

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

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 Defendant-Intervenors

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

HON. PAUL D. BORMAN

MAG. ELIZABETH A. STAFFORD

**REPLY IN SUPPORT OF
PROPOSED INTERVENORS' MOTION TO INTERVENE**

INTRODUCTION

Plaintiffs concede that the Motion to Intervene should be granted, because St. Vincent’s interest in partnering with the State to provide foster and adoption services to vulnerable families is at the heart of this lawsuit. Dkt. 21 at 2-3. Plaintiffs agree that this interest is substantial, and cannot be adequately represented by the State.

But Plaintiffs want to be choosy about their opponents. Having filed a Complaint that would shut down St. Vincent’s adoption and foster programs, Plaintiffs seek to exclude the people who benefit from those programs, as having only “attenuated” or “hypothetical” interests in this lawsuit. But the concrete and practical risks to the Buck Family and Shamber Flore (the “Individual Movants”) could not be more real. If Plaintiffs win, St. Vincent will be forced to immediately close its public foster and adoption programs.¹ The Bucks will lose critical services and the chance to adopt a biological sibling of their children through those programs. And Shamber will lose the ability to volunteer with these programs that once transformed her own life. Plaintiffs may regret seeking such harmful relief, but the proper remedy for that error is voluntary dismissal—not opposing intervention by the families who face harm.

Having conceded St. Vincent’s entitlement for intervention, Plaintiffs seek to

¹ Under Michigan law, St. Vincent can only offer foster and public adoption services if it partners with the State. But it cannot partner with the State if it is forced to violate its religious beliefs as a condition of doing so. Ex. 1 ¶ 8; Dkt. 18 at 11.

parlay that concession into the right to block other qualified parties from intervening. But adequacy of representation is judged based on *existing* parties to a suit, which is why the Sixth Circuit has frequently allowed multiple similarly situated individuals to intervene. Ultimately, Plaintiffs simply do not want to grapple with the real-world consequences their lawsuit, if successful, would inflict on countless families and children just like Individual Movants. But that is not a legal basis for this Court to exclude parties who meet the requirements for intervention as of right.

ARGUMENT

I. Individual Movants possess a substantial legal interest in the case that may be impaired by this lawsuit.

Plaintiffs claim that harm the Individual Movants face is “not implicated” because the Complaint does not formally request closure of St. Vincent or harm to the Individual Movants. Dkt. 21 at 1, 3. But the right to intervene depends not on such formalism, but on whether “disposing of the action *may as a practical matter* impair or impede the movant’s ability to protect its interest.” Fed. R. Civ. P. 24(a)(2) (emphasis added). The Sixth Circuit has frequently allowed intervention based on the practical consequences that *may* flow from a lawsuit, even if those consequences were not requested or even implied in the complaint.

For example, in *Grutter v. Bollinger*, plaintiffs sued to challenge the race-conscious policy of the University of Michigan Law School, arguing the policy

violated the Equal Protection Clause. 188 F.3d 394, 397 (6th Cir. 1999). In their legal challenge of the policy, the plaintiffs in *Grutter* did not request that the University stop admitting minority students, nor even request that the University admit *fewer* minority students. Yet a number of minority students (some who merely “intend[ed] to apply” in the future to the University) moved to intervene simply based on the potential practical impact the litigation would have on their chance of being admitted. *Id.* at 397, 400. The lower court ruled against intervention, holding that these students lacked a substantial interest. The Sixth Circuit reversed, holding that a ruling for the plaintiffs would have “diminish[ed] the[] likelihood of” the movants receiving services in the future. *Id.* at 400. This satisfied “the minimal requirements of the impairment element.” *Id.*

In contrast to the intervenors in *Grutter*, the Individual Movants here have an even stronger interest. A ruling in favor of Plaintiffs will not merely “diminish th[e] likelihood,” but will undoubtedly prevent the Individual Movants from receiving *any* services through St. Vincent’s public adoption and foster programs. Disposition of this lawsuit thus certainly “may as a practical matter impair or impede” the Individual Movants’ interests, even if those consequences were not something Plaintiffs requested—or even anticipated.

Plaintiffs also argue that Individual Movants lack a substantial legal interest

in the litigation because they are “not parties to any contract with the State and perform no services on behalf of the State.” Dkt. 21 at 7. But this approach flies in the face of Sixth Circuit and Supreme Court rulings “reject[ing] the notion that Rule 24(a)(2) requires a specific legal or equitable interest.” *Grutter*, 188 F.3d at 399 (quoting *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997)). That is why the Sixth Circuit has frequently concluded intervention was required for parties with no legal or contractual relationship.²

Similarly, the Supreme Court held that a union member was entitled to intervene by right in a suit brought by the Secretary of Labor to invalidate an election of union officers, even though federal law prohibited the union member from initiating his own suit. *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 537 (1972). As other courts have explained, “although an asserted interest must be ‘legally protectable,’ it need not be legally *enforceable*. . . . [A]n interest is sufficient . . . even if the intervenor does not have an enforceable legal entitlement or would not have standing to pursue her own claim.” *Texas v. United States*, 805 F.3d 653, 659 (5th Cir. 2015).

² See, e.g., *Grutter*, 188 F.3d at 398 (intervention for would-be student with no contractual or legal relationship with University or government); *Miller*, 103 F.3d at 1247 (intervention for the Michigan Chamber of Commerce in a dispute over campaign finance laws where the chamber had no contractual or legal relationship with the state or the labor unions that brought the lawsuit).

In an attempt to avoid this clear precedent, Plaintiffs rely on two cases in which intervention was denied because the motion was untimely, and because the would-be intervenors asserted merely “economic interests” which could have been satisfied through other alternatives. *See United States v. Tennessee*, 260 F.3d 587 (6th Cir. 2001); *Blount-Hill v. Bd. of Educ.*, 195 F. App’x 482 (6th Cir. 2006). Here, Plaintiffs do not dispute timeliness. And far more is at stake for Individual Movants than economic interests that could be satisfied elsewhere.³ Individual Movants thus easily meet the liberal requirement to show a substantial interest.

II. Individual Movants are not adequately represented by existing parties.

Plaintiffs next attempt to exclude the Individual Movants by arguing that St. Vincent adequately represents their interests in this case. But adequate representation is measured based on representation by “existing parties,” not between other potential intervenors. Fed. R. Civ. P. 24(a)(2); *see Jansen v. City of Cincinnati*, 904 F.2d 336, 337 (6th Cir. 1990) (“The proposed intervenors’ right to

³ Notably, the practical impact of this suit is far more direct for Individual Movants than for Plaintiffs. Plaintiffs will be able to adopt a child in Michigan regardless of whether they prevail here. In fact, they can currently adopt with agencies located even closer to them. Dkt. 18 Ex. 1 ¶ 8. But if Plaintiffs’ suit succeeds, the Bucks will likely lose the opportunity to work with trusted social workers and adopt a biological sibling of their children. *See* Ex. 1 ¶¶ 6-7; Dkt. 18 at 12-13. Nor could these services be replaced by private adoption, because that service is fundamentally different and expensive. *See* Ex. 1 ¶¶ 2-4.

intervene . . . depends also on whether their interest is adequately protected by the *existing parties*.” (emphasis added)); *Miller*, 103 F.3d at 1247 (same).

Plaintiffs cite no precedent for the proposition that a party opposing intervention may block a qualified movant by conceding that another movant should intervene. This would allow any plaintiff to strategically handpick his preferred intervening adversary by choosing which movant to concede intervention. More importantly, such a standard is inconsistent with Sixth Circuit precedent. For instance, in *Grutter* the Sixth Circuit allowed “41 students and three pro-affirmative action coalitions” to intervene, even though many were identically situated. 188 F.3d at 394, 397. The Sixth Circuit did not demand individualized interests for each intervenor, nor consider whether any of the movants could adequately represent the others, because such an inquiry is legally irrelevant. *Id.*; see also *Linton v. Comm’r of Health & Env’t*, 973 F.2d 1311, 1313 (6th Cir. 1992) (allowing six similar nursing homes to intervene); *Jansen*, 904 F.2d at 337 (a “class of black applicants” intervened).⁴

Here, the Government has already conceded that the State does not adequately

⁴ The same is true in other circuits. See, e.g., *Conservation Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 40 (1st Cir. 1992) (seven fishing groups); *New York Pub. Interest Research Grp., Inc. v. Regents of Univ. of State of N. Y.*, 516 F.2d 350, 351 (2d Cir. 1975) (three pharmacists); *Texas v. United States*, 805 F.3d 653, 655 (5th Cir. 2015) (three immigrants); *Curry v. Regents of Univ. of Minnesota*, 167 F.3d 420, 421 (8th Cir. 1999) (five university students); *Sanguine, Ltd. v. U.S. Dep’t of Interior*, 736 F.2d 1416, 1417 (10th Cir. 1984) (nine tribes).

represent interests related to St. Vincent’s provision of public adoption and foster services. Dkt. 21. at 2-3. Plaintiffs fail to reconcile this concession with their argument that the State adequately represents the interests of Individual Movants. That alone should be enough to show inadequate representation.

But even if the Individual Movants are required to separately show that their interests may be inadequately represented by the State, they have met the “minimal” burden of proof required to do so. *Grutter*, 188 F.3d at 400.⁵ As in *Grutter*, the State is “unlikely to present evidence” of factors that “may be important and relevant” to determining legal issues at stake. *Id.* at 401. Such evidence includes how Individual Movants rely on services from St. Vincent that state agencies do not provide.⁶ Dkt. 18-4 at 3. Thus, the State does not adequately represent Individual Movants.

CONCLUSION

The Court should grant the Motion in its entirety for all Proposed Intervenors.

Dated: Jan. 9, 2018

Respectfully submitted,

/s/ Stephanie H. Barclay

Counsel for Proposed Defendant-Intervenors

⁵ Plaintiffs erroneously state that the Individual Movants must “overcome the presumption of adequate representation by the state.” Dkt. 21 at 13. But the Sixth Circuit “has declined to endorse a higher standard for inadequacy when a governmental entity [is] involved.” *Grutter*, 188 F.3d at 400.

⁶ Plaintiffs also argue allowing Individual Movants to intervene would needlessly complicate the proceedings, raise costs, and delay adjudication. Dkt. 21 at 15. But this is inconsistent with Plaintiffs’ argument elsewhere that Individual Movants are not raising arguments different from St. Vincent and their evidence can still come in if relevant. Dkt. 21 at 12. Thus, permissive intervention is also appropriate.

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CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2018, I electronically filed the above document with the Clerk of Court via CM/ECF, which will provide electronic copies to counsel of record.

/s/ Stephanie H. Barclay

Stephanie H. Barclay

Attorney for Defendant-Intervenors

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EXHIBIT 1

**IN THE UNITED STATES DISTRICT COURT
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No. 2:17-CV-13080-PDB-EAS

HON. PAUL D. BORMAN

MAG. ELIZABETH A.
STAFFORD

SUPPLEMENTAL DECLARATION OF MELISSA BUCK

1. My name is Melissa Buck. I am over the age of 21 years old and capable of making this declaration pursuant to 28 U.S.C. § 1746. I have not been convicted of a felony or of a crime of dishonesty. I live in Lansing, Michigan. I have personal knowledge of all of the contents of this declaration.

2. Adopting children through private adoption is a very different process than providing children a family through public foster and public adoption programs. When my husband, Chad, and I first began considering adoption, we researched and explored all of these alternatives.

3. Private adoption generally occurs when a mother is voluntarily giving a child up for adoption or has abandoned the child. But Public foster and adoption programs are set up to serve children who have been removed from their homes by the State because of maltreatment. Families who want to serve as a foster family or adopt foster children can only do so by working with an agency that provides public foster and public adoption services.

4. Private adoption is very expensive. Chad and I estimated that it would cost our family over \$10,000 per child to adopt privately. But adopting foster children does not require foster families to pay any fees. Chad and I are not wealthy people, and we realized that private adoption would be financially impossible for us. If we were limited to private adoption, we would also not be able to care for children who are in some of the most precarious and difficult situations.

5. All five of our children came to us through St. Vincent's public foster and adoption programs. To my knowledge, St. Vincent does not even provide private adoption services, as this is a very different type of program and mission.

6. It is possible that a situation may arise in the future where a new biological sibling of our adopted children could be placed in foster care. If that occurred, and if St. Vincent were no longer providing foster and public adoption services, another agency would work with the State to place that child. Generally, agencies have a very short period of time—often only an hour—to determine which family they will place a child with. It is unlikely that a different agency would know of our connection

or try to place that biological sibling with us. In contrast, if St. Vincent were still able to provide foster and public adoption services, it would know to call us immediately about the possibility of fostering and adopting this sibling of our children because of its relationship with us and its institutional knowledge about our family.

7. In any event, we cannot envision putting our family through the difficult and traumatic adoption process again without St. Vincent's deep institutional knowledge and culture of support, and without our trusted social workers who understand the history of our special needs children and the difficult dynamics with the birth parents.

8. I am not Catholic, but I understand that St. Vincent operates consistent with its Catholic faith and mission. I have found that this mission motivates St. Vincent's staff to treat families and children with love and compassion, and to provide exemplary services far beyond what is required. I also understand that if St. Vincent were unable to operate consistent with its religious beliefs, it would be unable to continue providing foster and public adoption services. When Michigan was considering protections for religious adoption agencies, St. Vincent and

other adoption agencies provided letters to the State explaining this issue. A true and correct copy of one such letter is provided as Attachment A to this Declaration.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 9, 2018.



Melissa Buck

Attachment A



**MICHIGAN
CATHOLIC**
C O N F E R E N C E

23 April 2015

The Honorable Rick Snyder
Governor of Michigan
P.O. Box 30013
Lansing, Michigan 48909

Dear Governor Snyder:

I trust this letter finds you in good health and spirits as you continue your efforts to reinvent the State of Michigan towards a more prosperous and brighter future for all. One key element of a brighter future is the education, safety and well-being of Michigan's children. As you may know, the Catholic Church has collaborated with the State of Michigan for decades to help place vulnerable and neglected children in loving "forever homes." The Church's efforts are guided by a network of long-standing and highly-regarded Catholic Charities agencies that specialize in child placement. In addition to handling approximately twenty percent of the active foster care and adoption cases in Michigan, Catholic agencies provide refugee resettlement, homeless assistance, pregnancy assistance, drug and alcohol abuse counseling, mental health counseling, legal immigration and other valuable services to marginalized and at-risk persons.

For nearly seventy years, Catholic and other denominational faith-based child placement agencies have effectively provided stability and security for thousands of children who have otherwise lived in a neglectful or abusive domestic environment. Many of these children arrive at a Catholic or other denominational agency following the order of a probate court, which relies upon religious agencies for their exceptional level of care for vulnerable children. In fact, the most highly-regarded placement agencies in Michigan are faith-based, as the annual Department of Human Services' Faith Based Foster Care and Adoption Summit can attest. This is because of the agencies' exceptional track record on behalf of children in addition to the ability to provide services typically not found with a public provider, such as immediate access to individual mental health counseling and more direct personal care. The Catholic Church counts itself blessed to serve the community in a manner that respects and upholds the dignity and worth of each and every vulnerable child in Michigan.

Governor Snyder, I write today with profound concern and a sense of urgency for the future of Catholic child placement agencies and our ongoing relationship with the State of Michigan. As entities that operate according to a specific religious mission, Catholic Charities agencies provide services in harmony with the tenants of the Catholic faith. It is the essence and crux of who we are and have always been. Our faith guides each agency's mission to meet the needs of children and address their issues through love, respect and diligence. Yet the religious manner by which faith-based child placement agencies operate has become objectionable to those that do not value the diversity that comes with a statewide network of public and private placement providers.

Officers: Most Reverend Allen H. Vigneron, Archbishop of Detroit, *Chairman*; Most Reverend Paul J. Bradley, Bishop of Kalamazoo, *Vice-Chairman*; Mr. Robert W. Asmussen, Grosse Ile, *Secretary/Treasurer*

Board Members: Most Reverend Earl A. Boyea, Bishop of Lansing; Ms. Susanne Boxer, Hancock; Most Reverend Joseph R. Cistone, Bishop of Saginaw; Most Reverend John F. Doerfler, Bishop of Marquette; Mr. Mark Feldpausch, Delton; Mr. Patrick E. Heintz, Traverse City; Sr. Rose Marie Kujawa, CSSF, Ph.D., Livonia; Most Reverend Steven J. Raica, Bishop of Gaylord; Mr. Steven F. Roznowski, Lansing; Rev. Leonard A. Sudlik, Ada; Most Reverend David J. Walkowiak, Bishop of Grand Rapids

Mr. Paul A. Long, *President and Chief Executive Officer*

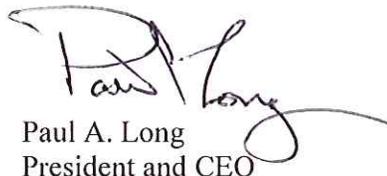
Regrettably, administrative or judicial rulings, encouraged by the efforts of adversarial organizations, have led to the shuttering of numerous Catholic child placement agencies in other states and cities, specifically Boston, Washington, D.C., San Francisco and throughout the State of Illinois. Communities in these areas witnessed the loss of a collective 300 year history of invaluable and effective services on behalf of vulnerable children and persons. It has been publicly stated that caseloads in these places were simply shifted to other agencies; it is privately known among outgoing agency directors that cases and families were disrupted, already transient children were again shuffled around, important services were lost, and state child welfare agencies took on more than they could handle. None of this was necessary; however, the religious agencies were given the untenable choice of terminating services or operating in a manner inconsistent with their sincerely held and long-standing religious beliefs and teachings, specifically as they relate to the family.

In order for the State of Michigan to secure its long-standing partnership with faith-based child placement agencies, to protect the diverse network of public and private providers in the state for decades to come, and to encourage more adoptions and placements rather than fewer, House Bills 4188-4190 are necessary. This legislation will codify into state law what has been in practice since before the Michigan Constitution of 1963 – effective state collaboration with faith-based child placement agencies genuinely concerned about the dignity and worth of every vulnerable child in its care. If House Bills 4188-4190 are not signed into law, and if statewide policy changes in a way that would force Catholic agencies to choose between violating strongly held religious beliefs or ceasing cooperation with the state, the agencies will cease to cooperate. With deference to the best interests of vulnerable children, it is our hope that faith-based agencies in general and Catholic agencies in particular will never have to make such a difficult choice, especially when agencies that serve clients with differing understandings of the family currently exist.

As leaders of placement agencies across the state, Catholic providers know first-hand the critical role faith-based agencies play in helping to find permanent, loving homes for vulnerable and neglected children. Michigan Catholic Conference strongly urges your support for House Bills 4188-4190 as the legislation will ensure a diverse range of child placement providers and stabilize the State of Michigan's relationship with faith-based agencies for years to come. This legislation, which does not prohibit adoption to any classification of persons, is a practical solution to a potential conflict. At a time when a greater number of "forever families" are needed, faith-based entities that are high-quality, well-established and highly-regarded deserve greater legal protection.

With deep appreciation for the significant responsibilities that fall upon your office, and with a profound desire for the Catholic Church to continue serving Michigan's most vulnerable children well into the future, I am

Sincerely,



Paul A. Long
President and CEO