

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

SHARONELL FULTON, CECELIA
PAUL, TONI LYNN SIMMS-BUSCH,
and CATHOLIC SOCIAL SERVICES,

Plaintiffs,

v.

CITY OF PHILADELPHIA,
DEPARTMENT OF HUMAN
SERVICES FOR THE CITY OF
PHILADELPHIA, and
PHILADELPHIA COMMISSION ON
HUMAN RELATIONS,

Defendants.

Civil Action No. 18-2075

**RESPONSE TO PROPOSED INTERVENORS' MOTION
FOR RECONSIDERATION OF THE COURT'S ORDER
STAYING THE MOTION FOR LEAVE TO INTERVENE**

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INTRODUCTION

The Support Center for Child Advocates and Philadelphia Family Pride (collectively, “Advocates”) seek reconsideration of their motion to intervene in the District Court, but they present no additional arguments as to why intervention is warranted. Instead, they simply argue that this Court *might* have jurisdiction to make a ruling on their motion despite Plaintiffs’ appeal. This is an erroneous reading of Third Circuit law, and this Court has already chosen to continue its proceedings pending the Third Circuit’s review of Plaintiffs’ motion for a preliminary injunction. Reopening the proceedings to consider this motion is both unnecessary and a waste of judicial resources. Especially given the lack of any new arguments as to why this Court should grant Advocates’ motion, this Court’s prior decision to withhold a ruling “in deference to the appellate jurisdiction of the Third Circuit” should stand. Order Staying Motion to Intervene (July 18, 2018), Dkt. 59 at 2.

The current procedural posture of this case also means there is nothing Advocates could do at this time were their motion granted other than file a brief at the Third Circuit, which they can already do as *amicus*. Finally, were this Court to reconsider its prior decision, it should deny Advocates’ motion for the same reasons Plaintiffs previously articulated in their Memorandum. *See* Memorandum of Law in Opposition to Emergency Motion to Intervene (June 29, 2018), Dkt. 48.

STATEMENT OF THE LAW

Parties unrelated to ongoing litigation may only intervene as a matter of right if they can demonstrate “an interest relating to the property or transaction that is the subject of the action, and [are] so situated that disposing of the action may as a

practical matter impair or impede [their] ability to protect [their] interest, unless existing parties adequately represent that interest.” Fed. R. Civ. P. 24(a)(2).

Intervention is granted only if “(1) the application for intervention is timely; (2) the applicant has a sufficient interest in the litigation; (3) the interest may be affected or impaired, as a practical matter by the disposition of the action; and (4) the interest is not adequately represented by an existing party in the litigation.” *Wallach v. Eaton Corp.*, 837 F.3d 356, 372 n.18 (3d Cir. 2016). “[E]ach [element] must be met.” *Harris v. Pernsley*, 820 F.2d 592, 596 (3rd Cir. 1987).

Additionally, unrelated parties that cannot intervene as a matter of right may be granted permissive intervention only if they demonstrate “a claim or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b)(1)(B).

ARGUMENT

I. This Court does not have jurisdiction to consider Advocates’ Motion.

“As a general rule, the filing of a notice of appeal divests the district court of jurisdiction over the case pending disposition of the appeal.” *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 97 (3d Cir. 1988) (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam)). Thus, “[d]uring the pendency of the appeal the District Court retains only the limited authority to take any steps that

will assist the Court of Appeals in its determination.” *Sec. & Exch. Comm’n v. Inv’rs Sec. Corp.*, 560 F.2d 561, 568 (3d Cir. 1977).¹

The Third Circuit has also held that this rule applies to intervention motions. As the Court in *Investors Security Corporation* explained, “the district court had neither power nor permission to grant the Thompsons permission to intervene” while a Third Circuit appeal was pending. *Id.* As this Court also recognized when withholding judgment on Advocates’ original motion, “[d]ecisions in other courts . . . suggest that the filing of a notice of appeal divests the district court of jurisdiction to rule on a motion to intervene.” Order Staying Motion to Intervene (July 18, 2018), Dkt. 59 at 2 (citing *Doe v. Public Citizen*, 749 F.3d 246, 258-59 (4th Cir. 2014) (acknowledging that the “majority of . . . circuits that have confronted this issue have applied the general jurisdiction-stripping rule to hold that an effective notice of appeal deprives a district court of authority to entertain a motion to intervene[.]”); *Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 298 (5th Cir. 1984) (providing that “the district court in this case was without jurisdiction to rule on the motion to intervene . . . once [the appellant] filed his notice of appeal.”)).

Advocates make the strained argument that these cases are distinguishable because they deal with motions to intervene filed *after* the notice of appeal, as opposed to motions filed *before* the notice. This is a distinction without a difference. If

¹ Advocates make no argument as to why ruling on their motion would help the Court of Appeals in its determination of Plaintiffs’ preliminary injunction motion. To the extent Advocates wish to make their arguments make known to the Third Circuit, they are permitted to file a brief with the Third Circuit as *amicus*.

jurisdiction is stripped by the filing of a notice of appeal, the timing of the intervention motion is irrelevant to the District Court's authority to rule on it. *See Inv'rs Sec. Corp.*, 560 F.2d at 568 (“[f]iling of a notice of appeal immediately transfers jurisdiction of a case from the District Court to the Court of Appeals.”) (citing *Hovey v. McDonald*, 109 U.S. 150, 157 (1883); *Plant Economy, Inc. v. Mirror Insulation Co.*, 308 F.2d 275, 276-77 (3d Cir. 1962)). Nor have Advocates pointed to a case relying on this alleged difference.

II. This Court has continued proceedings and thus need not rule on Advocates' Intervention Motion.

Per this Court's July 26, 2018 order, proceedings have been continued until further order due to Plaintiffs' appeal, which has “divest[ed] this Court of jurisdiction to decide Plaintiffs' claims set forth in their Complaint.” Order Continuing Proceedings (July 26, 2018), Dkt. 64 at 1. As this Court further explained, “[u]ntil the Third Circuit decides the matter on appeal, this Court may not reach the merits of this case.” *Id.* Accordingly, even *were* this Court to have jurisdiction over Advocates' motion, there is no reason to rule on the intervention question now as this case has been continued until further order. As mentioned above, there are no proceedings in which Advocates could even currently participate.

Advocates have also already provided testimony for the record—in the form of their executive director's testimony at the hearing—and they have presented both oral argument and briefing to this Court. At the Third Circuit, their testimony will be available to the court, and they can file an *amicus* brief. There is nothing further for them to do on appeal. Therefore, there is no immediate need to determine whether

intervention is appropriate. Any determination can be made *after* the pending appeal is completed.

III. Advocates have no interest in this litigation and will not be affected by the outcome.

Were this Court to reconsider Advocates' motion on the merits, their motion should be denied for the reasons previously articulated by Plaintiffs. *See* Memorandum of Law in Opposition to Emergency Motion to Intervene (June 29, 2018), Dkt. 48.

Advocates have no interest in this litigation, can identify no same-sex couple—much less a same-sex couple affiliated with their organizations—who has ever been negatively impacted by Catholic Social Services' ("Catholic") foster care program, and will continue their own work uninterrupted no matter how this Court rules. Advocates warn that preserving the status quo and allowing Catholic to serve the community in accordance with its beliefs will have harmful consequences, but Advocates have not articulated a single harm caused by maintaining the status quo that has been in place for over 50 years.

Even if Advocates had an interest in this litigation, that interest would be adequately represented by the City of Philadelphia. In fact, the positions taken by Advocates and the City are so perfectly aligned that the City selected the executive director of Support Center for Child Advocates as its sole expert witness called to articulate the City's theory of harm in this case.² Thus, to the extent Advocates have

² Transcript of Preliminary Injunction Hearing ("Tr."), Day 3, Cervone, pg. 153.

even a conceivable interest in this case, they cannot demonstrate any meaningful way in which this interest is distinguishable from that of the City.

Advocates should also be denied permissive intervention under Federal Rule of Civil Procedure 24(b), because they have no claim or defense that “shares . . . a common question of law or fact” with the City. Fed. R. Civ. P. 24(b).

Thus, were the Court to consider Advocates’ motion on the merits, it should be denied. For these same reasons, Advocates’ request that this Court make an indicative ruling should also be denied—it would require this Court to assess on the merits Advocates’ motion in the face of this Court’s order continuing proceedings pending appellate resolution of this Court’s denial of a preliminary injunction. There is no need for this Court to act on Advocates’ motion at this time.

CONCLUSION

For the foregoing reasons, this Court should deny Advocates’ Motion to Reconsider this Court’s prior order staying Advocates’ Motion to Intervene.

Dated: July 30, 2018

Respectfully submitted,

/s/ Lori H. Windham

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of July, 2018, the foregoing document was filed pursuant to the Court's electronic filing procedures using the Court's CM/ECF system.

/s/ Lori H. Windham
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