. of Baltimore v. Pa. Water & Power Co.*, 194 F.2d 89, 91 (4th Cir. 1952) (same).

The issues involved in these appeals are undeniably important, but the prospect that this Court's ruling could be dispositive of the *Harris* class's later-filed, and as yet undecided, case hardly is itself exceptional. To the contrary, the prospect that a decision of the court of appeals will be given *stare decisis* effect is quite routine. It arises anytime an appellate court considers a question of law that

is simultaneously being litigated (or may in the future be litigated) in lower courts, and is thus a plainly insufficient ground for intervening in a case on appeal.

This Court's decision in *Blakeney* illustrates the point. In *Blakeney*, five African American students moved in the district court for an injunction prohibiting school segregation. 334 F.2d at 240. The district court denied their request for an injunction, and the students appealed. On appeal, 49 additional students moved to intervene in the case for the first time. This Court reversed the judgment of the district court and held that the injunction should have been granted. *Id.* The Court also denied the 49 students' motion to intervene in the appeal because the Court was "satisfied" that they could receive relief from the district court in light of the Court's ruling on the merits of the injunction. *Id.*

Appellate courts around the country have similarly denied motions to intervene by nonparties claiming that the potential *stare decisis* effect of a decision afforded them an interest in marriage-equality litigation. *See, e.g.*, Order, *Kitchen v. Herbert*, No. 13-4178 (10th Cir. Feb. 3, 2014) (denying motion to intervene on appeal by gay and lesbian couples seeking to defend district court decision invalidating Utah's prohibition on same-sex marriage); Motion to Intervene, *Kitchen*, No. 13-4178, at 10 (claiming an "'interest that is affected by the trial court's judgment'"); *Perry v. Schwarzenegger*, 630 F.3d 898, 905 (9th Cir. 2011) (denying motion to intervene by a county that claimed an interest "in assuring that the vote of

its residents is defended and ultimately upheld"). The generalized interest shared by gay and lesbian couples seeking to overturn discriminatory state marriage laws has been held to be insufficient to warrant intervention even at the district court level, where intervention can be granted without the showing of "exceptional circumstances" required on appeal. Chief Judge Vaughn R. Walker denied a motion to intervene filed by the same counsel representing the *Harris* class during the district court proceedings challenging California's Proposition 8. *See Perry v. Schwarzenegger*, No. 09-2292 (N.D. Cal.), R. 160: Civil Minute Order.

Indeed, if the *Harris* class were correct that a case's potential *stare decisis* effect can be sufficiently "exceptional" to warrant intervention, it would invite every other litigant in pending marriage-equality litigation in this Circuit to intervene in these appeals.

For example, if *stare decisis* could justify the *Harris* class's intervention, then it would justify with no less force the intervention of *Harris* defendant Thomas E. Roberts as well. In fact, the reasoning necessarily extends to *any* party that is currently litigating an analogous case within the Fourth Circuit—including the plaintiffs and defendants in the currently pending cases challenging similar marriage prohibitions in West Virginia, North Carolina, and South Carolina. *See McGee v. Cole*, No. 13-24068 (S. D. W.Va.), *Fisher-Borne v. Smith*, No. 12-589 (M.D.N.C.), *Bradacs v. Haley*, No. 13-2351 (D.S.C.). On the expansive theory of

intervention advanced by the *Harris* class here, all of these litigants could bypass their district court proceedings and intervene in this appeal because, like the *Harris* class, those litigants have an interest in the potential *stare decisis* effect of this appeal. Such a boundless approach to appellate intervention practice would strip the "exceptional circumstances" test of any meaning and inevitably result in needless procedural complexity, a mountain of redundant briefs, and unavoidable delay in the resolution of this surpassingly important appeal.[1]

It is unsurprising, then, that none of the precedents cited by the *Harris* class as examples of intervention on appeal in this Circuit comes anywhere near holding that the prospect of *stare decisis* is an extraordinary circumstance that warrants intervention on appeal. *See North Carolina ex rel. Cooper v. Tenn. Valley*

[1] The implications of the *Harris* class's *stare decisis* theory of intervention on appeal would be even greater—absurdly so—in other areas of the law. For example, in *Halliburton Co. v. Erica P. John Fund, Inc.*, No. 13-317, the Supreme Court is now considering the viability of a widely-invoked presumption of reliance applicable to class actions under the federal securities laws. On the *Harris* class's theory, every litigant whose case might be substantially affected by the Supreme Court's decision should be permitted to intervene as a party in the Supreme Court's proceedings. Similarly, in cases like *Libertarian Party of Virginia v. Judd*, 718 F.3d 308 (4th Cir. 2013), which involved the constitutionality of certain election regulations, the *Harris* class's theory of intervention would have invited into the case as parties all manner of nonparties with an interest in the constitutionality of similar regulations in other States or jurisdictions within the Circuit. *See id.* at 317 (citing multiple circuit court decisions addressing the legality of petition restrictions). Such an expansive conception of intervention on appeal would halt many appeals and for that reason (at least) is insupportable.

Auth., 615 F.3d 291, 298 (4th Cir. 2010) (granting intervention without comment where the State of Alabama sought to intervene to challenge an injunction that implicated its sovereign interests in the regulation of power plants within its borders); *CSX Transp., Inc. v. U.S. Cruises, Inc.*, 989 F.2d 492 (4th Cir. 1993) (granting intervention without comment where vessel purchaser sought to intervene in an appeal challenging its purchase); *Feller v. Brock*, 802 F.2d 722, 729–30 (4th Cir. 1986) (holding that intervention should have been permitted in the district court where intervenors' wages would be directly affected by the outcome of litigation); *Atkins v. State Bd. of Ed. of N.C.*, 418 F.2d 874, 874 (4th Cir. 1969) (remanding desegregation action to permit the students' parents to intervene in a suit filed by the students' grandfather).

Similarly, the out-of-circuit cases that the *Harris* class cites for the proposition that "intervention on appeal is particularly appropriate when . . . the *stare decisis* effect of a pending appeal would control the outcome of the plaintiffs' litigation," Motion at 10, do not involve intervention on appeal at all. In each case, the motions to intervene were filed first during the *district court* proceedings, not on appeal. *See id.* at 10 (*citing Georgia v. U.S. Army Corps of Engineers*, 302 F.3d 1242, 1248 (11th Cir. 2002); *Foster v. Gueory*, 655 F.2d 1319, 1324–25 (D.C. Cir. 1981); *Hartman v. Duffy*, 158 F.R.D. 525, 534 (D.D.C. 1994)). Even further from the mark is the *Harris* class's invocation of the Supreme Court's decision in *Landis*

v. North American Company, 299 U.S. 248 (1936). Motion at 10. That case did not address intervention at all; it involved only a challenge to a judicial stay of litigation. *Id.* at 253.

Here, the *Harris* class would have this Court grant it leave to intervene on appeal based on nothing more than its interest in the *stare decisis* effect of this case—even though it never sought to intervene in the district court, is a party to a later-filed district court case that will provide it with its own opportunity to litigate in this Court, and has urged that district court to render a decision in its case without regard to the decision by the *Bostic* district court. *See Harris*, R. 55: Plaintiffs' Response to Motion for Stay at 6. The truly "exceptional" aspects of this request for intervention are its total lack of precedential support and its remarkable potential to upset the efficient administration of justice in this Circuit.

B. The *Harris* class is not entitled to permissive intervention because its untimely motion will significantly prejudice the *Bostic* Plaintiffs.

Unable to meet this Court's exacting standard for intervention on appeal, the *Harris* class instead seeks permissive intervention under Federal Rule of Civil Procedure 24 because some *other* circuits have applied that more permissive standard when considering motions to intervene on appeal. Motion at 6–7 (citing *Carter v. Welles-Bowen Realty*, 628 F.3d 790, 790 (6th Cir. 2010)). But even courts of appeals applying Rule 24 have recognized that intervention on appeal is "unusual"

and should only be permitted "for imperative reasons." *Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997); *see also Amalgamated Transit Union Int'l, AFL-CIO v. Donovan*, 771 F.2d 1551, 1553 (D.C. Cir. 1985) (denying intervention because the circumstances were not "exceptional"). Permissive intervention is not appropriate here.

First, a motion for permissive intervention must be timely, *see* Fed. R. Civ. P. 24(b)(1); the *Harris* class's motion is not. The *Harris* class does not deny that it has been aware of the *Bostic* proceedings since their inception, but, unlike Intervenor-Appellant McQuigg, it never sought to intervene in these proceedings in the district court. Instead, the *Harris* class made the tactical decision to pursue independent proceedings in a separate court before a different judge. This Court and others have consistently denied motions for intervention on appeal where the would-be intervenor was aware of the litigation but did not seek to intervene in the district court proceedings. *See Consol. Gas*, 194 F.2d at 91 (denying intervention where the movant had "been fully apprised of these proceedings . . . and yet it took no steps to intervene until a short time before the argument of the appeal"); *McKenna*, 303 F.2d at 779.

Permissive intervention also should be denied because the *Harris* class's intervention would generate a substantial risk of delay in the resolution of this appeal. *See Stuart v. Huff*, 706 F.3d 345, 349 (4th Cir. 2013) (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). The *Bostic* Plaintiffs are suffering irreparable injury every day that Virginia's Marriage Prohibition continues to infringe on their fundamental right to marry. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). Virginia's Marriage Prohibition causes the *Bostic* Plaintiffs and their families "humiliation, stigma, and emotional distress that accumulates daily." *Bostic*, R. 136: Amended Opinion and Order at 13. For that reason, the Bostic Plaintiffs negotiated a highly expedited briefing schedule with the current parties. Though the *Harris* class has agreed to be bound by that schedule, the current parties' agreement did not contemplate briefing from the *Harris* class, or from other litigants that might now seek to intervene in these appeals.

Any risk of delay in resolving this appeal is tremendously prejudicial to the *Bostic* Plaintiffs. The *Harris* class, on the other hand, would not be prejudiced if its motion to intervene were denied. If its case soon proceeds to judgment, the class will have an appeal of its own (albeit one without a party that defends the constitutionality of Virginia's Marriage Prohibition). If it does not, the *Harris* court will be able promptly to adjudicate the *Harris* class's requests for relief, just as in *Blakeney*. *See* 334 F.2d at 240 (suggesting denied intervenors seek relief in district court in view of appellate ruling). The threat of prejudice to the *Bostic* Plaintiffs, and the absence of prejudice to the *Harris* class, counsel strongly against

permitting intervention even under the standards of Rule 24—much less this Court's far more stringent "exceptional circumstances" test.

II. That *Harris* Is A Class Action Is Of No Moment.

The *Harris* class also argues that intervention should be allowed because its case now is a class action. *Bostic*, it argues, is a "litigation brought by four individuals" and should not be allowed to "wag[]" its class action "dog." Motion at 11. This reasoning fails for two independent reasons.

First, the *Harris* class made a considered tactical decision to proceed in a later-filed parallel litigation and repeatedly urged that the cases be allowed to proceed separately. After consenting to the exclusion of the *Bostic* Plaintiffs from its mandatory class, *Harris*, R. 40: Plaintiffs' Response to *Bostic* Plaintiffs' Request to be Excluded From Certified Class at 1, it argued that the *Bostic* and *Harris* cases be allowed to proceed on separate tracks, urging the court not to transfer the *Harris* case to the Eastern District of Virginia for purposes of consolidation into *Bostic*. *Harris*, R. 55: Plaintiffs' Response to Motion to Stay at 5. And just two weeks ago, the *Harris* class again urged Judge Urbanski to allow the *Harris* action to proceed on a track independent from *Bostic*, stating that "each party should have their days in court." *Harris*, R. 133: Status Hearing Transcript at 6. Having for months maintained that the *Harris* action be allowed to proceed separately from the *Bostic*

action, the *Harris* class can hardly complain now if the *Bostic* action continues to proceed separately.

Second, that the *Harris* plaintiffs now represent a class does not entitle the class to special treatment or a lower standard for intervention on appeal. There is nothing even remotely unusual about litigation brought by individuals establishing a rule of law that is then employed by larger classes of plaintiffs. Far from a form of "preempt[ion]," Motion at 11, that is an essential feature of the common-law development of our constitutional law.

But in the civil rights field it is even stranger to speak of litigation brought by individuals as "effectively preempt[ing]," *id.*, a class action because class actions generally are unnecessary to obtain the needed relief. The *Perry* case that struck down California's Proposition 8 was brought by four individual plaintiffs, and the judgment in favor of those four plaintiffs was sufficient to restore marriage rights to same-sex couples throughout California. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1004 (N.D. Cal. 2010). Here, the *Bostic* court likewise has issued a judgment in favor of the individual plaintiffs declaring Virginia's Marriage Prohibition unconstitutional on its face, and enjoining the defendants from enforcing the laws. *Bostic*, R. 136: Amended Opinion and Order at 40–41, R. 139: Judgment. As the Commonwealth acknowledges, that judgment, if it is affirmed,

is sufficient to accord relief to same-sex couples throughout Virginia. *Harris*, R. 30: State Defendants' Memorandum in Opposition to Motion to Certify Class at 6.

Tellingly, consistent with that approach, the other marriage litigations in federal court being handled by counsel for the *Harris* class are brought by individuals and not on behalf of a class. *See*, *e.g.*, *Sevcik v. Sandoval*, No. 12-00578 (D. Nev.), R. 1: Complaint; *Wolf v. Walker*, No. 14-00064 (W.D. Wis.), R. 26: Amended Complaint. Nor are the cases currently working their way through the courts in Utah, Oklahoma, Kentucky, Texas, North Carolina, South Carolina, and West Virginia styled as class actions. *See Kitchen*, R. 2: Amended Complaint; *Bishop v. Oklahoma*, No. 04-00848 (N.D. Ok.), R. 122: Second Amended Complaint; *Bourke v. Breshear*, No. 13-00750 (W.D. Ky.), R. 5: Amended Complaint; *De Leon v. Perry*, No. 13-982 (W.D. Tex.), R. 1: Complaint; *Fisher-Borne*, No. 12-589, R. 40: Amended Complaint; *Bradacs*, No. 13-2351, R. 41: Amended Complaint; *McGee*, No. 13-24068, R. 1: Complaint. Because there is no need for the class action device in this type of case, there is no reason to accord the existence of a certified class any special weight in the intervention analysis. *See De Leon v. Perry*, No. 13-00982, 2014 WL 715741, at *27 n.7 (W.D. Tex. Feb. 26, 2014).[2]

[2] The fact that counsel for the *Harris* class has not seen the necessity or benefit of a class action in any other marriage litigation of course begs the question of
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III. Intervention Is Not Necessary To Facilitate Coordination Of Appeals.

The *Harris* class suggests that its intervention in *Bostic* is appropriate to facilitate coordination of a potential appeal in its case. Motion at 12. This is a strange argument, and it is flawed on multiple levels.

First, the transcript of the February 19 status conference in *Harris* reveals that it is far from certain when the district court will act on the pending motion for summary judgment. Judge Urbanski's questions suggested the possibility that he may await this Court's ruling in *Bostic* before resolving the motion in *Harris*. *See Harris*, R. 133: Status Hearing Transcript at 6, 10–11, 12–13.

Second, the *Harris* class contemplates following the briefing schedule in *Bostic*, but in so doing it implicitly assumes that the court is going to award it summary judgment—even though the court said on February 19 it had reached no decision, *id.* at 7, and class counsel explicitly asked the court to leave open the possibility of scheduling a trial if the class's motion were not granted, *id.* at 19. Nor does the class suggest who, if the court ruled against it, would defend the judgment in this Court since no party in that case is defending Virginia's Marriage Prohibition.

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what benefit they saw in the class action device here. One answer may be found in the first class definition proposed by the *Harris* plaintiffs, which would have swept in the plaintiffs in the *Bostic* action.

Third, if the *Harris* class's assumptions were correct, that would only suggest that intervention in *Bostic* is unnecessary, because the *Harris* class then would be a party in its own appeal. Yet the *Harris* class should not be a party in both cases, any more than the *Bostic* Plaintiffs should be parties in both cases.

Rather than an effort to coordinate appeals, the *Harris* class's intervention request seems instead to be an effort to hedge against the possibility that its motion for summary judgment may not be immediately granted. That is not an appropriate basis for intervention on appeal.

IV. The *Harris* Class's Motion For Leave To File A Separate Brief Should Be Denied.

The *Harris* class's request for leave to file an additional party brief should be denied. *Harris* class counsel certainly are experienced and able, but they identify neither a divergence of interests from the *Bostic* Plaintiffs nor an argument they would make in support of the judgment that is not being advanced by the current parties. They mention only their "different perspective" based on their experience. Motion at 13. That is not a sufficient basis to warrant the filing of a separate brief—particularly where the current parties have negotiated an expedited briefing schedule and similar intervention requests may be in the offing.

The *Harris* class's suggestion that conforming to this Court's normal intervention practice would "effectively substitute" the *Bostic* Plaintiffs' counsel as class counsel lacks merit. Motion at 13. The *Harris* class complains about the

prospect of being made "to rely on the arguments" of other counsel, *id*., but that is just a criticism of Fourth Circuit Local Rule 12(e) itself. The *Harris* class has its own case pending in the Western District of Virginia in which it is able to present its arguments without interference from the *Bostic* Plaintiffs. The class should not be permitted to impose delay and costs on the *Bostic* action just to avoid joining the arguments of "plaintiffs who are not members of the class." Motion at 13.

CONCLUSION

For the foregoing reasons, the Court should deny the *Harris* class's motion for leave to intervene and for leave to file a separate brief.

Dated: March 3, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of March, 2014, I electronically filed the foregoing Opposition To *Harris* Class's Motion To Intervene On Appeal And For Leave To File Separate Briefs with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the Court's appellate CM/ECF system. Service was accomplished on all counsel of record by the appellate CM/ECF system.

/s/ Theodore B. Olson
Theodore B. Olson