

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

KRISTY DUMONT; DANA DUMONT;
ERIN BUSK-SUTTON; REBECCA
BUSK-SUTTON; and JENNIFER
LUDOLPH,

Plaintiffs,

v.

NICK LYON, in his official capacity as
the Director of the Michigan Department
of Health and Human Services; and
HERMAN MCCALL, in his official
capacity as the Executive Director of the
Michigan Children's Services Agency,

Defendants,

and

ST. VINCENT CATHOLIC CHARITIES;
MELISSA BUCK; CHAD BUCK; and
SHAMBER FLORE.

Proposed Defendants-
Intervenors.

No. 2:17-cv-13080-PDB-EAS

HON. PAUL D. BORMAN

MAG. ELIZABETH A. STAFFORD

**PLAINTIFFS' RESPONSE IN
PARTIAL OPPOSITION TO
MOTION TO INTERVENE**

Plaintiffs hereby submit this Response in Partial Opposition to the Motion to Intervene (the "Motion"), ECF No. 18, submitted by St. Vincent Catholic Charities, Melissa Buck, Chad Buck, and Shamber Flore. Plaintiffs do not oppose the Motion with respect to St. Vincent Catholic Charities. For the

reasons stated below and explained more fully in the attached Brief, the Motion should be denied with respect to Melissa Buck, Chad Buck, and Shamber Flore (the “Individual Movants”).

1. The Individual Movants are not entitled to intervention as of right, because they lack a “substantial legal interest in the case” and any conceivable interest they could have is adequately represented by other parties. *See Blount-Hill v. Zelman*, 636 F.3d 278, 283 (6th Cir. 2011); Fed. R. Civ. P. 24(a).
2. The Individual Movants are not entitled to permissive intervention, because they lack a “claim or defense that shares with the main action a common question of law or fact” and permitting their intervention would unduly delay or prejudice the adjudication of the original parties’ rights. *See* Fed. R. Civ. P. 24(b).

Dated: January 2, 2018

/s/ Garrard Beeney

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**BRIEF IN SUPPORT OF
PLAINTIFFS' RESPONSE IN
PARTIAL OPPOSITION TO
MOTION TO INTERVENE**

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CONCISE STATEMENT OF ISSUES PRESENTED

1. Whether Melissa Buck, Chad Buck, and Shamber Flore are entitled to intervention as of right when their sole asserted interest in this case—the potential loss of services and volunteer opportunities provided by Proposed Defendant-Intervenor St. Vincent Catholic Charities—is not part of the relief sought by Plaintiffs, and where their sole alleged interest is as incidental beneficiaries of a contract between the State of Michigan and St. Vincent Catholic Charities, who are both vigorously defending against Plaintiffs' claims.
2. Whether Melissa Buck, Chad Buck, and Shamber Flore, given the above, have any claim or defense that shares with the main action a common question of law or fact or whether, instead, their intervention would unduly delay or prejudice the adjudication of the original parties' rights.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

United States v. Michigan, 424 F.3d 438 (6th Cir. 2005); *United States v. Tennessee*, 260 F.3d 587 (6th Cir. 2001); *Blount-Hill v. Bd. of Educ. of Ohio*, 195 F. App'x 482 (6th Cir. 2006).

INTRODUCTION

This action challenges the State of Michigan's (the "State") practice of permitting state-contracted, taxpayer-funded child placing agencies to use religious criteria to turn away prospective foster and adoptive parents for children in the State's foster care system and to refuse to work with qualified families on the basis of their sexual orientation, irrespective of the needs of the children under their care. Compl. ¶ 1, ECF No. 1. This action does not in any way challenge the State's ability to contract with religiously affiliated child placing agencies. Nor does it challenge any action taken by private child placing agencies in their private adoption work. However, when the State hires private child placing agencies to perform the government function of providing child welfare services for children in State custody, it must ensure that those services are provided in accordance with the United States Constitution—just as if the State itself were providing those services directly.

St. Vincent Catholic Charities ("STVCC") is a state-contracted child placing agency that turns away same-sex couples based on religious objections to

such prospective parents. STVCC's ability to continue using religious criteria when performing public child welfare services for the State is at issue in this case. Thus, Plaintiffs do not oppose the Motion to Intervene (the "Motion") with respect to STVCC.

However, the Motion should be denied with respect to the other Movants, Melissa Buck, Chad Buck, and Shamber Flore (the "Individual Movants"). Only those that "claim[] an interest relating to the property or transaction that is the subject of the action" may intervene as of right. Fed. R. Civ. P. 24(a)(2). The Individual Movants, though, have no contract with and perform no services on behalf of the State, and their actions are not implicated by the Complaint. They assert only a contingent interest in receiving future services offered by STVCC or having opportunities to volunteer through STVCC, which they claim will be lost "[i]f St. Vincent closed its foster and adoptive programs." Memorandum in Support of the Motion ("Br.") at 13-14, ECF No. 18. This hypothetical interest is unrelated to the claims raised in the Complaint—Plaintiffs do not seek to prevent the State from contracting with STVCC or any other religiously affiliated agency. And, in any case, any incidental benefit the Individual Movants may get from STVCC's contracts with the State is insufficient as a matter of law to warrant intervention.

The Individual Movants say they wish to offer factual testimony about the benefits they receive from STVCC. *See* Br. at 20. That testimony is not legally relevant to Plaintiffs' claims and, in any event, is capable of introduction by other parties if the Court deems that such evidence should be admitted. To the extent the Individual Movants have any interest at all in these proceedings, it is adequately represented by the State and STVCC (whose intervention is not opposed by any party).

For the same reasons, there is no basis for discretionary intervention, which would unduly delay and prejudice the adjudication of the original parties' rights. *See* Fed. R. Civ. P. 24(b). Accordingly, the Court should not permit the Individual Movants to intervene as parties in this case.

LEGAL STANDARDS

The Individual Movants seek to intervene as of right under Federal Rule of Civil Procedure 24(a)(2), which provides that, "[o]n timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2).

In the alternative, the Individual Movants seek permissive intervention under Rule 24(b), which 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,” provided that such intervention does not “unduly delay or prejudice the adjudication of the original parties’ rights.” Fed. R. Civ. P. 24(b).

BACKGROUND OF THIS LITIGATION

The Michigan Department of Health and Human Services (“DHHS”)¹ is responsible for the approximately 13,000 children who are in the State’s foster care system because they have been removed from their families due to abuse or neglect or have otherwise become wards of the State. Compl. ¶ 2. Among the State’s responsibilities to these children is finding appropriate foster and adoptive families to care for them. *Id.* ¶¶ 2, 24.

DHHS has chosen to contract out public adoption and foster care services to private agencies and pays these agencies with taxpayer funds to perform this government function. *Id.* ¶¶ 3, 25-26. Some of these agencies refuse to accept prospective families headed by same-sex couples or to place children

¹ Defendants Nick Lyon, Director of DHHS, and Herman McCall, Executive Director of the Children’s Services Agency, a sub-agency of DHHS, administer and oversee the State’s child welfare system, including the State’s contractual relationships with private child placing agencies. Compl. ¶¶ 22-23. Messrs. Lyon and McCall will hereafter be called “Defendants.”

with same-sex parent families due to the agencies' religious objections to such families. *Id.* ¶ 3. STVCC is one such agency. *See id.* ¶¶ 43, 61-62.

In July 2016 and March 2017, STVCC turned away Plaintiffs Kristy and Dana Dumont, a same-sex married couple, based on religious objection. *Id.* ¶¶ 61-62. STVCC and Defendants have both admitted in briefing submitted to this Court that STVCC refuses to consider same-sex couples as prospective parents for children in State custody. *See* Br. at 10; Defs.' Br. in Supp. of Mot. to Dismiss at 13-14, ECF No. 16. In the Motion and its supporting affidavit, STVCC asserts that it "cannot provide" services "that would conflict with St. Vincent's religious beliefs," such as filing adoption or foster care licensing applications of "unmarried or same-sex couples." Br. at 10; Decl. of Gina Snoeyink ¶ 7, ECF No. 18-2.

Plaintiffs filed their Complaint on September 20, 2017, challenging and seeking to enjoin the State's practice of knowingly contracting out public child welfare services to religiously affiliated agencies that turn away prospective families headed by same-sex couples because of religious objections.

On December 15, 2017, the State filed its motion to dismiss. ECF No. 16. On December 18, 2017, Movants filed the present Motion to Intervene, ECF No. 18, as well as a proposed motion to dismiss, ECF No. 19.

ARGUMENT

I. THE INDIVIDUAL MOVANTS ARE NOT ENTITLED TO INTERVENTION AS OF RIGHT.

Under Rule 24(a)(2), a movant must show that, *inter alia*, “[it] possesses a substantial legal interest in the case,” its “ability to protect its interest will be impaired without intervention,” and “the existing parties will not adequately represent [its] interest.” *Blount-Hill v. Zelman*, 636 F.3d 278, 283 (6th Cir. 2011). “Each of these elements is mandatory, and therefore failure to satisfy any one of the elements will defeat intervention under the Rule.” *Id.*

The Individual Movants meet none of these requirements. They lack a “substantial legal interest” in the case that would be impaired absent intervention, and any interest they have is adequately represented by the State and STVCC, whose intervention is not opposed by any party.

A. The Individual Movants Have No Legally Cognizable Interest in the Case that Would Be Impaired Absent Intervention.

The Individual Movants are not parties to any contract with the State and perform no services on behalf of the State. Because the Individual Movants have no legal interest in any State contract that would be affected by the relief that Plaintiffs seek, they have no “substantial legal interest” in any way “relating to the property or transaction that is the subject of the action.” *Blount-Hill v. Zelman*, 636 F.3d at 283 (quoting Fed. R. Civ. P. 24(a)(2)).

Lacking a legal interest in the State contracts at issue in this case, the Individual Movants instead assert that they have an interest in this case because they may lose certain benefits they receive from STVCC. In particular, Individual Movants Melissa and Chad Buck, who previously adopted children through STVCC, state that they continue to receive from STVCC “ongoing services” in support of their parenting. Br. at 13. Individual Movant Shamber Flore, who as a child was placed into an adoptive family by STVCC, states that she has “the opportunity to mentor many . . . youth[s] as a volunteer at St. Vincent.” Br. at 14.

The Individual Movants’ asserted interest in maintaining their relationships with STVCC is not the subject of this litigation; Plaintiffs only seek to ensure that public child welfare services provided by private contractors comply with constitutional requirements. The Individual Movants’ interest in this litigation is premised solely on STVCC’s assertion that, if Plaintiffs prevail, STVCC “will be prohibited from providing adoption and foster services with the State *at all*” and as a result of losing the funding it receives under those State contracts, “its programs offering those services will be closed down.” Br. at 17-18; Snoeyink Decl. ¶ 13. Thus, the Individual Movants’ asserted claim of loss is attenuated from Plaintiffs’ requested relief, and depends entirely on STVCC’s own claims about its inability to function without the State contracts. As a matter of

law, this is not a “substantial legal interest” to support intervention as a matter of right.²

The Sixth Circuit has held that motions to intervene are properly denied when movants, like the Individual Movants here, claim to benefit as third parties from a contract with the State that is challenged on constitutional or statutory grounds. The Sixth Circuit’s decision in *Blount-Hill v. Board of Education of Ohio*, 195 F. App’x 482 (6th Cir. 2006), affirming a denial of a motion to intervene, is on point. There, the Sixth Circuit held that a movant’s interest in “preserv[ing] the constitutionality of [Ohio’s system for public funding of charter schools] so that [the movant] might continue to contract with community schools” to provide services to those schools was insufficient for purposes of intervention. *Id.* at 486. In *Blount-Hill v. Board of Education*, the movant claimed that it was “motivated by both economic interests *and* for reasons relating to the preservation of this educational alternative.” *Id.* The court observed that the movant was “not a party to any challenged contract nor [wa]s it directly targeted by plaintiffs’ complaint.” *Id.* The Sixth Circuit held that the asserted interest was

² To the extent the Individual Movants have an ideological interest in this litigation, which they seek to advance through intervention, this too is insufficient. See *Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 782 (6th Cir. 2007) (“Where . . . an organization has only a general ideological interest in the lawsuit . . . and the lawsuit does not involve the regulation of the organization’s conduct, . . . such an organization’s interest in the lawsuit cannot be deemed substantial.”).

insufficient, explaining that movants’ “claimed interest does not concern the constitutional and statutory violations alleged in the litigation, but rather an interest in the economic component.” *Id.* (internal quotation marks omitted). Here, similarly, the Individual Movants are not party to the contracts at issue or targeted by the Complaint; they merely “seek[] to preserve the constitutionality of the [State’s challenged practice] so that [they] might continue to” get services or volunteer through STVCC. *See id.* This is not a legally sufficient interest.

United States v. Tennessee, 260 F.3d 587 (6th Cir. 2001), is likewise instructive. Like this case, *Tennessee* concerned the constitutionality of a state’s provision of social services. When a consortium of state contractors asserted an interest in maintaining funding for their contracts, the court found their interest insufficient to warrant intervention because they were not concerned with “the constitutional and statutory violations alleged in the litigation,” but only with assuring that their own benefits flowing from the social services at issue could continue. *Id.* at 595. Here, similarly, the Individual Movants seek only to ensure that their own benefits from STVCC will continue.

The Individual Movants rely on authority that is wholly distinguishable and does not support intervention here. *Linton v. Commissioner of Health & Environment*, 973 F.2d 1311 (6th Cir. 1992), and *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997), stand for the proposition that a third

party may have a sufficient legal interest for intervention where the third party's conduct is directly regulated by a challenged ordinance or where the resolution of a litigation would directly impair the movants' contractual or statutory rights. *See Linton*, 973 F.2d at 1319 (proposed settlement agreement "allegedly altered the terms of the provider agreement between the State and the movants"); *Michigan State AFL-CIO*, 103 F.3d at 1247 (movant was "regulated by at least three of the four statutory provisions challenged by plaintiffs."). But again, the Individual Movants have no contract with the State of Michigan and are not regulated, directly or indirectly, by the policies at issue.³

The Individual Movants also say they wish to offer factual testimony about their (presumably the Bucks') ability to continue adopting without the help of STVCC. Br. at 20. That testimony is not legally relevant to Plaintiffs' claims because, as discussed above, Plaintiffs are not seeking to stop STVCC from

³ The Individual Movants also point to *New York Public Interest Research Group, Inc. v. Regents*, 516 F.2d 350 (2d Cir. 1975) (per curiam), a Second Circuit case holding that a group of pharmacists had sufficient legal interest to challenge a regulation prohibiting advertising of the price of prescription drugs because the regulation "affect[ed] the economic interests of members of the pharmacy profession." *Id.* at 352; *see also* Br. at 18. But this out-of-circuit authority does not help the Individual Movants because the Sixth Circuit has never accepted the sufficiency of a mere economic interest in maintaining someone else's contract as a basis for intervention. *See Tennessee*, 260 F.3d at 595-96; *Blount-Hill v. Bd. of Educ.*, 195 F. App'x at 486.

providing adoption services. In any event, such testimony is capable of introduction by other parties if the Court deems it relevant.

Because the Individual Movants lack any legal interest in the subject matter of this litigation (*i.e.*, the State's contracts with private child placing agencies), they cannot demonstrate the requirement of Rule 24(a) intervention that their "ability to protect [their] interest will be impaired without intervention." *Blount-Hill v. Zelman*, 636 F.3d at 283.⁴

B. Existing Parties Adequately Represent the Interest of the Individual Movants.

The Individual Movants should also be denied intervention for the independent reason that their sole asserted interest, incidental benefits of STVCC's contract with the State, will be adequately represented in this litigation by the State and STVCC (whose intervention is not opposed by any party). The Individual Movants cannot "overcome the presumption of adequate representation that arises when they share the same ultimate objective as a party to the suit." *United States v. Michigan*, 424 F.3d 438, 443-44 (6th Cir. 2005).

⁴ The Individual Movants also argue that denying intervention may impair their ability to prevent the loss of services and volunteer opportunities, but as the Individual Movants seem to acknowledge, this is simply a restatement of their alleged interest and not an argument as to their ability to protect their interest. *See* Br. at 19.

Here, the Individual Movants do not claim that their “ultimate objective” in this litigation is in any way distinguishable from STVCC’s ultimate objective: to maintain STVCC’s contracts with the State despite their use of religious criteria to exclude prospective foster and adoptive families headed by same-sex couples. No party objects to the intervention of STVCC, which performs adoption and foster care services on behalf of the State and whose conduct is specifically discussed in the Complaint. Assuming this Court permits STVCC’s intervention, STVCC will adequately represent the Individual Movants’ interests going forward.

Moreover, the Individual Movants fail to overcome the presumption of adequate representation by the State. The Individual Movants argue that the State has failed to present several legal arguments in its Motion to Dismiss, but none of these legal arguments relate to the Individual Movants’ claimed interest.⁵ Similarly, the Individual Movants argue that “inadequacy of representation can . . .

⁵ The Individual Movants argue that the State has failed to argue that allowing religiously affiliated child placing agencies to contract with the state is required under the Free Exercise Clause. Br. at 21. But the Individual Movants have no such contract with the State and accordingly have no legal interest in asserting such a defense. The Individual Movants also argue that the State has failed to argue that the relief requested would violate their free speech rights by requiring child placing agencies “to adopt a policy as a condition of government funding and make written recommendations to the state that contradict their beliefs.” Br. at 22. The Individual Movants, however, are not a child placing agency making such recommendations and accordingly have no legal interest in asserting such a defense.

be shown where a government entity has an interest in purchasing services from a proposed intervenor,” Br. at 22, but the Individual Movants do not sell any services to the State.

The Individual Movants also argue that their interests are not represented by the State because there is a divergence of interest: “Defendants may eventually want to settle this case with Plaintiffs” and the Individual Movants want to continue litigation. Br. at 23. But the State has shown no interest in settlement and, in fact, refused to meet with or even correspond with Plaintiffs in an effort to avoid litigation. Compl. ¶ 50. To the contrary, the State has indicated clearly that it intends to litigate and has further indicated that it sides with the Individual Movants in their position. Br. at 3. The alleged, entirely hypothetical future divergence of interest is insufficient to show that the State does not adequately represent the interest the Individual Movants assert. *See United States v. Michigan*, 424 F.3d at 445 (holding no divergence of interest where movant pointed to “future issues” which “are not now, and possibly never will be, before the district court.”).

II. THE INDIVIDUAL MOVANTS ARTICULATE NO BASIS FOR THE COURT TO PERMIT THEM TO INTERVENE AS A MATTER OF DISCRETION.

The court should decline to permit the Individual Movants to intervene pursuant to Rule 24(b) because, for the reasons discussed above, they do

not have any “claim or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b). In fact, the Individual Movants assert *no* legal “claim or defense”; they “assert[] no actual, present interest that would permit [them] to sue or be sued.” *Choice Fashion, Inc. v. U.S. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 2009 WL 1658047, at *2 (E.D. Mich. June 10, 2009) (quoting *Diamond v. Charles*, 476 U.S. 54, 77 (1986)) (alterations in original). Moreover, the Individual Movants’ intervention in this action is likely to “unduly delay or prejudice the adjudication of the original parties’ rights.” See Fed. R. Civ. P. 24(b)(3); *United States v. Michigan*, 424 F.3d at 445. The Individual Movants’ positions are outside the scope of the claims raised in the Complaint and their inclusion would needlessly complicate the proceedings, raise costs, and delay adjudication of the constitutionality of the State’s practice.

CONCLUSION

For the reasons set forth above, the Court should deny the Motion with respect to the Individual Movants.

Dated: January 2, 2018

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CERTIFICATE OF SERVICE

I hereby certify that, on January 2, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Dated: January 2, 2018

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