

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MARCIE FISHER-BORNE, for)	
herself and as guardian <u>ad</u>)	
<u>litem</u> for M.F.-B., a minor,)	
et al.,)	
)	
Plaintiffs,)	
)	
v.)	1:12CV589
)	
JOHN W. SMITH, in his official)	
Capacity as the Director of the)	
North Carolina Administrative)	
Office of the Courts, et al.,)	
)	
Defendants.)	
)	
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ELLEN W. GERBER, et al.,)	
)	
Plaintiffs,)	
)	
v.)	1:14CV299
)	
ROY COOPER, et al.,)	
)	
Defendants.)	

ORDER

Presently before this court is a motion to intervene by two parties, Thom Tillis, Speaker of the North Carolina House of Representatives, and Phil Berger, President Pro Tempore of the North Carolina Senate (collectively "Movants"). (1:12CV589 (Doc. 119); 1:14CV299 (Doc. 75).) Although the named parties in each of these two cases have not yet responded, the moving

intervenors have candidly made almost all opposing parties' positions known to this court: (1) Plaintiffs object; (2) the Durham and Guilford County Registers of Deed neither consent or oppose; and (3) the Defendant Attorney General has not responded. (See 1:14CV299 (Doc. 75) at 2.) For the reasons set forth herein, this court directs that Plaintiffs in each of these cases and the North Carolina Attorney General file responses to the motion to intervene as directed herein.

Movants claim inadequate representation in part because the Attorney General did not plan to "distinguish Bostic on the grounds that outcome-determinative concessions made by the Attorney General of Virginia in that case have not been made by North Carolina in these cases." (1:14CV299, Proposed Defendant-Intervenors' Mem. of Law in Supp. of Mot. for Intervention ("Intervenors' Mem.") (Doc. 76) at 15.)¹ The North Carolina statutory and constitutional provisions at issue in the cases before this court are notably similar to the Virginia statutory and constitutional provisions deemed unconstitutional in Bostic. See Bostic v. Schaefer, 760 F.3d 352, 367 n.1 (4th Cir. 2014). Though Movants' claims may ultimately be correct, this court

¹ All citations in this Order to documents filed with the court refer to the page numbers located at the bottom right-hand corner of the documents as they appear on CM/ECF.

does not have the authority to disregard Bostic. Bostic is binding precedent on this court and, for reasons which will be explained later in a separate opinion, controls the decision in this case.

Specifically with respect to the issue of whether intervention should be allowed, Movants argue:

In the event that this Court determines that Bostic nevertheless controls these North Carolina cases, Proposed Defendant-Intervenors will seek to preserve the issue of the constitutionality of North Carolina's marriage laws for purposes of appeal to the Fourth Circuit, the Fourth Circuit sitting en banc, and ultimately to the Supreme Court if necessary.

(Intervenors' Mem. (Doc. 76) at 7-8.)

Movants later argue:

Even if this Court determines that Bostic is nevertheless binding despite its reliance on concessions made in that case that have not been made here, preserving the significant issues at issue in this case for ultimate appeal to the Supreme Court is itself grounds for granting the motion to intervene, since the Attorney General appears to have determined not to file any appeal from an adverse judgment.

(Id. at 17.)

In their proposed answer (1:14CV299, Defendants-Intervenors' Answer and Defenses ("Intervenors' Answer") (Doc. 81)), Movants cite a recent development in the Supreme Court, that is, an "order by Justice Kennedy staying a Ninth Circuit decision invalidating Idaho's marriage law after subjecting it

to strict scrutiny, Otter v. Latta, [No. 14A374, 2014 WL 4996356] (October 8, 2014) (Kennedy, J.).” (Intervenors’ Answer (Doc. 81) at 7.) While such an order is not precedent or controlling authority overruling Bostic, the Supreme Court has stated that a Circuit Justice’s obligation in considering a stay application under 28 U.S.C. § 2101(f) and Rule 44 of the Court is “to determine whether four Justices would vote to grant certiorari, to balance the so-called ‘stay equities,’ and to give some consideration as to predicting the final outcome of the case in this Court.” Gregory-Portland Indep. Sch. Dist. v. United States, 448 U.S. 1342 (1980). If that standard is correct, it is not clear at this point what review, if any, the Court may ultimately conduct with respect to the marriage rights at issue in this case or the likelihood of such a development. Nevertheless, it is a factor this court has considered in relation to Movants’ motion.

As a result, this court directs that Plaintiffs in each of these cases and the North Carolina Attorney General respond to the motion to intervene by addressing the following questions:

1. While Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014) constitutes controlling precedent in this circuit, it may not constitute a waiver of, or the conclusion of, any appeal rights

of the State of North Carolina to challenge the opinion at least as to a petition to the Supreme Court. Has the State of North Carolina, through concessions and admissions made in its Answer, waived or otherwise abandoned any right to appeal to the Court of Appeals for the Fourth Circuit for en banc review or to the Supreme Court of the United States?

2. In the event the State of North Carolina has waived any further appellate review of a final ruling from this court in light of Bostic, are Movants adequately represented by the North Carolina Attorney General in this case? This court recognizes that decisions as to whether to appeal an adverse ruling to a higher court may be discretionary with a state's representative in some instances, however, this court requests that this question be responded to in light of the issues and circumstances presently pending.

3. Both Plaintiffs and the North Carolina Attorney General may address any other issues with respect to the motion to intervene as they believe appropriate; however, all parties should be aware that no further briefing as to whether Bostic is controlling precedent is necessary.

In light of the pending matters and the late timing of these issues, this court directs that these responsive briefs be

filed no later than Monday, October 13, 2014, at 3:00 p.m. The parties are free to file those responses before that time, and this court will review any responses as they are filed.

No reply will be permitted unless ordered by this court. These briefs shall be limited to the length of a response to a motion as permitted by the applicable rules.

Movants have also filed a motion requesting oral argument in this court. (1:14CV299 (Doc. 82); 1:12CV589 (Doc. 126).) At present, this court finds no reason that oral argument would aid this court in the decisional process, and the motion for oral argument is hereby denied.

The parties are advised that this court will proceed to ruling on an order on the motion to intervene and a final order as soon as reasonably possible following receipt of the briefs from Plaintiffs and the State of North Carolina. Movants should not anticipate a lengthy proceeding in this court in light of the applicability of Bostic and these cases will not be delayed unnecessarily.

IT IS HEREBY ORDERED that Movants' Request for Oral Argument on Motions for Intervention (1:14CV299 (Doc. 82); 1:12CV589 (Doc. 126)) is **DENIED**.

IT IS SO ORDERED.

This the 10th day of October, 2014.

William L. Ostun, Jr.

United States District Judge