No. 2014-2184

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

ADA MERCEDES CONDE-VIDAL; MARITZA LOPEZ-AVILES; IRIS DELIA RIVERA-RIVERA; JOSE A. TORRUELLAS-IGLESIAS; THOMAS J. ROBINSON; ZULMA OLIVERAS-VEGA; YOLANDA ARROYO-PIZARRO; JOHANNE VELEZ-GARCIA; FAVIOLA MELENDEZ-RODRIGUEZ; PUERTO RICO PARA TOD@S; IVONNE ALVAREZ-VELEZ,

Plaintiffs-Appellants,

v.

DR. ANA RIUS-ARMENDARIZ, in her official capacity as Secretary of the Health Department of the Commonwealth of Puerto Rico; WANDA LLOVET DIAZ, in her official capacity as the Director of the Commonwealth of Puerto Rico Registrar of Vital Records; ALEJANDRO J. GARCIA-PADILLA, in his official capacity as Governor of the Commonwealth of Puerto Rico; JUAN C. ZARAGOSA-GOMEZ, in his official capacity as Director of the Treasury in Puerto Rico,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Puerto Rico in Case No. 3:14-cv-01253, Judge Juan M. Pérez-Giménez

PLAINTIFFS-APPELLANTS' OPPOSITION TO MOTION FOR LEAVE TO INTERVENE AS DEFENDANTS-APPELLEES FOR PURPOSES OF APPEAL

April 27, 2015

Plaintiffs-Appellants seek to vindicate their rights to be married, as protected by the Fourteenth Amendment's guarantees of liberty and equality. Defendants-Appellees are the government officials authorized to execute and enforce Puerto Rico's marriage laws, who, in keeping with the Commonwealth's "strong interest in guaranteeing the equal protection of the law to all persons," have determined that they no longer can defend the constitutionality of the Marriage Ban. Appellees' Br. at 6. Even so, they continue to enforce it. The individuals who now seek to intervene in this appeal (hereinafter "Movants") disagree with the Commonwealth and support continuing the Marriage Ban's discrimination against LGBT Puerto Ricans. Their motion for leave to intervene as Defendants-Appellees should be denied for the reasons set forth below.

Movants, who are members of the Puerto Rico Legislative Assembly seeking to appear in their individual capacities, have no direct, real, or substantial interests in this matter, and assert no particularized harm they would suffer if Puerto Rico's Marriage Ban were held unconstitutional. Movants have no authority or standing to intervene in this matter, and their generalized interest in defending the constitutionality of the Marriage Ban is a wholly insufficient basis for allowing intervention. *See Pub. Serv. Co. of N.H. v. Patch*, 136 F.3d 197, 205 (1st Cir. 1998). Movants' ability to express their views on the floor of the legislature does not render them proper parties before this Court.

Movants fail to meet the criteria set forth in Federal Rule of Civil Procedure 24 for either intervention as of right or permissive intervention, they cannot meet the basic requirements of Article III standing, and they failed to comply with the procedural requirements for intervention. Their motion for leave to intervene should be denied.

ARGUMENT

I. MOVANTS CANNOT MEET THE REQUIREMENTS FOR INTERVENTION AS OF RIGHT.

Movants seek to intervene as of right under Rule 24(a)(2) and accordingly must "meet[] four conditions." *Conservation Law Found., Inc. v. Mosbacher*, 966 F.2d 39, 41 (1st Cir. 1992).[1] They must show: "(i) the timeliness of [their] motion to intervene; (ii) the existence of an interest relating to the property or transaction that forms the basis of the pending action; (iii) a realistic threat that the disposition of the action will impede [their] ability to protect that interest; and (iv) the lack of adequate representation of [their] position by any existing party." *R&G Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 584 F.3d 1, 7 (1st Cir. 2009); *see also Mosbacher*, 966 F.2d at 41. Because Movants fail to fulfill all four of these preconditions, their motion to intervene must be denied.

[1] Although no Federal Rule of Appellate Procedure addresses intervention, "the policies underlying intervention [per Fed. R. Civ. P. 24] may be applicable in appellate courts." *Int'l Union v. Scofield*, 382 U.S. 205, 216 n.10 (1965).

A. Movants Do Not Have A Protectable Interest At Stake In This Case.

Most critically, Movants have no interest that is "direct and 'significantly protectable.'" *Ungar v. Arafat*, 634 F.3d 46, 51 (1st Cir. 2011) (quoting *Donaldson v. United States*, 400 U.S. 517, 531 (1971)). Movants are in no way "distinct from the ordinary run of citizens," *Daggett v. Comm'n on Gov't Ethics & Elec. Practices*, 172 F.3d 104, 110 (1st Cir. 1999), and offer only "an undifferentiated, generalized interest in the outcome . . . [that] is too porous a foundation on which to premise intervention as of right." *Patch*, 136 F.3d at 205.

Movants are a small group of members of the Puerto Rico Legislative Assembly, all of whom seek to intervene in their individual capacities. Motion for Leave to Intervene ("Int. Mot.") at 4. They argue that they, "as duly elected officials[,] have plenary authority to regulate the institution of marriage in this State," *id*. at 7, and allege an interest "in the Commonwealth's laws and policy making through a democratic process." Br. in Support of Mot. to Intervene ("Int. Br.") at 7. They attempt to advance interests on behalf of the Legislature as a whole "as the State's legislative body, and as the author of the challenged laws, to ensure that the State's marriage laws are adequately defended when challenged in court," arguing that if they are not allowed to intervene, "the legislature's ability to protect its significant interests in the subject of this action will be impeded." Int. Mot. at 7; *see also* Int. Br. at 6 ("Movants have a strong interest in defending the

constitutionality of its legislative handiwork codified in" the Marriage Ban). Yet, as described below, none of Movants' purported interests are sufficiently concrete, direct, or specific to warrant their intervention here.

Movants suggest that this Court's consideration of the Marriage Ban's constitutionality somehow undermines their authority as elected legislative officials to regulate marriage through the enactment of the Ban. This argument is fatally flawed.

First, Movants, in their individual capacities, are not authorized to advance the interests of the Legislature as a whole before the court. In *Karcher v. May*, the Supreme Court differentiated between a state's legislative leaders' intervention "in their official capacities as presiding officers on behalf of the legislature" and intervention "in their other individual and professional capacities." 484 U.S. 72, 78 (1987). Once the legislative leaders no longer held those positions, they could no longer represent the interests of the legislature. *Id.* at 77, 81. Likewise, in *INS v. Chadha*, 462 U.S. 919 (1983), it was Congress as a whole that intervened to defend a measure, and only because "both Houses, by resolution, had authorized intervention in the lawsuit." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 n.20 (1997).

Here, Movants cannot claim to speak for the Commonwealth's House of Representatives or the Senate, let alone the whole Legislative Assembly. As they

note, several of their legislative colleagues, including the Commonwealth's Senate President, have filed an *amicus curiae* brief in support of Plaintiffs-Appellants. *See* Int. Mot. at 7; *see also* Mot. by Commonwealth Senators for Leave to File as *Amici Curiae* in Support of Appellants. Movants cite no authorization from either legislative body to represent its interests. As individuals, Movants' interests are no different than those of "the public at large and thus provide no basis for suit" or to support intervention. *Raines v. Byrd*, 521 U.S. 811, 832 (1997) (Souter, J., concurring).

More specifically, even if, *arguendo*, it were possible to state a judicially cognizable legislative injury from Executive failure to defend a statute, any legislative interest in the constitutionality of the law at issue would belong to the entire Legislative Assembly, not just a few legislators acting on their own. Movants ignore well established law that individual legislators lack a sufficient interest to intervene to defend a law's constitutionality. *See*, *e.g.*, *Raines*, 521 U.S. at 821, 830 ("[I]ndividual members of Congress do not have a sufficient 'personal stake' in this dispute [over the constitutionality of an Act of Congress] and have not alleged a sufficiently concrete injury" to have standing notwithstanding their claim that "the Act causes a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress."); *Tarsney v. O'Keefe*, 225 F.3d 929, 939 (8th Cir. 2000) ("The general rule is that

when a court declares an act of the state legislature to be unconstitutional, individual legislators who voted for the enactment have no standing to intervene.") (quotation omitted); *Planned Parenthood v. Ehlmann*, 137 F.3d 573, 577-78 (8th Cir. 1998) (disagreement with Attorney General's litigation position regarding constitutional challenge to state abortion law did not give individual legislators who voted for the law a sufficient interest to intervene); *Korioth v. Briscoe*, 523 F.2d 1271, 1278 (5th Cir. 1975) (rejecting argument that "a legislator, simply by virtue of that status, has some special right to invoke judicial consideration of the validity of a statute").[2]

Puerto Rico law provides no authority to members of the legislature to intervene to defend the constitutionality of the Commonwealth's laws. On the contrary, the authority and discretion to decide whether to defend the constitutionality of Puerto Rico's laws is expressly granted to the Executive Branch. *See, e.g.*, 3 L.P.R.A. § 1 (Governor "*may* direct the Secretary of Justice to appear on behalf of the Government of Puerto Rico" in event of constitutional

[2] To be sure, as previously noted, the Supreme Court has recognized the ability of a *legislature* to intervene to defend the constitutionality of a law but only when such intervention is *expressly authorized under state law*. *See, e.g.*, *Karcher*, 484 U.S. at 82 ("Speaker of the General Assembly and the President of the Senate [were permitted] to intervene as parties-respondent on behalf of the legislature in defense of a legislative enactment" only because "the New Jersey Legislature had *authority under state law* to represent the State's interests." (emphasis added)); *cf. Arizonans for Official English*, 520 U.S. at 65 (state legislators may "have standing

challenge to a Puerto Rico law (emphasis added)); 32A L.P.R.A. App. III, Rule 21.3 (requiring notice to Secretary of Justice when constitutionality of Puerto Rico's laws is at issue in an action where the Commonwealth is not a party). Indeed, the Puerto Rico Supreme Court has expressly recognized that the power to defend (or decline to defend) the constitutionality of the Commonwealth's laws belongs solely to the Executive Branch, stating plainly, "[e]ven in cases questioning the constitutionality of a statute, it is the Executive Power, through the Secretary of Justice, who intervenes in the process . . . There is no legal provision at present that expressly grants such authority to the Legislative Assembly." *Pueblo v. Gonzalez Malave*, 1985 JTS 58, 16 P.R. Offic. Trans. 708, 715-16 (1985).[3]

Lastly, none of the proposed intervenors was serving in the legislature at the time of the passage of the Marriage Ban.[4] To the extent they are attempting to

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to contest a decision holding a state statute unconstitutional" only "if *state law authorizes* legislators to represent the State's interests" (emphasis added)).

[3] Given this delegation of express executive authority, Movants' suggestion that their intervention as legislators is important to maintain the separation of powers is both ironic and illogical. Int. Mot. at 8. *See* Part II, *infra*.

[4] *See* Comisión Estatal de Elecciones de Puerto Rico (State Elections Commission of Puerto Rico), *Escrutinio Elecciones Generales 1996: Candidatos Electos* (*General Election Results 1996: Elected Candidates*), *available at* http://209.68.12.238/elecciones1996/escrutinio/electos.html#ADICIONALES (last visited Apr. 21, 2015).

assert that the votes of those legislators who enacted the Marriage Ban are being undermined or nullified, they lack standing to do so.[5]

In sum, Movants fail to articulate a single direct interest that justifies their intervention. They are "parties who are merely interested in the outcome of a case [and] do not automatically qualify for intervention as of right under Rule 24(a)(2)." *Patch*, 136 F.3d at 210.

B. The "Interests" Identified By Movants Are Not Threatened By This Case.

Moreover, Movants' alleged interests in regulating marriage are in no way harmed by the outcome of this case. *Compare Daggett*, 172 F.3d at 110 (intervention proper where "applicants' interests would be adversely affected if the present suit were lost by the defendants"). Both chambers of the Legislative Assembly voted on the Marriage Ban, and it was signed into law by the Governor. Regardless of the outcome of this case, the authority of legislators to engage in the ordinary legislative processes – including those governing domestic relations – remains intact. This Court's review of the Ban's constitutionality in no way alters the ability of legislators to participate in those processes—the outcomes of which

[5] Even those legislators who served in the legislature at the time and voted for the Marriage Ban would be precluded from intervening solely on that basis. *See, e.g.*, *Harrington v. Schlesinger*, 528 F.2d 455, 459 (4th Cir. 1975) ("Once a bill has become a law, however, their interest is indistinguishable from that of any other citizen. They cannot claim dilution of their legislative voting power because the legislation they favored became law.").

are properly subject to judicial review. *See United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013) ("State laws defining and regulating marriage, of course, must respect the constitutional rights of persons."); *Figueroa Ferrer v. E.L.A.*, 107 D.P.R. 250, 7 P.R. Offic. Trans. 278, 303 (1978) ("The Legislature may erect reasonable safeguards to adequately defend family stability, as long as it does not violate the rights protected by [the P.R. Constitution];" it is the job of the courts "under the Constitution to protect the right to privacy of the citizens of this country in the area of family relations"). *Cf. Largess v. Supreme Jud. Ct.*, 373 F.3d 219, 229 (1st Cir. 2004) (rejecting legislators' challenge to state court ruling on marriage ban, recognizing proper role of judicial branch).

As in *Patch*, Movants' participation in legislative processes to regulate marriage is not in jeopardy. The issue before the Court is not an attack on the process resulting in the Marriage Ban, "but, rather, [the Complaint] pleads causes of action that will require the . . . [C]ourt to measure [the Ban] against . . . constitutional benchmarks." 136 F.3d at 206. Movants' assertion of "substantial burdens on the legislature," Int. Mot. at 8, is baseless. A conclusion by this Court that the Marriage Ban is unconstitutional will have no effect on Movants' future ability to carry out their roles as legislators in considering permissible legislation affecting marriage.

C. To The Extent Movants Seek To Represent The Interests Of The Commonwealth, Such Interests Are Adequately Represented.

As noted *supra*, Movants have no authority to represent the interests of the Commonwealth. That power is expressly and solely granted to the Commonwealth's Executive Branch. *See* 3 L.P.R.A. § 1; 3 L.P.R.A. § 292a (Secretary of Justice "is the legal counsel of the Commonwealth, its agencies, and the People of Puerto Rico in civil, criminal, administrative and special suits and proceedings to which it is a party or which are brought before the courts or other forums in or outside of Puerto Rico."). Specifically, the Secretary of Justice is charged with determining when constitutional questions regarding Puerto Rico laws present public policy issues affecting the public interest. *See* 3 L.P.R.A. § 292e ("The Secretary is hereby empowered . . . to determine the matters that shall constitute public policy issues from the legal standpoint.").

Even if, *arguendo*, Movants could claim to directly represent the interests of the Commonwealth, those interests are adequately represented by Appellees.[6] Appellees continue to represent those interests in ultimately concluding that the Ban is unconstitutional in the face of a dramatically changed legal landscape. As they stated, the interests of the Commonwealth include "guaranteeing the equal protection of the law to all persons" and "eliminating all forms of discrimination

and unequal legal treatment within the Commonwealth's borders." Appellees' Br. 6-7. They further recognized that there are no interests the Commonwealth could advance to justify the discriminatory treatment of LGBT Puerto Ricans embodied in the Marriage Ban. Appellees' Br. 7, 37.

Despite these conclusions, Appellees nonetheless remain parties to this appeal, and continue to enforce the Marriage Ban. As Appellees noted in their brief, the district court's decision remains in effect, and this Court must determine that the court below erred for Plaintiffs to obtain relief. Appellees' Br. 39. Appellees' continuing role precludes the need for Movants' intervention on the Commonwealth's behalf, even if they had the authority to do so.[7]

Movants thus fail to meet the requirements for intervention as of right.[8]

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[6] Where the proposed intervenors' standing to represent the interests of the Commonwealth is so attenuated, their claim of inadequacy is similarly diluted. *See Maine v. Dir., U.S. Fish & Wildlife Serv.*, 262 F.3d 13, 21 (1st Cir. 2001).

[7] That Defendants continue to exclude Plaintiffs from marriage also means that there remains a live case or controversy between the parties. *See, e.g.*, *Windsor*, 133 S. Ct. at 2686 ("Windsor's ongoing claim for funds that the United States refuses to pay thus establishes a controversy sufficient for Article III jurisdiction."); *Chadha*, 462 U.S. at 939 ("INS's agreement with the Court of Appeals' decision that § 244(c)(2) is unconstitutional does not affect that agency's 'aggrieved' status for purposes of appealing that decision").

[8] Movants' motion also fails the requirement of timeliness. Movants point to the filing of the Appellees' brief on March 20, 2015 as prompting their desire to intervene. Int. Mot. at 5; Int. Br. at 6. Rather than immediately seeking to do so, however, Movants instead moved to file an *amicus* brief, *see* Mot. by Eight Senators and Four Representatives for Leave to File *Amicus* Br. in Support of Affirmance, which was denied without prejudice on March 30, 2015, for failure to

II. MOVANTS DO NOT HAVE STANDING TO DEFEND PUERTO RICO'S MARRIAGE BAN.

Not only do Movants lack a sufficient interest to support intervention, but they lack any injury that would grant them Article III standing. Though the First Circuit has not addressed the question directly, other circuit courts have found that the interest articulated for intervention must also satisfy the Article III standing requirement. *See, e.g.*, *Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996) ("a would-be intervenor, because he seeks to participate as a party, must have standing as well"); *Bldg. & Constr. Trades Dep't v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994) ("because an intervenor participates on equal footing with the original parties to a suit, a movant for leave to intervene under Rule 24(a)(2) must satisfy the same Article III standing requirements as original parties"); *United States v. 36.96 Acres of Land*, 754 F.2d 855, 859 (7th Cir. 1985) ("interest of a proposed intervenor … must be greater than the interest sufficient to satisfy the standing

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tender a proposed brief. Order of the Court, No. 14-2184 (Mar. 30, 2015) (Doc. 00116817315). Rather than curing their error or seeking intervention at that time, Movants waited an additional two weeks, after the close of briefing in this matter, before filing their motion to intervene. Movants plainly were aware of their alleged jeopardy, and failed to act reasonably promptly. *See Banco Popular de P.R. v. Greenblatt*, 964 F.2d 1227, 1231 (1st Cir. 1992). Allowing Movants to intervene and reopen and elongate the briefing in this matter would cause prejudice to the Plaintiffs by delaying the vindication of their constitutional rights, which continue to be injured by the Marriage Ban. *See Culbreath v. Dukakis*, 630 F.2d 15, 22 (1st Cir. 1980) (finding prejudice where intervention would mean that "opportunities to rectify the wrongs of which the plaintiffs complain are unrealized" and would delay the relief sought).

requirement"); *cf. Cotter v. Mass. Ass'n of Minority Law Enforcement Officers*, 219 F.3d 31, 34 (1st Cir. 2000) ("[I]n the ordinary case, an applicant who satisfies the 'interest' requirement of the intervention rule is almost always going to have a sufficient stake in the controversy to satisfy Article III as well."). Here, Movants have "no 'direct stake' in the outcome of the[] appeal. Their only interest . . . [is] to vindicate the constitutional validity of a generally applicable [Puerto Rico] law." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013). This generalized interest, indistinct from that of every other citizen, cannot give rise to standing. *Daggett*, 172 F.3d at 110.

That Movants are members of the Legislature does not change the calculus. First, even had Movants actually voted for the Marriage Ban, once it became law, Movants "have no role—special or otherwise—in the enforcement of" the Marriage Ban. *Perry*, 133 S. Ct. at 2663. As discussed in Part I.A, *supra*, it is well established that individual legislators like Movants have no standing to defend the constitutionality of enacted laws. *See also, e.g.*, *Russell v. DeJongh*, 491 F.3d 130,135 (3rd Cir. 2007) ("[O]nce a bill has become law, a legislator's interest in seeing that the law is followed is no different from a private citizen's general interest in proper government."); *Chiles v. Thornburgh*, 865 F.2d 1197, 1205-06 (11th Cir. 1989) (same).

Second, as discussed in Part I, *supra*, Movants have no authority to represent either the Legislature's or the Commonwealth's interests.[9] Movants' assertion that this action threatens the Legislature's ability to regulate domestic relations cannot create standing for individual legislators. As the Supreme Court held in *Raines*, individual legislators "do not have a sufficient 'personal stake'" or "sufficiently concrete injury" where they have not been authorized to represent their legislative bodies and where they allege "wholly abstract and widely dispersed" institutional injury. 521 U.S. at 829-30.[10]

The fact that Movants disagree with the Commonwealth's stance that the Marriage Ban is unconstitutional does not grant them standing. An "assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 483 (1982).

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[9] As the Supreme Court noted in *Perry*, "[i]t is, however, a 'fundamental restriction on our authority' that '[i]n the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.'" 133 S. Ct. at 2663 (quoting *Powers v. Ohio*, 499 U. S. 400, 410 (1991)).

[10] *See also id.* at 829 n.10 (quoting *U.S. v. Ballin*, 144 U.S. 1, 7 (1892): "The two houses of Congress are legislative bodies representing larger constituencies. Power is not vested in any one individual, but in the aggregate of the members who compose the body, and its action is not the action of any separate member or number of members, but the action of the body as a whole.").

Furthermore, Movants' reliance on *Chadha*, 462 U.S. 919, is wholly misplaced. Even if Movants appeared as representatives of the Legislature rather than as individuals, legislative bodies do not automatically have standing to defend the constitutionality of enacted statutes absent some specific authority or injury to their legislative prerogatives. *See supra*. *Chadha*'s holding that Congress could intervene to defend the constitutionality of § 244(c)(2) turned on the fact that both houses of Congress specifically authorized such intervention. 462 U.S. at 930 n.5. And unlike this case, the legal injury asserted in *Chadha* went well beyond a generic, broadly held interest in the constitutionality of laws. *Chadha* involved Congress's effort to defend the "allocation of authority within the government, as opposed to action applying that authority to the behavior of the citizenry in general." *Newdow v. U.S. Cong.*, 313 F.3d 495, 498 (9th Cir. 2002). By contrast, a legislative body does not have "a roving commission to enter every case involving the constitutionality of statutes it has enacted. . . . A public law, after enactment is not the [legislative body's] any more than it is the law of any other citizen or group of citizens." *Id.* at 499.

Moreover, granting standing to Movants would undermine the basic constitutional structure separating the making of laws from the execution of them, while allowing the judiciary to mediate inter-branch disputes. The question of standing is deeply connected to the "tripartite" structure of our constitutional

government. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (quotation marks and citations omitted). *See also Allen v. Wright*, 468 U.S. 737, 752 (1984) ("[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers."). "[O]nce [the Legislature] makes its choice in enacting legislation, its participation ends." *Bowsher v. Synar*, 478 U.S. 714, 733 (1986). Neither the Legislature nor Movants have judicially cognizable interests in the "execution" of laws. *Id.* at 734. Indeed, absent injury to their legislative prerogatives, our constitutional structure counsels against Movants' standing.

In short, each Movant is "[a] litigant 'raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large,'" and therefore does have Article III standing. *Perry*, 133 S. Ct. at 2662 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-574 (1992)).

III. MOVANTS DO NOT SATISFY THE REQUISITE CONSIDERATIONS FOR PERMISSIVE INTERVENTION.

Like their request for intervention as of right, Movants' request for permissive intervention should be denied. Rule 24(b) provides that, "[o]n timely motion, the court may permit anyone to intervene who . . . 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)(B). "In exercising its discretion, the court must consider whether the

intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Here, Movants possess neither the requisite claim nor defense required by Rule 24(b) and their intervention would cause substantial prejudice to Plaintiffs' interests. Their request should be rejected.

Movants assert that their "defense shares a common question of law with Plaintiffs' claims—namely, whether Puerto Rico's Marriage Law violates the United States Constitution." Int. Br. at 12. But Movants' opinions on whether the Marriage Ban unconstitutionally discriminates against LGBT people in Puerto Rico do not present any claim or defense that would support their intervention. Although permissive intervention does not require the same level of direct personal interest in the subject of the case as intervention as of right, Movants must still be able to articulate an "actual, present interest that would permit [them] to sue or be sued by [Plaintiffs-Appellants], or the [Commonwealth of Puerto Rico], or anyone else, in an action sharing common questions of law or fact with those at issue in this litigation." *Diamond v. Charles*, 476 U.S. 54, 77 (1986) (O'Connor, J., concurring). Because Movants' cannot elevate an abstract, generalized interest in the Ban's constitutionality into Article III standing, *Diamond*, 476 U.S. at 66-67, Movants have no direct interest in or standing to defend the Marriage Ban, and therefore should not be permitted to intervene. *See also* Part I.A-B, *supra*.

Furthermore, to allow Movants' untimely request to become intervenors in this case after the briefing for the appeal has been completed would cause substantial prejudice and detrimental delay for Plaintiffs by delaying the vindication of their constitutional rights, which continue to be injured by the Marriage Ban. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (loss of constitutional freedoms "for even minimal periods of time, unquestionably constitutes irreparable injury"). Movants' request for permissive intervention should be denied.

IV. MOVANTS FAILED TO COMPLY WITH RULE 24(C).

Finally, because "[a] motion to intervene must be made in a procedurally proper manner," *Cadle Co. v. Schlictmann, Conway, Crowley & Hugo*, 338 F.3d 19, 21 (1st Cir. 2003), Movants' motion should be rejected for failure to comply with the procedural requirements of Federal Rule of Civil Procedure 24(c). Rule 24(c) requires that "[t]he motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Rather than setting forth the claims Movants intend to make, the brief accompanying their motion simply reiterated their arguments for permitting intervention.[11] Movants' stated intentions to "ensur[e] that the critical constitutional questions presented in this case are properly defended," Int. Mot. at

[11] Movants' separately-filed brief also violates Federal Rule of Appellate Procedure 27(a)(2)(C)(i), which clearly states that "[a] separate brief supporting …

5, and to "properly defend the Puerto Rico's [*sic*] marriage law," *id*. at 6, fail to meet Rule 24(c)'s requirement "that the intervenor state a well-pleaded claim or defense to the action." *R.I. Fed. of Teachers v. Norberg*, 630 F.2d 850, 854 (1st Cir. 1980). Movants offer no legal theory or defense of the Marriage Ban at all, instead asserting throughout their motion and brief their purported authority and intention to do so at some later point. Their motion should be rejected.

CONCLUSION

For these reasons, Plaintiffs-Appellants respectfully request that this Court deny Movants' Motion for Leave to Intervene as Defendants-Appellees.[12]

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a motion must not be filed," and effectively allowed Movants to surpass the page limits for motions set forth in Federal Rule of Appellate Procedure 27(d)(2).

[12] In lieu of intervention, Plaintiffs do not oppose Movants' late participation as *amici curiae*. *See Daggett*, 172 F.3d at 113 (recognizing *amicus* brief as an alternate means to intervention). Plaintiffs would request the same opportunity and timeframe to respond to arguments raised therein that the Court allowed in granting the similar motion of the Conference for Catholic Bishops of Puerto Rico. Order of the Court, No. 14-2184 (Apr. 10, 2015) (Doc. 00116822137).

April 27, 2015

Respectfully submitted,

/s/ Karen L. Loewy

FELICIA H. ELLSWORTH
MARK C. FLEMING
RACHEL I. GURVICH
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
Felicia.Ellsworth@wilmerhale.com
Mark.Fleming@wilmerhale.com
Rachel.Gurvich@wilmerhale.com

PAUL R.Q. WOLFSON
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 663-6000
Paul.Wolfson@wilmerhale.com

ALAN E. SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800
Alan.Schoenfeld@wilmerhale.com

KAREN L. LOEWY
OMAR GONZALEZ-PAGAN
HAYLEY GORENBERG
JAEL HUMPHREY-SKOMER
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
120 Wall Street, 19th Floor
New York, NY 10005
(212) 809-8585
kloewy@lambdalegal.org
ogonzalez-pagan@lambdalegal.org
hgorenberg@lambdalegal.org
jhumphrey@lambdalegal.org

GARY W. KUBEK
HARRIET M. ANTCZAK
JING KANG
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, NY 10022
(212) 909-6000
gwkubek@debevoise.com
hmantcza@debevoise.com
jkang@debevoise.com

RYAN M. KUSMIN
DEBEVOISE & PLIMPTON LLP
555 13th Street N.W.
Washington, DC 20004
(202) 383-8000
rmkusmin@debevoise.com

CELINA ROMANY-SIACA
CELINA ROMANY LAW OFFICES
268 Munoz Rivera Avenue, Suite 1500
San Juan, PR 00918
(787) 754-9304
butecelinaromany@gmail.com

Counsel for Plaintiffs-Appellants Maritza López Avilés and Iris D. Rivera Rivera; José A. Torruellas Iglesias and Thomas J. Robinson; Zulma Oliveras Vega and Yolanda Arroyo Pizarro; Johanne Vélez García and Faviola Meléndez Rodríguez; and Puerto Rico Para Tod@s

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing Opposition to Motion for Leave to Intervene as Defendants-Appellees with the Clerk of the United States Court of Appeals for the First Circuit via the CM/ECF system this 27th day of April, 2015 to be served on the following counsel of record via ECF:

Margarita Luisa Mercado-Echegaray
Andrés González-Berdecía
Puerto Rico Department of Justice
P.O. Box 9020192
San Juan, PR 00902-0192

José L. Nieto
Nieto Law Offices
District View Plaza, Suite 301
644 Fernández Juncos Avenue
San Juan, PR 00907-3122

Ada M. Conde Vidal
Conde Attorney At Law, PSC
P.O. Box 13268
San Juan, PR 00908-3268

Evelyn Aimée De Jesús
Counsel for Movants
P.O. Box 88
Caguas, PR 00726-0088

/s/ Karen L. Loewy

KAREN L. LOEWY
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
120 Wall Street, 19th Floor
New York, NY 10005
(212) 809-8585
kloewy@lambdalegal.org

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