UNITED STATES DISTRICT COURT
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,

Intervening Defendants.
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Case No. 17-cv-13080

Paul D. Borman
United States District Judge

ORDER GRANTING MELISSA BUCK, CHAD BUCK, AND SHAMBER FLORE'S MOTION TO INTERVENE (ECF NO. 18)

On December 18, 2017, St. Vincent Catholic Charities ("St. Vincent"), Melissa Buck, Chad Buck and Shamber Flore (referred to collectively as "the Individual

Movants") filed a motion to intervene as Defendants in this matter. (ECF No. 18.) The Proposed Intervenor Defendants received full concurrence in their motion from the Defendants. (ECF No. 18, Mot. at 3, PgID 419.) On January 2, 2018, Plaintiffs filed a "Response in Partial Opposition to Motion to Intervene." (ECF No. 21.) Plaintiffs oppose the intervention of Chad Buck, Melissa Buck, and Shamber Flore but "Plaintiffs do not oppose the Motion [to Intervene] with respect to St. Vincent Catholic Charities." (ECF No. 21, Pls.' Resp. 1, PgID 524.) On March 5, 2018, the Court granted the unopposed motion of St. Vincent to intervene. (ECF No. 31.) On March 7, 2018, the Court heard oral argument on the motion of the Individual Movants to intervene in this case. For the reasons that follow, the Court GRANTS the motion as to each of the Individual Movants.

INTRODUCTION

Plaintiffs filed their 42 U.S.C. § 1983 Complaint challenging Defendants Nick Lyon (sued in his official capacity as the Director of the Michigan Department of Health and Human Services "DHHS") and Herman McCall's (sued in his official capacity as the Executive Director of the Michigan Children's Services Agency "CSA") practice of permitting state-contracted and taxpayer-funded child placing agencies to use religious criteria to screen prospective foster and adoptive parents for children in the foster care system. Plaintiffs allege that this practice harms vulnerable

children by denying them access to loving families and violates the Plaintiffs' rights protected by the Establishment Clause of the First Amendment to the United States Constitution and violates the Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Plaintiffs are prospective adoptive same-sex couples and individuals who have contacted certain faith-based Michigan adoption agencies and been denied consideration for evaluation and recommendation to the State for adoption by those agencies based upon their same-sex status. Plaintiffs seek a declaratory judgment that these practices violate the First and Fourteenth Amendments and an Order enjoining Defendants Lyon and McCall, in their official capacities, from contracting with or providing taxpayer funding to private child placing agencies that are tasked with screening prospective foster or adoptive parents, but employ religious criteria that exclude same-sex couples from participating in their process. Plaintiffs seek an Order directing Defendants Lyon and McCall, in their official capacities, to ensure that lesbian and gay individuals and couples are treated the same as heterosexual individuals and couples by state-contracted child placement screening agencies.

Plaintiffs allege that Melissa Buck, Chad Buck, and Shamber Flore, who seek to intervene as Defendants in this action: (1) lack a substantial legal interest in the case and any interest they do have is adequately represented by other parties; and (2)

lack a claim or defense that shares a common question of law or fact with the main action and allowing their intervention would unduly delay or prejudice adjudication of the main action.

I. BACKGROUND

In 2015, the Michigan Legislature passed Mich. Comp. Laws § 722.124e, which provides in relevant part: "To the fullest extent permitted by state and federal law, a child placing agency shall not be required to provide any services if those services conflict with, or provide any services under circumstances that conflict with, the child placing agency's sincerely held religious beliefs . . . ." Mich. Comp. Laws § 722.124e(2). "Services" is defined under statute to include "any service that a child placing agency provides, except foster care case management and adoption services provided under a contract with the department." Mich. Comp. Laws § 722.124e(7)(b). Plaintiffs in this action do not directly challenge the constitutionality of the statute, but rather challenge DHHS's implementation of the statute through the practice of subsidizing faith-based agencies, including St. Vincent, that decline to evaluate and refer couples like the Dumonts and Busk-Suttons to the State as prospective foster or adoptive families based on their status as a same-sex couple.

The Michigan DHHS is responsible for placing the approximately 13,000 children who are in the State's foster care system due to abandonment or neglect, in

foster homes or with adoptive families. (Compl. ¶ 2.) Through rule making authorized by statute, DHHS has chosen to contract out public foster care and adoption screening services to private child placement agencies; the State pays these agencies with taxpayer funds to perform these services. (Compl. ¶¶ 3, 25-28; Mich. Comp. Laws §§ 722.111(c), 722.115(3).) A private child placement agency may only perform public adoption and foster care screening services related to placing children with families if that agency partners with and is authorized by the DHHS. (*Id.*) Child placement agencies are required to maintain recruitment programs to evaluate applicants for foster homes or adoptive parents, as well as selecting an appropriate placement for a child into a foster or adoptive home. (Compl. ¶ 26; Mich. Admin. Code R. 400.12101-400.1208.) Child placement agencies perform in-depth home studies assessing the characteristics of families that could make them suitable to adopt or foster children. (ECF No. 18, Mot. to Intervene Ex. 1, December 15, 2017 Declaration of Gina Snoeyink ¶ 5.) Once a child placement agency has performed its assessment of a prospective family, it provides a written evaluation and recommendation to the State regarding foster licensing and approval of adoption for families. DHHS makes the ultimate determination about placement of children and licensing of families for foster and adoptive purposes. (Snoeyink Decl. ¶ 6.)

Some of these private agencies, like St. Vincent, are faith-based agencies that

historically have declined to provide written recommendations to the State evaluating and endorsing a family situation that would conflict with its religious beliefs, such as a same-sex or unmarried couple seeking to foster or adopt. (Snoeyink Decl. ¶ 7; Compl. ¶ 38.) If unmarried or same-sex couples want to obtain their license through St. Vincent then, consistent with State law, St. Vincent staff provide written information on the State's website and contact information for a list of *other* local adoption or foster care service providers that would be willing to work with the family. (Snoeyink Decl. ¶ 9.) There are seven other foster or adoption agencies in the tri-county area that are willing to work with unmarried or same-sex couples. (*Id.*) St. Vincent submits that it would not be able to continue its adoption and foster programs, either legally or financially, if the State were not allowed to partner with it in providing these screening programs.

According to St. Vincent, losing the State contract and authorization to perform these screening services would result in the immediate closure of St. Vincent's public foster and adoption programs, as well as financially impacting St. Vincent's other programs including its counseling services, and refugee resettlement, which may no longer be sustainable without partnership with the State. (Snoeyink Decl. ¶ 13.) If St. Vincent were to close its adoption and foster programs, Individual Movants Chad and Melissa Buck submit that they would potentially be foreclosed from adopting

future siblings of their current adoptive sibling children and would be deprived of the ancillary services provided by St. Vincent, such as monthly parent support groups. (Mot. to Intervene Ex. 2, December 16, 2017 Declaration of Melissa Buck ¶¶ 6-7.) If St. Vincent were forced to close its adoption and foster programs, Individual Movant Shamber Flore submits that she would be deprived of the opportunity to continue mentoring many youth from St. Vincent in her role as a volunteer at St. Vincent. (Mot. to Intervene, Ex. 3, December 15, 2017 Declaration of Shamber Raine Flore ¶¶ 4-5.)

Plaintiffs concede that this action directly involves St. Vincent's ability to continue to use religious criteria when performing child welfare services for the State of Michigan, and therefore Plaintiffs do not object to St. Vincent's intervention in this action. (ECF No. 21, Pls.' Resp. 3, PgID 532.) Through this concession, Plaintiffs necessarily acknowledge that St. Vincent has satisfied the criteria entitling it to intervene as of right in this action, i.e. that the motion to intervene is timely filed, that St. Vincent has a substantial legal interest in this case, that St. Vincent's ability to protect that interest will be impaired in the absence of intervention, and that the existing parties to the action do not adequately represent St. Vincent's interest.

On the other hand, as to the Individual Movants who have filed jointly with St. Vincent to intervene, Plaintiffs urge the Court to reach a different conclusion and to

deny them the right to intervene in this case. The Plaintiffs assert that the Individual Movants have an insubstantial, contingent, and hypothetical interest in this case and that, in any event, the interests of the Individual Movants are aligned with the interests of another Proposed Intervenor-Defendant, St. Vincent, whose intervention Plaintiffs do not oppose, who will adequately represent the interests of the Individual Movants in this case.

II. LEGAL STANDARDS AND ANALYSIS

A. Intervention as of Right: Rule 24(a)

Federal Rule of Civil Procedure 24(a) provides that a non-party may intervene as of right in a pending action "when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Fed. R. Civ. P. 24(a). The Sixth Circuit "has interpreted Rule 24(a) as establishing four elements, each of which must be satisfied before intervention as of right will be granted: (1) timeliness of the application to intervene, (2) the applicant's substantial legal interest in the case, (3) impairment of the applicant's ability to protect that interest in the absence of intervention, and (4) inadequate representation of that interest by parties already

before the court." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997).

The Sixth Circuit "subscribe[s] to 'a rather expansive notion of the interest sufficient to invoke intervention of right.'" *Grutter v. Bollinger*, 188 F.3d 394, 398 (6th Cir. 1999) (quoting *Miller*, 103 F.3d at 1245). The Sixth Circuit has also "reject[ed] the notion that Rule 24(a)(2) requires a specific legal or equitable interest.'" *Grutter*, 188 F.3d at 399 (quoting *Miller*, 103 F.3d at 1245). In a "close case," the matter of intervention should be resolved "'in favor of recognizing an interest under Rule 24(a).'" *Id.* (quoting *Miller*, 103 F.3d at 1247). In addition, the proposed intervenor bears a "minimal burden" in establishing the impairment element of the intervention test: "'To satisfy [the element of impairment] of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied. This burden is minimal.'" *Grutter*, 188 F.3d at 399 (quoting *Miller*, 103 F.3d at 1247). "'Failure to meet [any] one of the [four] criteria will require that the motion to intervene [as of right] be denied.'" *Stupak-Thrall v. Glickman*, 226 F.3d 467, 471 (6th Cir. 2000) (quoting *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989)) (final alteration added). *See also Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 780 (6th Cir. 2007) (concluding that because none of the proposed intervenors demonstrated a

substantial legal interest in the litigation, the court "need not address the remaining factors") (citing *Grubbs*, 870 F.2d at 345). "[A]n intervenor need not have the same standing necessary to initiate a lawsuit," and "[t]he inquiry into the substantiality of the claimed interest is necessarily fact-specific." *Miller*, 103 F.3d at 1245.

Plaintiffs do not challenge the timeliness of the Individual Movants' Motion to Intervene. Nor could they as Plaintiffs concur in the intervention of St. Vincent as a Defendant and the Individual Movants filed a joint motion with St. Vincent, which was filed within three days of the filing of State Defendants' motion to dismiss. Plaintiffs argue, however, that the Individual Movants do not have a "substantial legal interest" in this case that they will be unable to protect in the absence of intervention and further argue that whatever interest the Individual Movants do have will be adequately protected by St. Vincent's participation as a party to the case, "assuming this Court grants St. Vincent's unopposed Motion to Intervene." The Court did grant St. Vincent's Motion to Intervene on March 5, 2018. (ECF No. 31.)

The Individual Movants Chad and Melissa Buck submit that if St. Vincent is forced to close its foster and adoption programs, which St. Vincent claims will occur if Plaintiffs obtain the relief they seek in this action, the Bucks will lose critical services that are currently provided to them by St. Vincent and may lose the ability to adopt biological siblings of their present adoptive children. Shamber Flore submits

that she will lose the opportunity to volunteer at St. Vincent and do the important work of mentoring children in a faith-based setting who, like herself, come from broken and abusive backgrounds.

1. The Nature of the Individual Movants' Alleged Substantial Legal Interest and the Possible Impairment of That Interest Should Intervention be Denied

Timeliness is not an issue in this instance and the parties spend the bulk of their briefing attempting to establish whether or not the Individual Movants have a substantial legal interest in this litigation and whether any such interest is likely to be impaired in the absence of intervention. The Bucks and Ms. Flore rely principally on *Grutter*, *supra*, in which the Sixth Circuit addressed the nature of the interests of a group of students and a coalition, both of whom separately sought to intervene in a lawsuit challenging the University of Michigan's race-conscious admissions program. The named plaintiffs in the action were white students, one male and one female, who were challenging the constitutionality of the University's affirmative action/race-conscious admissions program. The Sixth Circuit determined that two separate groups of proposed intervenors, a group of minority undergraduate students who intended to apply to law school and a pro-affirmative action coalition, had a direct, substantial, and compelling interest in maintaining the use of race as a factor in the University's admission program to enhance their chances of gaining admission to the

University. Although neither group had a legal right at stake in the litigation that was protected by legislation or a judicial decree, the Sixth Circuit found that their interest in preserving access for minorities to educational opportunities and preventing a decline in minority enrollment satisfied the Rule 24(a) substantial legal interest test:

> The [] district court's opinion relies heavily on the premise that the proposed intervenors do not have a significant legal interest unless they have a "legally enforceable right to have the existing admissions policy construed." We conclude that this interpretation results from a misreading of this circuit's approach to the issue. As noted earlier, we have repeatedly "cited with approval decisions of other courts 'reject[ing] the notion that Rule 24(a)(2) requires a specific legal or equitable interest.'" *Miller*, 103 F.3d at 1245.
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> The case law of this circuit does not limit the finding of a substantial interest to cases involving the legislative context, any more than it limits such a finding to cases involving a consent decree. Neither a legislative context nor the existence of a consent decree is dispositive as to whether proposed intervenors have shown that they have a significant interest in the subject matter of the underlying case. We find that the interest implicated in the case now before us is even more direct, substantial, and compelling than the general interest of an organization in vindicating legislation that it had previously supported. This case is, if anything, a significantly stronger case for intervention than *Miller* and many of the cases on which *Miller* relied.
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> Even if it could be said that the question raised is a close one, "close cases should be resolved in favor of recognizing an interest under Rule 24(a)." *Miller*, 103 F.3d at 1247. The proposed intervenors have enunciated a specific interest in the subject matter of this case, namely their interest in gaining admission to the University, which is considerably more direct and substantial than the interest of the Chamber of Commerce in *Miller*—a much more general interest. We therefore hold that the district court erred in [] in failing to rule that the

> proposed intervenors have established that they have a substantial legal interest in the subject matter of this case.

Grutter, 188 F.3d at 398-99. The Sixth Circuit in *Grutter* also quickly disposed of the impairment issue, finding that even a "diminished likelihood' of acceptance at the University satisfied the minimal impairment requirement. *Id.* at 400. Here, the Bucks and Ms. Flore argue, a ruling in favor of the Plaintiffs that likely will result in the closure of St. Vincent makes it all but certain that the Bucks and Ms. Flore will no longer be able to receive services from, or provide their volunteer services to, their faith-based agency of choice, St. Vincent. (ECF No. 24, Reply at 3, PgID 554.)

In response, Plaintiffs rely on *Blount-Hill v. Bd. of Educ. of Ohio*, 195 F. App'x 482 (6th Cir. 2006) and *United States v. Tennessee*, 260 F.3d 587 (6th Cir. 2001), for the proposition that parties merely claiming to benefit as third parties to a contract with the State that is challenged on constitutional or statutory grounds do not have an interest that satisfies Rule 24(a)'s "substantial legal interest" requirement. In *Blount-Hill*, a group of education association members and parents of school-aged children in Ohio filed an action alleging that certain funding provisions of a state statute violated both the state and federal constitutions. 195 F. App'x at 483-84. White Hat Management ("White Hat"), a management firm that contracts with community schools in Ohio to provide services to aid in the schools' operations,

sought to intervene in the action. The Sixth Circuit, relying on *United States v. Tennessee*, *supra*, found that because White Hat was not a party to any contract that was challenged in the action and was not directly targeted by the plaintiffs' complaint, and sought only to preserve its economic interest in continuing to contract with the community schools, it did not have a "substantial legal interest" sufficient to satisfy Rule 24(a):

> White Hat's primary motivation for seeking intervention is concededly economic: because "[s]tate funds are the sole source of funding for community schools ... [i]f [s]tate funds are taken away from community schools, they will be forced to close." Nevertheless, White Hat contends that it also has an interest in fulfilling its "mission"-to provide an alternative education option for Ohio students.
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> White Hat alleges that it is motivated by both economic interests and for reasons relating to the preservation of this educational alternative. Nevertheless . . . White Hat's primary interest is economic. It is not a party to any challenged contract nor is it directly targeted by plaintiffs' complaint. Instead, White Hat seeks to preserve the constitutionality of the community school's funding structure so that it might continue to contract with community schools. Similar to [the proposed intervenor in *Tennessee*], White Hat's "claimed interest does not concern the constitutional and statutory violations alleged in the litigation," but rather "an interest in the economic component." *Tennessee*, 260 F.3d at 596. We conclude that this interest is insufficient to comprise a substantial legal interest for purposes of Rule 24(a) intervention. Like the proposed intervener in *Tennessee*, White Hat "can protect its economic interests in contract negotiations with the State by lobbying the legislative and executive branches for favorable funding arrangements. . . ." *Id.* at 596-97.

Blount-Hill, 195 F. App'x at 486. Plaintiffs submit that, like the proposed intervenors

in *Blount-Hill* and *Tennessee*, the Bucks and Ms. Flore are not parties to the child placement agency contracts at issue in the litigation, nor are they targeted by the Plaintiffs' Complaint. Rather, Plaintiffs argue, the Bucks and Ms. Flore "merely 'seek[] to preserve the constitutionality of the [State's challenged practice] so that [they] might continue to'" get services or volunteer through St. Vincent." (ECF No. 21, Pls.' Response at 10, PgID 539) (quoting *Blount-Hill*, 195 F. App'x at 486).

The Individual Movants reply that the Sixth Circuit has expressly "rejected the notion that Rule 24(a)(2) requires a specific legal or equitable interest," *Grutter*, 188 F.3d at 399, and has frequently held that no legal or contractual relationship is required to establish a substantial legal interest. (ECF No. 24, Reply at 4 n. 2, PgID 555) (citing *Grutter*, 188 F.3d at 398 (intervention for prospective student with no contractual or legal relationship to University or state) and *Miller*, 103 F.3d at 1247 (allowing Chamber of Commerce to intervene in dispute over campaign finance laws where Chamber had no contractual or legal relationship with original parties to the lawsuit)). The Bucks submit that much more is at stake for them than economic interests in the outcome of this litigation – they point to the potential that they will likely lose the opportunity to "work with trusted social workers and adopt a biological sibling of their children." (Reply at 5, PgID 556.) And Ms. Flore likewise submits that what is at stake for her goes beyond economics – she will lose the opportunity

to do the important work of mentoring others in the St. Vincent system.

In determining whether to permit intervention, the court "must accept as true the non-conclusory allegations of the motion." *Horrigan v. Thompson*, No. 96-4138, 145 F.3d 1331 at *2 (6th Cir. 1998) (Table Case) (quoting *Lake Investors Dev. Group v. Egidi Dev. Group*, 715 F.2d 1256, 1258 (7th Cir. 1983)). *See also Westvue NPL Trust v. Kattula*, No. 16-cv-12813, 2016 WL 6138616, at *1 (E.D. Mich. Oct. 21, 2016) ("[W]hen determining whether intervention should be allowed, the court 'must accept as true the non-conclusory allegations of the motion.'") (quoting *Lake Investors* and citing *Horrigan*). St. Vincent and the Individual Movants submit that if Plaintiff's lawsuit is successful, St. Vincent will be forced to close its foster and adoption programs. St. Vincent will no longer be able to facilitate support groups or help place vulnerable children with families who have been relying on St. Vincent and working with St. Vincent staff for years. The Individual Movants submit that the interests of people like the Bucks and Shamber Flore, the individuals who actually benefit from the programs that St. Vincent offers, who regularly attend support groups and rely heavily on the services of their St. Vincent adoption workers with whom they have established relationships, and who have important mentoring relationships with the vulnerable children at St. Vincent, indeed have a substantial interest in the outcome of this case. And, according to the Individual Movants, given

the small window of time (one hour[1]) that an agency has to place a child once they receive a referral for placement, there is a very real possibility that people like the Bucks, who have already adopted two sibling foster children, would miss the opportunity to adopt another sibling of those adopted children if such an opportunity were to present itself – it would be unlikely that another agency unfamiliar with the Buck family would be able to facilitate that placement in the same manner that St. Vincent, who is intimately familiar with the Buck's background, would. The Individual Movants submit that the Bucks would not be on the prior case records of a different agency but they would be on the minds of the St. Vincent caseworker who knows their family situation and would know to immediately contact them, and therefore there is a likelihood that they would miss the opportunity to adopt another sibling. (ECF No. 33, Transcript of March 7, 2018 Hearing 11:7-14:4.) The Bucks have demonstrated, at least for purposes of the Court's consideration of a motion under Rule 24, that they have a substantial interest in continuing to work with the individuals at St. Vincent who have a deep institutional knowledge of their family situation. The Bucks also have a substantial interest in continuing to receive the

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[2] Under the standard foster care contract, "[i]f DHS makes a referral to a child placing agency, the child placing agency must accept or decline the referral immediately, within one hour, of receipt of the referral." (ECF No. 16, Mot. Intervene Ex. 2, St. Vincent/DHS Contract at 4, PgID 148.)

services of St. Vincent's support groups, which they attend regularly, and which the Individual Movants submit will likely go unfunded and cease to operate should Plaintiffs prevail in this action. (Buck Decl. ¶¶ 6-7.) The court must accept these non-conclusory allegations as true for purposes of analyzing the motion to intervene, and accepting them, the Court finds that the Bucks and Ms. Flore have demonstrated a substantial interest in this litigation that may be impacted by the outcome of this case. The Individual Movants submit that the institutional knowledge possessed by St. Vincent about the Bucks and other families with whom St. Vincent has been working for years is a significant interest that the Individual Movants have a deep stake in protecting. (3/7/18 Hr'g Tr. 14:15-15:24.)

Plaintiffs submit that the Bucks and Ms. Flore are not harmed or favored by St. Vincent's policy of refusing to evaluate and refer same-sex couples for foster and adoptive purposes, and therefore they have no interest in the constitutional violations at the heart of this case. As long as St. Vincent stays in business, Plaintiffs submit, the Individual Movants will have their interests satisfied. The Individual Movants submit that while it may be true that St. Vincent and the Individual Movants share an interest in St. Vincent's continued viability, the Individual Movants do bring perspectives to the analysis that St. Vincent might not be in the best position to convey, and they suffer distinct harms that St. Vincent does not share. Thus, the

Individual Movants submit, though they may share to some extent the same substantial legal interest, the potential for impairment of that interest may be greater if the Individual Movants are denied a significant voice in these proceedings. (3/7/18 Hr'g Tr. 23:1-24:3.) This case is not just like *Blount-Hill* and *United States v. Tennessee*, discussed *supra*, in which the parties seeking to intervene could demonstrate only a third-party beneficial economic interest in the case. Here, while the Individual Movants may face a pecuniary loss, much more is a stake for them, they submit, than just money. (3/7/18 Hr'g Tr. 34:7-13.) Accordingly, the Court finds that the Individual Movants satisfy the second and third prongs of the intervention as of right test.

2. The Adequacy of Representation of These Interests Absent Intervention of the Individual Movants

St. Vincent and the Individual Movants filed a joint motion to intervene in this action. The Individual Movants insist that Plaintiffs offer no precedent for "carving up" a joint motion to intervene and then comparing the adequacy of representation of the joint movants' interests to one another, rather than comparing the representational adequacy of those interests to the existing parties to the litigation. (3/7/18 Hr'g Tr. 20:3-18.) The Court agrees and also has been unable to locate persuasive authority discussing just this situation. However, there is authority for the

proposition that intervenors can be compared to one another for purposes of deciding the adequacy of representation issue. *Coaltion to Defend Affirmative Action v. Granholm*, 240 F.R.D. 368 (E.D. Mich. 2006), *aff'd* 501 F.3d 775 (6th Cir. 2006), involved just such a situation. *Coalition to Defend* involved a challenge to the validity of an amendment to the Michigan state constitution that barred the use of race, sex, color, ethnicity, or national origin to promote diversity in public hiring or education. 240 F.R.D. at 371. The Michigan Attorney General sought to intervene as a defendant in the matter, and the district court granted the motion, which was either consented to or unopposed by the original parties. *Id.* at 371. On the same day that the court granted the Attorney General's motion to intervene, two other groups sought to intervene and several days later another group and an individual sought to intervene. *Id.* In the process of deciding, for various reasons, to deny all but the individual's motion to intervene, the district court expressly considered that the Attorney General (who sought intervention at the same time as several other proposed intervenors) would adequately represent the interests of many of the other proposed intervenors:

> The main argument by the proposed intervening defendants on the adequacy of representation is that the original parties to the lawsuit all had been opposed to the ballot proposal before the election. That argument certainly had some force before the Michigan Attorney General was allowed to intervene in the case. . . . Since the interests of

> proposed intervenors the American Civil Rights Foundation, the Michigan Civil Rights Initiative Committee, and Toward a Fair Michigan are precisely aligned with those of the Michigan Attorney General, and because there is little likelihood that their participation would shed any new light on the issues presented, they have not shown that the present parties, as they are now aligned, would be inadequate to advance their interests.

240 F.R.D. at 376.

The Individual Movants attempt to distinguish *Coalition to Defend* because in that case the attorney general had moved separately to intervene and had been granted the right to intervene before the two interest groups and the individual filed their motion to intervene. (3/7/18 Hr'g Tr. 20:3-21:2.) While this is a distinguishing factor, it is also true that the motions to intervene in *Coalition to Defend* were filed just days apart – but as a technical matter the Individual Movants are correct. In this case, at the time the joint motion to intervene was filed, the only comparator for purposes of analyzing the adequacy of representation was the State. And Plaintiffs have conceded, by concurring in St. Vincent's intervention, that the State cannot adequately represent St. Vincent's interests. In opposing the intervention of the Individual Movants, Plaintiffs argue that the interests of St. Vincent and the Individual Movants are perfectly aligned. The Individual Movants submit that because Plaintiffs have already conceded that the State Defendants cannot adequately represent the interests of St. Vincent, and argue further that the interests of St.

Vincent and the Individual Movants are perfectly aligned, they cannot argue now that the State adequately represents the interests of the Individual Movants. In the absence of any authority brought to light by the Plaintiffs, or unearthed by this Court, in which a joint motion to intervene has been disaggregated for purposes of the Rule 24 analysis, the Court finds that the Individual Movants have the better argument and that they, like St. Vincent, have demonstrated that the "existing parties" to the litigation at the time they filed their motion to intervene could not adequately represent their interests. In addition, unlike the proposed intervenors who were denied intervention in *Coalition to Defend*, the Individual Movants have demonstrated that "their participation would shed [] new light on the issues presented . . ." 240 F.R.D. at 376.

Even if the Individual Movants were required to establish a lack of adequacy of representation of their interests by St. Vincent, they submit that they have articulated a sufficient independent basis – St. Vincent faces institutional constraints with respect to evidence and argument that the Individual Movants do not and that the harm suffered by the Individual Movants is much more personal in nature, and distinct in some important ways from, the harm to St. Vincent. (3/7/18 Hr'g Tr. 23:1-24:3.) While their interests are admittedly related, the Individual Movants argue, they are also distinct and as parties, the Individual Movants improve their chances of

introducing impact evidence they deem important to their unique situations. (3/7/18 Hr'g Tr. 24:14-25:11.) The Individual Movants submit that the Plaintiffs have not conceded the relevance of any evidence that the Individual Movants would seek to introduce that would relate specifically to the distinct harm faced by the Individual Movants in the event that the Plaintiffs prevail in this case. (3/7/18 Hr'g Tr. 24:14-20, 37:1-13.) While the Plaintiffs represented at the hearing on the motion to intervene that they will not object to any evidence "that the Court deems relevant," they stopped short of conceding the relevance of any impact evidence that the Individual Movants may wish to submit. (3/7/18 Hr'g Tr. 28:6-13.)

The Sixth Circuit established in *Grutter* "that the proposed intervenors' burden in showing inadequacy is 'minimal.'" *Grutter*, 188 F.3d at 400 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972)). "The proposed intervenors need only show that there is a *potential* for inadequate representation." *Id.* (alteration in original). Even if the Individual Movants were required to establish inadequacy of representation vis-a-vis St. Vincent rather than the State, they have met that minimal burden here.

The Court concludes that the Individual Movants have shown that they have a substantial legal interest in the subject matter of this case, that this interest will be impaired if the Individual Movants are denied intervention, and that neither the State

nor St. Vincent can fully and adequately represent their unique perspective and interest in these proceedings. Accordingly, the Individual Movants are entitled to intervene as of right.

B. Permissive Intervention

Even if the Court were to conclude that the Individual Movants failed to satisfy the requirements for intervention as of right, the Court would exercise its discretion to permit them to intervene under Fed. R. Civ. P. 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." Fed. R. Civ. P. 24(b)(1)(B). Whether to grant permissive intervention rests within the sound discretion of the court, but "[i]n 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). "So long as the motion for intervention is timely and there is at least one common question of law or fact, the balancing of undue delay, prejudice to the original parties, and any other relevant factors is reviewed for an abuse of discretion." *Miller*, 103 F.3d at 1248.

The Individual Movants direct the Court's attention to the opening paragraph of Plaintiffs' Complaint, which alleges that the practice of permitting state-contracted child placing agencies to use religious criteria to screen prospective foster and

adoptive families "harms vulnerable children by denying them access to loving families that they desperately need . . . ." (Compl. ¶ 1; 3/7/18 Hr'g Tr. 8:1-21.) Likewise, the Individual Movants point out, Paragraph 11 of the Complaint alleges that the State's policy challenged in this action "fails to take adequate account of the burdens imposed on children" whom the State hires these agencies to serve. (Compl. ¶ 11; 3/7/18 Hr'g Tr. 26:16-27:4.) And the Individual Movants point to paragraph 86 of the Complaint alleging that "no government interest is served by denying children access to potentially qualified families based on a religious exclusion." (Compl. ¶ 86, 3/7/18 Hr'g Tr. 27:11-14.) The Individual Movants suggest that the common question of law and fact that they share with this case is in demonstrating from their perspective the impact and burden on the children of the State if Plaintiffs obtain the relief they seek. (3/7/18 Hr'g Tr. 8:1-21, 27:15-28:1.) If the Court is being asked to decide an issue based in part on an impact of its ruling on the welfare of the State's foster children and their families, which the Individual Movants submit the Plaintiffs have placed in issue in their Complaint, the Individual Movants urge the Court to allow those children and families to have a voice in these proceedings.

Like the proposed intervenors in *American Beverage Assoc. v. Snyder*, No. 11-cv-195, 2011 WL 13128662, at *5 (W.D. Mich. April 26, 2011), the Individual Movants assert that they will be "adversely impacted by a declaration of

unconstitutionality" in this case, and thus "share a common question with the main action." And, as in *American Beverage*, the Individual Movants "bring[] to this litigation a unique perspective" because of the nature of the individual and very personal harm that they will suffer if Plaintiffs prevail in this case.

Finally, as this case is in its very early stages and the Individual Movants, who jointly sought intervention along with St. Vincent and are represented by the same counsel as St. Vincent, are now being granted the right to intervene just two weeks after St. Vincent intervened with no opposition from any party, the Court finds that the Individual Movants intervention will not result in undue prejudice or delay.

III. CONCLUSION

For the foregoing reasons, the Court GRANTS the Individual Movants' motion to intervene (ECF No. 18). Having granted permission to each of the Proposed Intervening Defendants to intervene in this action, the Court accepts the Defendant-Intervenors' Proposed Motion to Dismiss (ECF No. 19), which will be deemed filed on today's date. Plaintiffs shall respond to the Defendant-Intervenors' Motion to Dismiss on or before **April 12, 2018**. Intervening Defendants shall reply on or before **April 26, 2018**.

The Court will hold a hearing on **May 10, 2018 at 2:30 p.m.** on **both** the State Defendants' (ECF No. 16) and the Intervening Defendants' motions to dismiss. All

parties are ordered to follow the Eastern District of Michigan Local Rules with regard to page length and formatting of briefs.

IT IS SO ORDERED.

Paul D. Borman
United States District Judge

Dated: 3-22-18