

Timothy B. BOSTIC, et al., Plaintiffs, v. Robert F...., 2013 WL 9070566...

2013 WL 9070566 (E.D.Va.) (Trial Motion, Memorandum and Affidavit)
United States District Court, E.D. Virginia,
Norfolk Division.

Timothy B. BOSTIC, et al., Plaintiffs,

v.

Robert F. McDONNELL, Kenneth T. Cuccinelli, II, and
George E. Schaefer, III, in their official capacities, Defendants.

No. 2:13-cv-00395.
August 9, 2013.

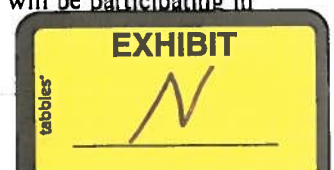
Memorandum in Support of Motion of the Commonwealth of Virginia to Intervene

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COMES NOW, the COMMONWEALTH OF VIRGINIA, pursuant to Fed. R. Civ. P.

5.1(c) and 28 U.S.C. § 2403(b), and moves this Court to “permit the State to intervene for presentation of evidence ... and for argument on the question of constitutionality” of Va. Const. art. I, §15-A, and Va. Code Ann. §§ 20-45.2 and 20-45.3 (“Virginia’s marriage laws”), which have been called into question by the Plaintiffs, Timothy B. Bostic and Tony C. London, in their complaint naming Robert F. McDonnell, in his official capacity as Governor of Virginia, Kenneth T. Cuccinelli, II, in his official capacity as Attorney General of Virginia, and George E. Schaefer, III, in his official capacity as the Clerk of Court for Norfolk Circuit Court. *See* (Doc. 1 at 1, 3 ¶¶5, 7, at 4 ¶¶10-12.) By intervening, the Commonwealth of Virginia does not waive its sovereign immunity from suit, *see* U.S. Const. amend. XI, but seeks only to intervene for the limited purpose of presenting evidence and argument on the question of constitutionality, as it may do of right under 28 U.S.C. § 2403(b). *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 70 n.25 (1997) (noting that 28 U.S.C. § 2403(b) “by its terms subjects an intervenor ‘to all liabilities of a party as to *court costs*’ required ‘for a proper presentation of the facts and law relating to the question of constitutionality,’ ” but “does not subject an intervenor to liability for damages available against a party defendant.”).

Plaintiffs, by initially naming as defendants and serving their complaint upon the Governor and Attorney General of Virginia, placed the Commonwealth on notice of their challenge to Virginia’s marriage laws, as required by Fed. R. Civ. P. 5.1(a)(1)(B) and (a)(2). However, as explained more extensively in the filing of the Governor and Attorney General, they both enjoy the Commonwealth’s Eleventh Amendment “immunity from suit,” *see Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 482 (4th Cir. 2005), not falling within the exception to that immunity recognized in *Ex parte Young*, 209 U.S. 123, 155-56 (1908), because they are not officers that have any “ ‘special relation’ ” with the challenged laws, *see McBurney v. Cuccinelli*, 616 F.3d 393, 399 (4th Cir. 2010) (affirming dismissal of the Attorney General of Virginia as immune from suit), or any “specific duty to enforce” its requirements. *Waste Mgmt. Hldgs. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001) (holding that the Governor of Virginia “should be dismissed as a party” as immune from suit). That being so, plaintiffs have failed to name a Virginia official properly subject to suit who can represent the interests of the Commonwealth in this matter. Accordingly, once the Court dismisses them from suit, neither the “State [n]or any agency, officer, or employee thereof” will be participating in



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the action to represent the Commonwealth's interests, and the Commonwealth of Virginia should thus be allowed intervention. 28 U.S.C. § 2403(b); *see, e.g., Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 390 (1988) (noting that “[p]laintiffs brought suit ... against the Arlington County Chief of Police,” a local official, to challenge the constitutionality of a Virginia law, and thus that the “Virginia Attorney General intervened” on behalf of the Commonwealth).

To ensure that States will be afforded the opportunity to defend their laws from constitutional attack, and to afford a means by which they may do so without waiving their sovereign immunity, the U.S. Code and the Federal Rules afford a right and a procedure by which States may intervene for limited purposes wherever a party files a legal paper “drawing into question the constitutionality of a ... state statute.” Fed. R. Civ. P. 5.1(c); *see* 28 U.S.C. § 2403(b) (directing “a court of the United States” to “permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality”). As the Fourth Circuit has recognized, once a party files a paper challenging a law of Virginia as unconstitutional, “[a]t that point, under 28 U.S.C. § 2403(b), the Attorney General, *on behalf of the state*, could intervene *as of right* to defend the constitutionality” of the enactment. *Mobil Oil Corp. v. Att’y Gen. of Virginia*, 940 F.2d 73, 76-77 (4th Cir. 1991) (emphases added). And the Fourth Circuit has recognized that intervention by a State to defend its interests is appropriate even when state officials, and the State itself, have previously been dismissed on their own motion on grounds of sovereign immunity. *See, e.g., Legend Night Club v. Miller*, 637 F.3d 291, 295 (4th Cir. 2011) (noting that after “the district court dismissed the claims against Governor Ehrlich and the State of Maryland[, t]he State later intervened to defend the statute's constitutionality under 28 U.S.C. § 2403(b)”; (Case No. 1:05-cv-02138 Doc. 42 and Doc. 47) (moving and granting intervention of the State after dismissal on grounds of sovereign immunity). Otherwise, the Court would be required “to pass judgment on the constitutionality of a provision of [the State's] law without hearing the views of the [State],” a result that is “contrary to both the letter and spirit of section 2403(b).” *Yniguez v. Arizona*, 939 F.2d 727, 739 (9th Cir. 1991), *vacated on other grounds, Arizonans for Official English*, 520 U.S. at 67-75.

Accordingly, while the Commonwealth of Virginia requests that this Court dismiss the Governor and Attorney General of Virginia as immune from suit, it also requests that it grant the Commonwealth leave to intervene under 28 U.S.C. § 2403(b) for the purpose of defending the constitutionality of Virginia's marriage laws.

Respectfully submitted,

/s/

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