UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ROBERT L. VAZZO, LMFT, individually and on behalf of his patients, and DAVID H. PICKUP, LMFT, individually and on behalf of his patients, Plaintiffs, v. CITY OF TAMPA, FLORIDA, Defendant.	No. 8:17-cv-02896-CEH-AAS

EQUALITY FLORIDA'S REPLY IN SUPPORT OF ITS MOTION TO INTERVENE AS PARTY DEFENDANT

Equality Florida Institute, Inc., satisfies the requirements for permissive intervention under Federal Rule of Civil Procedure 24(b). Plaintiffs' opposition is based on disregarding the difference between intervention as of right and permissive intervention.

I. *Laroe Estates* Does Not Require Equality Florida To Have Article III Standing

Plaintiffs incorrectly assert that *Town of Chester v. Laroe Estates*, 137 S. Ct. 1645 (2017), changed the law to require a party to possess independent Article III standing to intervene permissively in a case. *See* Dkt. 42 at 3. To the contrary, *Laroe Estates* merely clarified that "an intervenor *of right* must have Article III standing *in order to pursue relief that is different* from that which is sought by a party with standing." 137 S. Ct. at 1651.[1] It does not cite Rule 24(b) or address permissive intervention, as sought here. Equality Florida did not rely on "stale" law or mislead the Court by failing to cite *Laroe Estates*. *See* Dkt. 42 at 3.

[1] Throughout this reply, internal citations, quotation marks, and alterations are omitted, and emphasis is added.

Indeed, in *Salvors, Inc. v. Unidentified Wrecked & Abandoned Vessel*, 861 F.3d 1278 (2017), the Eleventh Circuit expressly recognized *Laroe Estates*'s application only to intervention as of right. *Salvors* noted that *Laroe Estates* "answered whether a litigant must possess Article III standing in order to intervene *as of right* under Federal Rule of Civil Procedure 24(a)(2)." 861 F.3d at 1290. Other circuits similarly recognize *Laroe Estates's* limited scope. *See, e.g., Envtl. Integrity Project v. Pruitt*, No. 17-5010, 2017 WL 6553401, at *1 (D.C. Cir. Nov. 28, 2017); *Or. Prescription Drug Monitoring Program v. U.S. Drug Enf't Admin.*, 860 F.3d 1228, 1234 (9th Cir. 2017).

None of the authorities cited by Plaintiffs applied *Laroe Estates*'s standing requirement to permissive intervention. *See City of Chicago v. Sessions*, No. 17-C-5720, 2017 WL 5499167, at *4 (N.D. Ill. Nov. 16, 2017) (noting that "an intervenor *as of right* must demonstrate Article III standing"); *Zimmerman v. GJS Grp., Inc*., No. 2:17–cv–00304, 2017 WL 4560136, at *4 (D. Nev. Oct. 11, 2017) (denying motion to intervene as of right because intervenors did not have standing but granting motion to intervene permissively); *cf. Seneca Res. Corp. v. Highland Twp.*, No. 16-cv-289, 2017 WL 4168472, at *4, 8 (W.D. Penn. Sept. 20, 2017) (denying motion to intervene as of right after full opinion discussing lack of standing and then denying alternative motion to intervene permissively on the same basis in final two sentences of order). *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), on which plaintiffs rely heavily, *see* Dkt. 42 at 3, also involved intervenors as of right. *See* Order Granting Motion to Intervene at 3, *Perry v. Schwarzenegger*, No. C 09-2292 (N.D. Cal. June 30, 2009), ECF No. 76.

Plaintiffs nonetheless argue that Article III standing should be required for permissive intervention because that "makes intuitive sense" and is the "only logical application" of *Laroe Estates*. Dkt. 42 at 4. But Plaintiffs' elision of the difference between intervention as of right and

permissive intervention is contrary both to Rule 24 itself and decades of settled case law. *See Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989); 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1923 (3d ed. 2008) ("there are two branches to Rule 24 and the differences between them cannot be ignored"). *Laroe Estates* did not eliminate this established distinction by implication.

II. Plaintiffs Misapprehend The Requirements For Permissive Intervention

By its terms, Rule 24(b) imposes only three requirements for permissive intervention: (1) the motion must be timely; (2) the putative intervenor must raise a question of law or fact in common with the existing claims; and (3) intervention must not cause undue delay or prejudice to the existing parties. Fed. R. Civ. P. 24(b); *see also* Dkt. 30 at 5.

Plaintiffs do not contest the timeliness of Equality Florida's motion to intervene. Moreover, Equality Florida shares multiple points of commonality with the City: Equality Florida will argue that Ordinance No. 2017-47 ("the Ordinance") should be upheld (a common result), that it does not violate the U.S. Constitution (a common question of law), and that it is reasonably directed at the prevention of recognized harm (a common question of fact).

Plaintiffs' claims that intervention would cause undue delay are belied by their own agreement to stay discovery pending the resolution of their motion for a preliminary injunction. *See* Dkt. 49. Equality Florida will abide by all deadlines imposed on Plaintiffs and the City. Intervention will thus cause no delay.

Plaintiffs' assertion that Equality Florida's participation will raise unnecessary issues because Plaintiffs bring a facial challenge to the Ordinance is also wrong. *See* Dkt. 42 at 12. Even facial First Amendment challenges require some evaluation of the validity of the government's justifications for its actions. *See, e.g., Wollschlaeger v. Governor, Fla.*, 848 F.3d

1293, 1316–17 (11th Cir. 2017) (en banc). Equality Florida can be of great assistance to the Court in adjudicating the issues at the heart of this case. *See King v. Christie*, 981 F. Supp. 2d 296, 310 (D.N.J. 2013) (quoting *Pickup v. Brown*, No. 2:12–cv–02497, 2012 WL 6024387, at *4 (E.D. Cal. Dec. 4, 2012)).

Plaintiffs also are incorrect that Equality Florida needs enforcement authority or responsibility over the Ordinance to intervene permissively. Dkt. 42 at 11–12. The Eleventh Circuit does not require "enforcement authority" for permissive intervention in defense of a challenged statute. *See Ga. Aquarium v. Pritzker*, 309 F.R.D. 680, 690–91 (N.D. Ga. 2014) (permitting intervention in challenges to regulation by entity with no enforcement authority or responsibility); *see also Nat'l Parks Conservation Ass'n v. U.S. Dep't of Interior*, No. 2:11–cv–578, 2012 WL 1432479, at *2–3 (M.D. Fla. Apr. 25, 2012) (same).

Plaintiffs misread two sentences from *Norris v. Detzner*, No. 3:15-cv-343, 2015 WL 12669919, *2 (N.D. Fla. Sept. 17, 2015), as support for this novel requirement. In *Norris*, various voting rights groups sought to intervene in a challenge to Florida's Fair District Amendments to advance the groups' interest in impeding partisan gerrymandering. *Id.* at *1 & n.1. But the district court noted that the case was "not a voting rights case" and would "not result in lifting any ban on partisan gerrymandering because that is not what Plaintiffs are requesting." *Id.* at *2. Thus, *Norris*'s rejection of the putative intervenors' commonality arguments had to do with the nature of the *suit*, not the nature of the intervenors themselves. Having enforcement authority over the challenged law would have given the intervenors a common defense in the suit. *Id.* at *2. But in the absence of that authority *and any other grounds* for a common question of law or fact, the voting rights groups lacked sufficient basis to intervene. *Id.*

Finally, Plaintiffs' points regarding adequacy of representation, Dkt. 42 at 14–15, are irrelevant in the permissive intervention context. *Compare* Fed. R. Civ. P. 24(a)(2) *with* 24(b). The same argument against permissive intervention was rejected in both prior challenges to conversion therapy bans. *See King v. Christie*, 981 F. Supp. 2d 296, 209 (D.N.J. 2013) ("the presence of overlapping interests between Garden State [Equality] and the State does not preclude permissive intervention"); *Pickup v. Brown*, No. 2:12–cv–02497, 2012 WL 6024387, at *4 (E.D. Cal. Dec. 4, 2012).

III. Equality Florida Possesses Independent Article III Standing

Even if Equality Florida were required to possess independent Article III standing to intervene permissively, it satisfies that burden. "To establish Article III standing, an injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty Int'l*, 568 U.S. 398, 409 (2013).

Plaintiffs repeatedly mischaracterize Equality Florida's interest as no more than general support for the Ordinance. As stated in the declaration of its executive director, Equality Florida is a membership organization that includes children who "face a realistic danger of suffering an injury" without the protection of the Ordinance. *See Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014) (discussing elements of organizational standing). Its interest is in fact the flip side of Plaintiffs' assertion of standing because they intend to practice conversion therapy on the City's minors immediately upon the lifting of the Ordinance's ban. *See* Dkt. 3 at 6.

CONCLUSION

For these reasons, Equality Florida respectfully requests that the Court permit it to intervene as a party defendant under Rule 24(b).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 22, 2018, the foregoing was electronically filed with the Clerk of Court by using the CM/ECF system, which will also send a notice of electronic filing to all counsel of record.

/s/ Sylvia Walbolt
Attorney