

**IN THE IOWA DISTRICT COURT FOR POLK COUNTY**

**KATHERINE VARNUM, PATRICIA HYDE; DAWN BARBOUROSKE, JENNIFER BARBOUROSKE; JASON MORGAN, CHARLES SWAGGERTY; DAVID TWOMBLEY, LAWRENCE HOCH; WILLIAM M. MUSSER, OTTER DREAMING; INGRID OLSON and REVA EVANS,**

**Plaintiffs,**

**v.**

**TIMOTHY J. BRIEN, in his official capacities as the Polk County Recorder and Polk County Registrar,**

**Defendant.**

**CASE NO. CV 5965**

**RULING ON APPLICANTS' MOTION TO INTERVENE**

This matter came before the Court upon Applicants' motion to intervene on June 2, 2006. Attorneys Dennis Johnson and Camilla B. Taylor represented Plaintiffs. Attorney Michael B. O'Meara represented Defendant Timothy J. Brien. Attorneys Timm W. Reid, Glen Lavy, and Christopher Stovall represented the Applicants.

**BACKGROUND FACTS AND PROCEDURE**

In their Petition filed on December 13, 2005, Plaintiffs asked for the Court to recognize their right to marry their partners as a matter of due process and equal protection under the Iowa and Federal Constitutions. Defendant filed his answer on February 6, 2006, denying any constitutional violation.

On April 6, 2006, Applicants filed their motion requesting that the Court permit them to intervene in the instant action. Plaintiffs filed their resistance to said motion on April 20, 2006. Defendant filed a Response to Motion to Intervene on April 21, 2006,

stating Defendant had no opposition to the Motion to Intervene. Both Applicants and Plaintiffs have filed additional briefs to support their positions on the issue of intervention in this case.

Having considered the arguments and authorities presented by the parties and the Applicants, and being otherwise fully advised in the premises, the Court now rules on the application to intervene.

### ANALYSIS

Applicants argue that they are entitled to intervention as a matter of right, or, in the alternative, permissive intervention, pursuant to Iowa Rules of Civil Procedure 1.407(1) and (2), respectively. The Court will address both arguments.

#### I. Intervention of Right

##### A. Statement of the Law

Rule 1.407(1) requires a timely motion that includes the three following requirements to permit intervention as a matter of right: (1) applicants claim an interest in the subject matter of the action; (2) disposition of the action may as a practical matter impair or impede the applicants' ability to protect their interest; and (3) applicants' interest is not adequately represented by existing parties. IOWA R. CIV. P. 1.407(1). Applicants have the burden to prove each and every element. *Am. Nat'l Bank & Trust Co. v. City of Chicago*, 865 F.2d 144, 146 (7th Cir. 1989). A failure to prove any one of these elements requires a denial of the motion. *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 176 (2d Cir. 2001). It is ultimately within the discretion of the Court to decide whether a proposed intervenor's interest in the action is sufficiently direct to permit

intervention. *In re H.N.B.*, 619 N.W.2d 340, 342-43 (Iowa 2000); *In Interest of A.G.*, 558 N.W.2d 400, 403 (Iowa 1997).

The requirements of Rule 1.407 and Federal Rule of Civil Procedure 24 for intervention are substantively similar. IOWA R. CIV. P. 1.407, Official Comment, Amendment 2001. Where state and federal laws are essentially the same, “federal interpretations are persuasive.” *Bilner v. Ottumwa Cmty. Sch. Dist.*, 549 N.W.2d 295, 299 (Iowa 1996); *Brody v. Ruby*, 267 N.W.2d 902, 904 (Iowa 1978). Case law as it relates to the issue of a party’s standing is also persuasive because both standing and intervention require a similar showing of interest in an action. *San Juan County, Utah v. U.S.*, 420 F.3d 1197, 1203 (10th Cir. 2005).

In this case, no one disputes that the Applicants’ motion to intervene was timely. Therefore, the Court addresses only the remaining three requirements of the inquiry.

#### **B. Interest in the Subject Matter of the Action**

An applicant seeking to intervene “is ‘interested’ under [Rule 1.407] if [the applicant] has a *legal right* that the proceeding will *directly affect*.” *In Interest of A.G.*, 558 N.W.2d at 403 (emphasis in original); *In re H.N.B.*, 619 N.W.2d at 343. An indirect or speculative interest is not sufficient to demonstrate a right to intervene. *See In re H.N.B.*, 619 N.W.2d at 343 (holding former foster parents’ interest in adopting child not sufficient to create a legal right in proceedings for child’s custody).

Additionally, contingent interests based on the *outcome* of a case are not legally sufficient to support intervention as a matter of right. *Standard Heating & Air Conditioning Co. v. City of Minneapolis*, 137 F.3d 567, 571 (8th Cir. 1998); *see State ex*

*rel. Miles v. Minar*, 540 N.W.2d 462, 465 (Iowa App. 1995) (“A potential intervenor must typically have more than a speculative or contingent interest.”).

Federal courts also require a direct, substantial, and legally protectable interest to allow intervention under Federal Rule 24. *Standard Heating & Air Conditioning Co.*, 137 F.3d at 571; *Am Nat'l Bank & Trust Co.*, 865 F.2d at 146-47.

Iowa and federal cases that discuss standing are also persuasive to the Court. Both courts use a similar legal interest test to determine whether a party has standing to bring a lawsuit as they do to determine whether there is sufficient legal interest for an applicant to intervene. *See Alons v. Iowa Dist. Ct.*, 698 N.W.2d 858, 863-64 (Iowa 2005) (citing *Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 475 (Iowa 2004) (“a complaining party must . . . have a specific personal or legal interest in the litigation”)); *accord, Sanchez v. State*, 692 N.W.2d 812, 821 (Iowa 2005); *see also San Juan County, Utah*, 420 F.3d at 1203 (“Both standing and intervention require that a party have an interest in the subject matter of the litigation.”); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731-32 (D.C. Cir. 2003) (holding that an intervenor must meet both the federal intervention rules and federal standing requirements because an “intervenor seeks to participate on an equal footing with the original parties to the suit”); *see also S.D. v. Ubbelohde*, 330 F.3d 1014, 1023 (8th Cir. 2003) (“A party seeking to intervene must establish both that it has standing to complain and that the elements [to intervene] are met.”).

Applicants claim an interest in “protecting separation of powers,” arguing that cases involving “marriage policy” are within the exclusive province of the legislature, and argue that their performance as legislators will be hampered by an adverse outcome.

Applicants' Brief at 6. In *Alons v. Iowa District Court*, a group of legislators petitioned for certiorari from a district court judgment dissolving the Vermont civil union of two Iowa women. 698 N.W.2d at 862. The legislators argued that the judge had "usurped the power properly belonging to the legislature" by adjudicating a matter involving a legal relationship between two people of the same sex. *Id.* at 873. They claimed that the judge's order had violated Iowa marriage laws and public policy, and that they were proper parties to the case because they "ha[d] an interest, as legislators, in seeing that the 'law passed to preserve traditional marriage' is properly enforced." *Id.* at 872-73.

The Iowa Supreme Court rejected their claims and determined that the legislators did not have a "sufficient stake" in the case to interfere. *Id.* at 863-64 (citation omitted). The Court held that none had "shown that they [had] a legally recognized or personal stake in the underlying case. Nor [had] they shown that they [had] been injured in fact as distinguished from having been injured in an abstract manner." *Id.* at 873-74. The Court held that judges' proper role is to interpret the law concerning a case over which it has jurisdiction, and that the legislators' job is to create the law. *Id.* at 873; see *Lynch v. Saddler*, 656 N.W.2d 104, 108 (Iowa 2003) ("[I]t is the legislature's duty to declare the law and the court's responsibility to interpret the law."); *Hutchins v. City of Des Moines*, 176 Iowa 189, 157 N.W. 881, 887 (1916) (holding that legislative power is the "power to make, alter, and repeal laws" in contrast to courts, which have the power to "construe and interpret the Constitution and laws, and to apply them and decide controversies").

The Iowa Supreme Court went on to state that "[i]t would be strange indeed and contrary to our notions of separation powers if we were to recognize that legislators have standing to intervene in lawsuits just because they disagree with a court's interpretation

of a statute.” *Alons*, 698 N.W.2d at 873. Without a statutory directive, “a legislator may sue only to challenge misconduct or illegality in the legislative process itself.” *Id.* (citations omitted). The remedy for a legislator who disagrees with a court’s decision about a law is to pass legislation to correct that interpretation. *Id.*

A legislator has no personal power to determine public policy or assert the meaning of laws. Nor can an individual legislator represent the legislature itself in such matters. See *Dillard v. Baldwin County Comm’rs*, 225 F.3d 1271, 1279 (11th Cir. 2000) (stating that individual state legislators do not represent the legislature as a whole when attempting to intervene on the state’s behalf). The “general rule” is that even “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.’” *Tarsney v. O’Keefe*, 225 F.3d 929, 939 (8th Cir. 2000) (citation omitted).

In this case, the claims put forth by the Plaintiffs are constitutionally based. Whether or not constitutional claims are valid is a matter of judicial determination, not legislative. The separation of powers between legislative and judicial authority is not endangered by this case. Nor will any determination by this Court limit the legislature’s authority to make laws. The Applicants claim that the legislature will be negatively impacted by the budgetary and legal effects of changing the laws for which marriage is a triggering factor. Applicants’ Brief at 10. These are not the concerns of this Court. See *Alons*, 698 N.W.2d at 871 (stating that “judicial action” may not be controlled “because such action involves indirectly and incidentally the expenditure of public funds” and courts “have no control over such funds save as an incident to the expenditure and proper conduct of the business before them”); see also *Alons*, 698 N.W.2d at 873 (citing *Raines*

v. *Byrd*, 521 U.S. 811, 829 (1997) (holding that legislators' claims of "legislative injury" were wholly abstract and too widely dispersed to be a legal interest)).

The Applicants have not identified any legal interest that is legally sufficient for intervention. Therefore, Applicants have failed to prove the first element of Rule 1.407(1) and their Motion to Intervene as a matter of right must be denied.

### **C. Impede or Impair**

In order to have intervention as a matter of right, a party's ability to protect its interests must be impaired or impeded. *See* IOWA R. Civ. P. 1.407(1)(b); *see also San Juan County, Utah*, 420 F.3d at 1210 ("[A] would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied.") (citation omitted).

Applicants assert that if the Court were to grant the Plaintiffs' petition and mandate that same-sex couples be allowed to marry, then "the Legislature would be required to make appropriations sufficient to pay for the costs generated." Applicants' Brief at 10. This very general "costs" argument exists for at least one party in almost all litigation and is not a sufficient basis to join this or any other lawsuit. *See Alons*, 698 N.W.2d at 871 (stating that "complaint of the increased cost of the administration of justice" is not sufficient to qualify as an impediment sufficient to join litigation). Mere speculation that a case may have an impact on the state budget, whether to save money or spend it, does not qualify as an interest of an individual legislator. *See id.* (stating that potential state funding issues do not personally harm legislators and therefore are not sufficient grounds for intervention).

The Applicants also argue that an adverse outcome to them would burden the legislature with tedious review and revision of all laws affected. The possibility that the outcome of this case would increase the Applicants' workload is not a valid impairment. The Applicants' ability to fulfill their responsibilities will not be personally affected by any outcome in this case. Their rights to obtain marriage licenses and to marry will remain unaffected. In support of their views on this issue, the Applicants may continue to advocate for legislation, constitutional amendments, and other public policy changes. *See Alons*, 698 N.W.2d at 874 (stating that rather than litigate, the legislators should use legislation to make clear their views).

Therefore, this Court concludes that the Applicants' ability to protect their interests will not be impeded or impaired by a denial of intervention in this action.

#### **D. Interest Adequately Represented**

"The applicant bears the burden of showing that the existing parties will not adequately represent the prospective intervenors' interest, but this burden is minimal." *San Juan County, Utah*, 420 F.3d at 1211 (citation omitted). Some federal courts have suggested that there is a presumption that the government cannot adequately protect the interests of both the public and a private intervenor. *Id.* at 1212 (citations omitted). They reason that the government cannot zealously protect an individual's interest, which may or may not be cointerested with the public's interest, thus preventing adequate representation. *Id.*

Nevertheless, a proposed intervenor must cite specific reasons to explain why an existing party's representation is not adequate. *Id.* at 1212. Such reasons might include "showing collusion between the representative and an opposing party, that the

representative has an interest adverse to the applicant, or that the representative failed in fulfilling his duty to represent the applicant's interest." *Id.* at 1211-12; *see Prete v. Bradbury*, 438 F.3d 949, 956 (9th Cir. 2006) (listing factors, including whether an existing party will make all the proposed intervenor's arguments, whether the existing party is willing and able to make such arguments, and whether the proposed intervenor represents a neglected element of the action). No specific reasons have been identified in this case.

Applicants argue that Defendant does not have the authority to change state marriage law. However, as the County Registrar and Recorder, the Defendant is the official charged by the legislature in the Iowa Code with the duty of issuing and recording marriage licenses and enforcing Iowa marriage laws. IOWA CODE § 144.9 ("county recorder is county registrar" and stating details of duties). The oath of office required by the Iowa Code requires the county registrar to uphold Iowa laws. IOWA CODE § 63.10. County officials routinely defend state laws, and Applicants concede that Defendant is "presumed as the Polk County Recorder and Polk County Registrar to fulfill his duties of faithfully executing and upholding Iowa marriage law." Applicants' Brief at 2; *see, e.g., Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 972 (3d Cir. 1998) (government officials charged with defending a law are presumed adequate for the task); *Standard Heating & Air Conditioning Co.*, 137 F.3d at 572 ("Where the interests asserted fall within the realm of 'sovereign interests,' and the government is a party, a presumption that the government adequately represents the interests of its citizens arises."). "[T]here is also an assumption of adequacy when the government is acting on behalf of a constituency that it represents." *Prete*, 438 F.3d at 956.

Furthermore, representation is presumed “adequate when the objective of the applicant for intervention is identical to that of the parties.” *San Juan County, Utah*, 420 F.3d at 1212; *see Prete*, 438 F.3d at 956 (“The most important factor ... is how the [proposed intervenor’s] interest compares with the interests of existing parties.”). When the proposed intervenor and an existing party “have the same ultimate objective, a presumption of adequacy of representation arises.” *Prete*, 438 F.3d at 956.

In this case, the Applicants wish to prevent homosexuals from marrying by enforcing Iowa’s man-and-woman marriage requirement; the Defendant’s sole interest is to uphold current Iowa law— which requires a man and a woman for a valid marriage. Therefore, their interests are the same—to defend current Iowa marriage law. Thus, this Court concludes that applicants’ interests in the case are adequately represented by Defendant.

## **II. Permissive Intervention**

### **A. Statement of Law**

Iowa Rule of Civil Procedure 1.407(2) states that permissive intervention *may* be granted when an applicant’s claim or defense and the main action have a question of law or fact in common. (Emphasis added). The court shall consider all applications for permissive intervention and grant or deny the application as the circumstances require. IOWA R. CIV. P. 1.407(4). The Rule grants this Court broad discretion in whether to grant Applicants’ motion for permissive intervention. *See U.S. v. Union Elec. Co.*, 64 F.3d 1152, 1170 n.9 (8th Cir. 1995) (“The grant or denial of permissive intervention is in the discretion of the trial court.”). Rule 1.407(2) requires that “the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of

the parties.” The judicial process cannot be a mere “vehicle for the vindication of the value interests of concerned bystanders.” *Alons*, 698 N.W.2d at 868 (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982)). The Iowa Supreme Court has also stated that “[t]he law does not permit mere intermeddlers to resort to the courts where no real reason exists and no rights are affected.” *Bowers v. Railey*, 237 Iowa 295, 300-01, 21 N.W.2d 773, 776 (Iowa 1946).

### **B. Common Question of Law or Fact**

The Applicants claim that they have a “claim or defense in common” with the existing parties because they wish to address whether Plaintiffs’ right to marry constitutes a fundamental liberty interest, whether Plaintiffs are similarly situated to different-sex married couples, and whether Iowa’s marriage laws are supported by rational bases. Applicants’ Brief at 14. However, they have supplied this Court with no reason to suspect that Defendant will not adequately address these same issues. It would appear that Applicants merely wish to “weigh in” on those issues.

A desire to express a view on legal issues is not a “claim” or “defense.” *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 n.18 (1997) (holding that, in the context of permissive intervention, “claims or defenses” must “refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit”) (citation omitted); *see also Alons*, 698 N.W.2d at 874 (stating that having an opinion about an action is not enough to allow interference in other peoples’ cases because there would not be any limit to the number of petitions brought)

### **C. Undue Delay or Prejudice**

Allowing the Applicants to join this action will unnecessarily increase the expenditure of time and resources for all parties hereto as well as this Court. This Court concludes that granting permissive intervention in this case would be inconsistent with the goals of Rule 1.407, which are to reduce litigation and expeditiously determine matters before the court. *See Miner*, 540 N.W.2d at 465 (stating that intervenor's presence would "have done little to assist in the efficient disposition of the case"). Therefore the Applicants' request for permissive intervention is denied.

**ORDER**

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Motion to Intervene, filed by Applicants, is **DENIED**. Costs are assessed to Applicants.

**IT IS SO ORDERED** this 9<sup>th</sup> day of August, 2006.

  
ROBERT B. HANSON, DISTRICT JUDGE  
Fifth Judicial District Court

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