

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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

Plaintiffs,

v

ROBERT GORDON, in his official  
capacity as the Director of the Michigan  
Department of Health and Human Services;  
HERMAN MCCALL, in his official capacity  
as the Executive Director of the Michigan  
Children's Services Agency; DANA NESSEL,  
in her official capacity as Michigan Attorney  
General; ALEX AZAR, in his official capacity  
as Secretary of Health and Human Services;  
UNITED STATES DEPARTMENT OF  
HEALTH AND HUMAN SERVICES,

Defendants.

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No. 1:19-cv-00286

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STATE DEFENDANTS'  
MOTION TO TRANSFER OR,  
ALTERNATIVELY, TO  
DISMISS**

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**INDEX OF EXHIBITS TO  
STATE DEFENDANTS' MOTION TO TRANSFER  
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Exhibit 2	<i>Dumont</i> Complaint
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# Exhibit 1

**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

**MOTION TO INTERVENE**

**ORAL ARGUMENT  
REQUESTED**

Proposed Intervenors St. Vincent Catholic Charities, Melissa and Chad Buck, and Shamber Flore move this Court under Fed. R. Civ. P. 24(a)(2) and (b)(1) for leave to intervene, for the reasons below and explained more fully in the attached Brief.

1. Proposed Intervenors meet the criteria for intervention as of right as this

motion is timely, they have a “substantial legal interest in the case” that could be impaired in the absence of intervention, and no other party adequately represents their interests. *See Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 315 (6th Cir. 2005).

2. Intervention is timely as Plaintiffs filed their suit less than three months ago, and Defendants filed their responsive Motion to Dismiss just three days ago. Proposed Intervenors have a substantial legal interest that may be impaired, because Plaintiffs’ complaint could force St. Vincent to close its foster and adoption programs, and also harm the Buck Family and Shamber Flore through the resulting loss of services. No other party adequately represents Proposed Intervenors’ interests, because the State (a) has not raised the arguments advanced by Proposed Intervenors, (b) cannot adequately advance Proposed Intervenors’ Free Exercise interests (on which the State would be adverse), (c) cannot present the same factual evidence as Proposed Intervenors, and (d) is a purchaser of St. Vincent’s services, and therefore may have different priorities and interests in this litigation.

3. Alternatively, this Court should exercise its discretion to grant permissive intervention. Fed. R. Civ. P. 24(b)(1). For the same reasons as above, Proposed Intervenors satisfy this standard.

4. Pursuant to Local Rule 7.1(a), on the morning of December 18, 2017, counsel for Proposed Intervenors contacted Plaintiffs’ and Defendants’ counsel to

determine if they would concur in the motion to intervene, explaining the nature of and basis for the motion and offering to confer. Defendants' counsel said they "concur in [Proposed Intervenors'] request." Plaintiffs' counsel said they were unable to provide a response today.

Dated: December 18, 2017

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## CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2017, I electronically filed the above document(s) with the Clerk of Court via CM/ECF, which will provide electronic copies to counsel of record.

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*Proposed Defendant-Intervenors.*

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

HON. PAUL D. BORMAN

MAG. ELIZABETH A. STAFFORD

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

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## CONCISE STATEMENT OF ISSUES PRESENTED

1. Whether Proposed Intervenors are entitled to intervention as a right because of their direct stake in this litigation that is not adequately represented by other parties.
2. Whether Proposed Intervenors are entitled to discretionary intervention as a right because their motion was timely filed and will not prejudice any parties.

## **CONTROLLING OR MOST APPROPRIATE AUTHORITY**

*Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309 (6th Cir. 2005); *Purnell v. City of Akron*, 925 F.2d 941 (6th Cir. 1991); *Linton by Arnold v. Comm’r of Health & Env’t*, 973 F.2d 1311 (6th Cir. 1992); *Jansen v. City of Cincinnati*, 904 F.2d 336 (6th Cir. 1990); *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997).

## INTRODUCTION

This case is about whether Proposed Intervenors will be forced to stop partnering with the State and serving Michigan’s most vulnerable children. If Plaintiffs succeed, St. Vincent Catholic Charities (“St. Vincent”), an adoption agency specifically named in the Complaint, will be forced to shut down its successful adoption and foster programs. Melissa and Chad Buck will lose critical support for the special needs children they adopted through St. Vincent. Shamber Flore—a young woman who would not have been adopted as a child if it were not for St. Vincent—will lose her ability to continue mentoring other youth in foster care who have dealt with abuse. No one has more at risk from Plaintiffs’ claims than the Proposed Intervenors—the agency the lawsuit seeks to exclude and the parents and children who depend on, and participate in, that agency’s loving and successful work.

Proposed Intervenors easily satisfy all four criteria for intervention as of right. *First*, their motion is timely. It is being filed only three days after the Defendants filed their Motion to Dismiss, and less than three months after Plaintiffs filed their Complaint. No party will be delayed or prejudiced by intervention. *Second*, Proposed Intervenors have a “substantial legal interest” in the litigation. St. Vincent is explicitly named in Plaintiffs’ Complaint, and the lawsuit seeks to

prohibit the State from working with St. Vincent. The other Proposed Intervenors both receive and offer critical services to vulnerable children through the work of St. Vincent. *Third*, Proposed Intervenors face severe impairment of their interests. If Plaintiffs are successful, St. Vincent will have to immediately close its adoption and foster care programs and transfer children under its care to other agencies and families, and the other Proposed Intervenors will no longer be able to adopt or receive critical services through St. Vincent. *Fourth*, Proposed Intervenors are not adequately represented. In its Motion to Dismiss, Defendants have not raised the same legal arguments Proposed Intervenors plan to raise to defend their interests, nor do Defendants have access to many facts relevant to Plaintiffs' claims. In fact, Defendants highlighted potential areas where there is adversity of interests with Proposed Intervenors. Thus, Proposed Intervenors are entitled to intervention as a right. Alternatively, the Court should grant permissive intervention.

## **BACKGROUND**

### **A. Shortage of Families for Children in Michigan**

As the ACLU has recognized, Michigan “doesn’t have enough families willing and able to meet the[] needs” of the State’s foster children.”<sup>1</sup> Every year over 600

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<sup>1</sup> Leslie Cooper, *Same-Sex Couples Are Being Turned Away From Becoming Foster and Adoptive Parents in Michigan. So We’re Suing.*, ACLU, (Sept. 20, 2017) <https://www.aclu.org/blog/lgbt-rights/lgbt-parenting/same-sex-couples-are->

children in Michigan “age out” of foster care,<sup>2</sup> which generally means that they exit the foster system at age 18 without any permanent family, and lacking the resources and skills to make it on their own.<sup>3</sup> These youth are much more likely to end up in poverty and much less likely to graduate from college or even high school.<sup>4</sup> There are also nearly 13,000 children in foster care in Michigan, all of whom need safe homes while they are in the State’s custody.<sup>5</sup> And as of this writing, over 340 of those children are waiting to be adopted, over half of whom are minority children.<sup>6</sup> As a foster child ages, the prospect of finding a permanent

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being-turned-away-becoming-foster-and-adoptive.

<sup>2</sup> Child Trends, *Transition-Age Youth in Foster Care in Michigan*, [https://www.childtrends.org/wp-content/uploads/2017/09/Transition-Age-Youth\\_Michigan.pdf](https://www.childtrends.org/wp-content/uploads/2017/09/Transition-Age-Youth_Michigan.pdf); Kristi Tanner, *More than 900 Michigan foster care youth age out*, Detroit Free Press (Jan. 31, 2015) <https://www.freep.com/story/opinion/contributors/raw-data/2015/01/31/michigan-foster-care-youth/22621127/>.

<sup>3</sup> Children’s Rights, *Aging Out*, <http://www.childrensrights.org/newsroom/fact-sheets/aging-out/> (last visited Dec. 15, 2017).

<sup>4</sup> Mark E. Courtney, Amy Dworsky, Adam Brown, Colleen Cary, Kara Love & Vanessa Vorhies, *Midwest evaluation of the adult functioning of former foster youth: Outcomes at age 26* (2011); Erick Eckholm, *Offering Help for Former Foster Care Youths*, The New York Times (Jan. 27, 2007) <http://www.nytimes.com/2007/01/27/us/27foster.html>.

<sup>5</sup> Michigan Department of Health & Human Services, *Foster Care*, [http://www.michigan.gov/mdhhs/0,5885,7-339-73971\\_7117---,00.html](http://www.michigan.gov/mdhhs/0,5885,7-339-73971_7117---,00.html) (last visited Dec. 15, 2017).

<sup>6</sup> Michigan Adoption Resource Exchange, *View Waiting Children*, <http://www.mare.org/For-Families/View-Waiting-Children> (last visited Dec. 15, 2017).

family diminishes.

### **B. Adoption and Foster Care in Michigan**

When children are removed from their families by a court order, the Department of Health and Human Services (“DHHS”) works with contracted Child Placing Agencies (“CPAs” or agencies) to recruit and license temporary foster homes until the children can return to their families or be adopted. Mich. Admin. Code R. §§ 400.12304, 400.12706. Faith-based agencies are often particularly effective at reaching different segments of the population and recruiting families that would not work with other agencies.<sup>7</sup> *See* Ex. 2 ¶ 8. Michigan has concluded, for example: “Ensuring that faith-based child placing agencies can continue to provide adoption and foster care services will benefit the children and families who receive publicly funded services.” Mich. Comp. Laws § 722.124e(1)(g).

A private agency may only perform public adoption and foster services related to placing children with families if that agency partners with and is authorized by

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<sup>7</sup> National One Church One Child, Inc., *About Us*, <http://www.nationalococ.org/about.html> (last visited Dec. 18, 2017) (“Historically, the church has provided leadership in the African American community. As such, the state of Illinois recognized that a possible solution to moving African American children to permanency lay in forming a relationship between the state and the African American churches.”).

the DHHS.<sup>8</sup> Agencies do not make any final determinations regarding the placement of children for adoption or foster care. Instead, the agency's role is limited to providing written evaluations and recommendations to the State regarding foster licensing and approval of adoption for families.<sup>9</sup> The ultimate determination about placement of children and licensing of families for foster and adoptive purposes is made by DHHS. *See* Ex. 1 ¶ 6.

### **C. Referrals of Families to Other Adoption Agencies**

Adoption agencies in Michigan have long been able to refer families to other agencies for a variety of reasons, including: (1) the family may live further away than the agency would like to drive for home visits, so they refer them to a closer agency, (2) the agency already has a waiting list, (3) the family has not been satisfied with the agency's services, and (4) the family is looking for a specific type of child not currently in that agency's care. Ex. 1 ¶ 14. Some agencies even

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<sup>8</sup> Mich. Comp. Laws §§ 722.115, 722.117, 722.118; Mich. Admin. Code R. 400.12201. Detailed requirements govern the services provided by such agencies. *See* Mich. Comp. Laws §§ 710.21–710.70, 722.111–722.128 and Mich. Admin. Code R. 400.12101– 400.12808.

<sup>9</sup> Mich. Admin. Code R. 400.12325 (“An agency shall recommend to the department the appropriate licensing action . . . .”); Mich. Admin. Code R. 400.12605 (“An agency social service worker shall complete a written adoptive evaluation within 90 days of the family signing an adoption application and prior to approving a family for adoption.”); Mich. Admin. Code R. 400.12607 (“An agency shall recommend the appropriate action consistent with the facts contained in the adoptive evaluation.”).

specialize in placing children with Native American families,<sup>10</sup> or in finding homes for black children.<sup>11</sup> And Faith-based agencies have also long referred families elsewhere when those agencies cannot adequately serve those families consistent with their religious values.<sup>12</sup>

After faith-based foster and adoption service providers were forced out of Massachusetts and the District of Columbia,<sup>13</sup> Michigan passed a law in 2015

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<sup>10</sup> Sault Ste. Marie Tribe of Chippewa Indians, *Child Placement*, <https://www.saulttribe.com/membership-services/acfs/child-placement> (last visited Dec. 15, 2017) (“The Sault Tribe Binogii Placement Agency is our tribal child placement agency. The agency is licensed by the state of Michigan to provide foster care and adoption services to children ages 0-19 who reside within the tribe’s seven-county service area. The agency services children who are enrolled or eligible for enrollment as Sault Ste. Marie Tribe of Chippewa Indians members and Sault Tribe households.”).

<sup>11</sup> Michigan Adoption Resource Exchange, *Find a Licensed Agency*, <http://mare.org/For-Families/New-to-Adoption/Find-a-Licensed-Agency> (listing Homes for Black Children) (last visited Dec. 15, 2017); AdoptUSKids, *Minority Specializing Agency and Resource Directory*, 4 <https://www.adoptuskids.org/assets/files/NRCRRFAP/resources/minority-specializing-agency-directory.pdf> (discussing how Homes for Black Children focused on the “adoptive placement of black children”).

<sup>12</sup> Historically, a number of state laws allowed religious organizations to make placements consistent with the religious beliefs of the religious adoption agency. Ellen Herman, *Kinship by Design: A History of Adoption in the Modern United States* 60, 125 (2008). Children were routinely placed with families of the same faith whether through self-selection, informal referrals between adoption agencies, or religion matching laws. Barbara Melosh, *Strangers and Kin: The American Way of Adoption* 77-79 (2002) 77-79 (describing how religious organizations referred adoptive parents to each other based on the parent’s religious beliefs).

<sup>13</sup> Washington Times, *Catholic Charities pulls out of adoptions* (Mar. 14,

ensuring that faith-based providers could continue partnering with the State and providing more homes for children. The statute requires that such an agency refer the applicant to another foster or adoption agency that is willing to provide the declined services or to the DHHS website. Mich. Comp. Laws § 722.124e(4). There are eight other agencies in St. Vincent’s service area. Ex. 1 ¶ 3.

**D. Proposed Intervenors.**

*1. St. Vincent Catholic Charities.* St. Vincent is one of the oldest and most effective adoption agencies in Michigan. Ex. 1 ¶ 3. St. Vincent has served children and families for over 65 years, helping those in crisis find hope and safety both in their own homes and with new families. *Id.* ¶ 4. As a nonprofit, faith-based organization, St. Vincent’s mission is “to share the love of Christ by performing the corporal and spiritual works of mercy.” *Id.* The work began in 1948 when a parish priest, John Slowey, recognized the need for adoption services in the Catholic Diocese of Lansing. *Id.* A few years later, Slowey founded a children’s home to provide temporary housing for children. *Id.* Although its focus has always remained on serving children and families, St. Vincent provides a range of services

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2006), <https://www.washingtontimes.com/news/2006/mar/14/20060314-010603-3657r/>; Julia Duin, *Catholics end D.C. foster-care program*, Washington Times (Feb. 18, 2010), <https://www.washingtontimes.com/news/2010/feb/18/dc-gay-marriage-law-archdiocese-end-foster-care/>.

in fulfillment of its mission. *Id.* Current programs include professional mental health and substance abuse counseling, marital and family counseling, and refugee resettlement. *Id.*

In the last fiscal year, St. Vincent recruited more new families than seven of the eight other adoption agencies in St. Vincent's tri-county service area, which includes the Michigan counties of Ingham, Eaton, and Clinton. *Id.* ¶ 3. Through St. Vincent's work in 2016, 79 children were placed in foster care, 24 children had their adoptions finalized, and 17 additional children began the process of finalizing an adoption. *Id.* Most of the children in St. Vincent's care are minority children, and St. Vincent excels in providing extra support for families with special needs children. *Id.* St. Vincent is also very effective at finding homes for sibling groups and older children. *Id.*

Many of the children St. Vincent serves have undergone the trauma of physical or emotional abuse, neglect, or the illness or death of a parent. *Id.* ¶ 11. To address these needs, St. Vincent provides services including individual, family and group therapy, monthly visits to the foster home, visitation with birth parents and other relatives, monitoring and referrals to community resources for additional treatment and support. *Id.* Unlike many agencies, staff at St. Vincent are on-call 24 hours a day to respond to foster families' concerns. *Id.*

St. Vincent's also operates a Children's Home that complements its other program, providing residential care and treatment for up to 40 children in the foster care system at a time. *Id.* ¶ 12. Teenagers and younger children live in three living units and have programming specific to their treatment needs. *Id.* Over 90% of the youth served by the Children's Home are wards of the court due to abuse or neglect. *Id.* Many need intensive support and cannot be cared for in a family setting due to safety issues. *Id.* St. Vincent cares for these children regardless of their faith, nationality, race, or sexual orientation. *Id.* Children in St. Vincent's care include LGBT youth. *Id.*

St. Vincent is also dedicated to ensuring that children find the best possible homes. *Id.* ¶ 5. Consistent with State requirements, St. Vincent performs in-depth home studies assessing the characteristics of each family that make them suitable to adopt and foster children. *Id.* The home evaluation involves an exhaustive review of the family's eligibility, considering factors such a family history, strengths and weaknesses of family members, parenting ability, education and employment history, acceptance of family towards children, the family's capacity and disposition to give an adopted child love and guidance, and other characteristics of the child relevant to the family. *Id.*

St. Vincent is responsible for providing its written evaluations and

recommendations to the State regarding foster licensing and approval of adoption for families. *Id.* ¶ 6. DHHS makes the ultimate determination about placement of children and licensing of families for foster and adoptive purposes. *Id.*

Adoptive and foster families are not expected to share St. Vincent's religious beliefs. *Id.* ¶ 7. However, as a Catholic organization, St. Vincent cannot provide a written recommendation to the State evaluating and endorsing a family situation that would conflict with St. Vincent's religious beliefs. *Id.* If unmarried or same-sex couples want to obtain their license through St. Vincent then, consistent with State law, 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. *Id.* ¶ 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 does not prevent any couples from fostering or adopting. *Id.* ¶ 10. Families working with any other adoption agencies are not restricted to children in the care of their chosen licensing agency, and any family could be matched with children in St. Vincent's care through the Michigan Adoption Resource Exchange. *Id.*

St. Vincent would not be able to continue its adoption and foster programs if the State were not allowed to partner with it, either legally or financially. *Id.* ¶ 13. St. Vincent does not make a profit providing adoption or foster services—it actually *loses* money on foster services. *Id.* But losing the State contract and authorization to perform these public services would result in the immediate closure of St. Vincent’s public foster and adoption programs. *Id.* St. Vincent’s other programs, including the Children’s Home, counseling services, and refugee resettlement, would be impacted by this financial loss as well and may no longer be financially sustainable. *Id.*

**2. *Melissa and Chad Buck.*** After getting married, Melissa and Chad Buck envisioned having a small family with one or two children. Ex. 2 ¶ 2. After years of heartbreaking infertility and unsuccessful treatments, the Bucks decided to adopt. *Id.* They still planned to adopt only one or two children. *Id.* But when St. Vincent approached them about a sibling group of three children who had suffered severe abuse, the Bucks couldn’t say no. *Id.* They felt that after these children had lost all of the other connections they had, all they had left was each other, and the Bucks wanted to keep them together. *Id.*

When St. Vincent later approached them about adopting a new infant sibling of these children, the Bucks’ first instinct was to say no, that their home was full. *Id.*

¶ 3. But they couldn't stop thinking about how much it would mean to this child to be raised with his siblings, and they realized they had the resources to provide for another child. *Id.* So the Bucks put aside their fears and opened their home again. *Id.* The Bucks also worked with St. Vincent to adopt a baby girl. *Id.*

All of the children the Bucks adopted have a range of special needs. *Id.* ¶ 4. These include autism, a genetic disorder similar to diabetes, severe anxiety, attachment disorder, and other learning disabilities. *Id.* Most of the children also suffered severe trauma, including being physically thrown across rooms, slammed into walls, and frequently hit before they entered foster care. *Id.*

Most of the Bucks' adoptions involved a heart-wrenching and difficult process that would not have been possible without the services St. Vincent workers lovingly provided. *Id.* ¶ 5. This included acting as an intermediary for the Bucks with hostile birth parents, being available all hours on the phone to provide emotional support, and accompanying the Bucks to endless medical appointments to help address the special needs of the children. *Id.* The Bucks are not aware of any other agencies who go to these lengths to support families the agencies are working with. *Id.*

It is possible that someday the Bucks could be asked to adopt a new biological sibling of their adopted children who is now an infant. *Id.* ¶ 6. The Bucks are open

to this possibility. *Id.* But if St. Vincent closed its adoption and foster program, the Bucks would not be able to work with their trusted social workers anymore. *Id.* These St. Vincent staff members already know the history of the Bucks' special needs children and the hostile dynamics with the birth parents. *Id.* The Bucks cannot envision putting their family through such a traumatic process again without St. Vincent's deep institutional knowledge and support. *Id.*

St. Vincent also provides ongoing services to the Bucks. *Id.* ¶ 7; Ex. 1 ¶ 11. For example, the Bucks attend a monthly parent support group. Ex. 2 ¶ 2. This group provides critical resources that allow the Bucks to meet the needs of their special needs children, including training and helpful literature. *Id.* If St. Vincent closed its foster and adoptive programs and these ancillary services were impacted, it would leave a gaping hole where a pillar of support used to exist for the Buck family. *Id.* Many other families would similarly be left without support or the ability to continue taking children into their homes if St. Vincent closed its program. *Id.* at ¶ 8.

**3. *Shamber Flore.*** Shamber Flore was removed from her birth home at the age of five after experiencing years of abuse, poverty, and neglect, as well as exposure to drugs, gangs, and prostitution. Ex. 3 ¶ 2. Many of her young memories are scarred by feelings of terror and agitation. *Id.* As a child, Shamber didn't know

what love meant, and she felt worthless and broken inside. *Id.* But when St. Vincent placed Shamber and her two siblings with their new adoptive family—the Flores—Shamber was finally able to begin a path of healing. *Id.*

Today, Shamber is a vibrant young woman who loves her family and mentors other youth at St. Vincent who have dealt with trauma and abuse. *Id.* ¶¶ 3-4. Shamber wouldn't have been adopted by her Flore family if it were not for the work of St. Vincent. *Id.* ¶ 3. Shamber's adoptive parents, Tam'al and Jerry Flore, had previously tried to adopt with a state adoptive agency and had a very negative experience. *Id.* Because adoption is already such a difficult process, the Flores would not have been able to continue with the adoption process if they had not found in St. Vincent a trusted partner and ally. *Id.* Shamber is one of 16 children the Flores have adopted over the past 14 years. *Id.*

If St. Vincent were forced to close its adoption and foster services, Shamber would lose the opportunity to mentor many of these youth as a volunteer at St. Vincent. *Id.* ¶ 5. She also believes that if St. Vincent can no longer recruit families like the Flores to adopt, many children who were abused and alone like she was will lose the opportunity to find a loving and permanent home. *Id.*

#### **E. The Present Lawsuit.**

Plaintiffs filed suit on September 20, 2017, asking this Court to enjoin

Michigan from partnering with St. Vincent and other religious adoption agencies. The Defendant filed a motion to dismiss on December 15, 2017.

### LEGAL STANDARDS

The Sixth Circuit has made clear that the rules governing intervention are to be “construed broadly in favor of the applicants.” *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1246 (6th Cir. 1997) (citations omitted). Federal Rule of Civil Procedure 24(a)(2) provides: “On 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.” To establish a right to intervene under this rule, Proposed Intervenors must satisfy four criteria: (1) their motion must be timely; (2) they must have a “substantial legal interest in the case”; (3) there must be a potential “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.” *See Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 315 (6th Cir. 2005).

Even if a party does not satisfy the requirements for mandatory intervention under Rule 24(a)(2), a court may nonetheless permit intervention under Rule 24(b),

which “grants the district court discretionary power to permit intervention if the motion is timely, and if the applicant’s claim or defense and the main action have a question of law or fact in common.” *Purnell v. City of Akron*, 925 F.2d 941, 950 (6th Cir. 1991) (citations omitted). In exercising its discretion, a court “must consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” *Id.* at 951.

## ARGUMENT

### I. Proposed Intervenors are entitled to intervention as of right.

#### A. The motion to intervene is timely.

Intervention here is timely because the lawsuit is at its very earliest stage. Plaintiffs filed their suit less than three months ago, and Defendants filed their responsive Motion to Dismiss just three days ago. This Court has not yet scheduled any hearings or entered any orders. *See Johnson v. City of Memphis*, 73 F. App’x. 123, 131-32 (6th Cir. 2003) (considering factors for timeliness).

In other cases, the Sixth Circuit has found a motion timely when parties intervened much later in the proceedings. *See Macomb Interceptor Drain Drainage Dist. v. Kilpatrick*, No. 11-13101, 2012 WL 1598154 at \*3 (E.D. Mich. May 7, 2012) (allowing intervention after a lawsuit had been pending for six months); *Linton by Arnold v. Comm’r of Health & Env’t, State of Tenn.*, 973 F.2d 1311, 1318 (6th Cir. 1992) (allowing intervention “two and one-half years after the suit

was initiated”). Here, intervention this early in the proceedings will not cause any delay capable of prejudicing any existing parties to the action. Thus, the Court should find that this motion to intervene is timely.

**B. Proposed Intervenors have a substantial legal interest in the case.**

The Sixth Circuit has taken a “rather expansive” view of the “interest sufficient to invoke intervention of right.” *Michigan State AFL-CIO*, 103 F.3d at 1245. The intervenor need not even “have the same standing necessary to initiate a lawsuit.” *Atlas Noble, LLC v. Krizman Enterprises*, 692 F. App’x 256, 269 (6th Cir. 2017).

In *Linton*, 973 F.2d at 1319, the Sixth Circuit held that individual nursing homes were entitled to intervention as of right in a suit challenging aspects of Medicaid contracts between the State and nursing homes. Because the suit would impact the contractual and statutory rights of the nursing homes, the court held that they had a substantial interest justifying intervention. *See United States v. Tennessee*, 260 F.3d 587, 596 (6th Cir. 2001) (citing *Linton by Arnold v. Comm’r of Health & Env’t, State of Tenn.*, 30 F.3d 55 (6th Cir. 1994)).

Like the nursing home in *Linton*, St. Vincent’s foster and adoption services are directly implicated by Plaintiffs’ suit. In fact, this is an *a fortiori* case to *Linton*, where the impact would be to prevent nursing homes from terminating membership in Medicaid. Here, St. Vincent will be prohibited from providing

adoption and foster services with the State *at all*, its programs offering those services will be closed down, and its staff will be laid off. Ex. 1 ¶ 13. The Buck family and Shamber will be directly harmed by that loss of services. Ex. 2 ¶¶ 6-7; Ex. 3 ¶ 5. It is difficult to conceive of a stronger interest for intervention. *See also Michigan State AFL-CIO*, 103 F.3d at 1246 (citing *New York Pub. Interest Research Group, Inc. v. Regents*, 516 F.2d 350 (2d Cir. 1975)) (intervention allowed to “defend . . . financial interests with respect to a state [law]”).

Factors the Sixth Circuit has considered elsewhere for intervention include whether the would-be intervenor was “a party to any challenged contract,” or was “directly targeted by Plaintiffs’ complaint,” or whose interest is directly implicated by “the constitutional . . . violations alleged in the litigation.” *Blount-Hill v. Bd. of Educ. of Ohio*, 195 F. App’x 482, 486 (6th Cir. 2006). Here, Proposed Intervenor St. Vincent is a party to a contract with one Defendant that is directly challenged by Plaintiffs, is directly targeted in Plaintiffs’ Complaint, and will be directly impacted by the constitutional arguments Plaintiffs raise. *See* Dkt. 1 ¶¶ 43, 61, 62.

Prospective intervenors need not show that an unfavorable disposition in the case would necessarily impair their right, only that it “*may . . . impair or impede [their] ability to protect [their] interest.*” *Purnell*, 925 F.2d at 948 (quoting Rule 24(a)(2) and adding emphasis). *See Michigan State AFL-CIO*, 103 F.3d at 1247

(proposed intervenors need only show that impairment is “possible”). Thus, this Court should find that Proposed Intervenors also have “a significantly protectable interest” in the outcome of the lawsuit. *Donaldson v. United States*, 400 U.S. 517, 531 (1971).

**C. Proposed Intervenors’ interests may be impaired without intervention.**

For the same reasons that Proposed Intervenors have a significantly protectable interest in the outcome of this litigation, the resolution of this case “may as a practical matter impair or impede the [Potential Intervenors’] ability to protect [their] interest[s].” Fed. R. Civ. P. 24(b)(2). The Sixth Circuit has recognized that “[t]his burden is minimal.” *Michigan State AFL-CIO*, 103 F.3d at 1247. Further, “the application of stare decisis” in a way that would impede litigation elsewhere constitutes an impairment of interest. *Linton*, 973 F.2d at 1319. That minimal burden is satisfied here, where St. Vincent may be required to shut down the lynchpin programs offered by its organization, the Bucks could lose critical services and the possibility to adopt in the future, and Shamber could lose the opportunity to keep volunteering with youth through St. Vincent. Furthermore, the arguments raised by Defendants could mean that this Court will interpret St. Vincent’s contractual obligations or consider St. Vincent’s Free Exercise rights.

**D. No other party adequately represents their interest**

Finally, Proposed Intervenors are not adequately represented by the other parties already present in the litigation. Proposed Intervenors need only demonstrate that “representation *may* be inadequate.” *Linton*, 973 F.2d at 1319 (emphasis added). The Sixth Circuit “has declined to endorse a higher standard for inadequacy when a governmental entity is involved.” *Grutter v. Bollinger*, 188 F.3d 394, 400 (6th Cir. 1999). The burden in this context is again “minimal.” *Id.*

Inadequacy can be demonstrated by showing that the Defendant is “unlikely to present evidence” regarding factors that “may be important and relevant” to determining legal issues at stake. *Id.* at 401. Here, Defendant is unable to present evidence of Proposed Intervenors’ religious beliefs or practices for referring certain couples to other agencies. Defendant also has not presented evidence of families, such as Proposed Intervenors, who will be unable to continue adopting without the help of St. Vincent. In many instances, Defendants won’t have access to this evidence, yet it is directly relevant to claims Plaintiffs raise.

A government entity’s failure to raise the same “affirmative defense[s]” to the action as Proposed Intervenors also “indicates that the [defendants] and the proposed intervenors have divergent views” demonstrating inadequacy. *Jansen v. City of Cincinnati*, 904 F.2d 336, 343 (6th Cir. 1990); *see also Michigan State*

*AFL-CIO*, 103 F.3d at 1247 (“[I]t may be enough to show that the existing party who purports to seek the same outcome will not make all of the prospective intervenor’s arguments.”).

Here, as described in the Proposed Motion to Dismiss, Proposed Intervenors plan to make additional constitutional arguments that the State has not made. At the heart of this case is the constitutionality of the State partnering with faith-based adoption agencies who cannot endorse and license couples for foster or adoption care inconsistent with their religious beliefs. On that issue, Proposed Intervenors will argue in their Proposed Motion to Dismiss that allowing them to partner with the State is not merely permissible under the federal constitution but also required under the Free Exercise Clause.

The State did not argue that Proposed Intervenors’ Free Exercise rights would be violated by the result Plaintiffs seek; it only noted it under Plaintiffs’ desired policy, faith-based agencies “would likely file suit against Defendants.” Dkt. 16 at 19. If anything, this simply highlights the potential adversity of interest between Defendants and Proposed Intervenors on this constitutional issue. A government entity does not adequately represent a proposed intervenor if, as here, it “has an interest adverse to the proposed intervenor.” *Purnell v. City of Akron*, 925 F.2d 941, 950 (6th Cir. 1991).

Moreover, Proposed Intervenors will argue that Plaintiffs' proposed policy would result in impermissible content-based compulsion of speech. Specifically, Proposed Intervenors will be required to adopt a policy as a condition of government funding and make written recommendations to the state that contradict their beliefs. *See Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013). Defendants did not address this issue at all in their Motion to Dismiss, thus indicating potential "divergent views" on this important issue. *Jansen*, 904 F.2d at 343.

Proposed Intervenors also plan to set forth a different standard for analyzing Establishment Clause claims. Specifically, Defendants rely on the three-part test established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See* Dkt. 16 at 16. But that test has been superseded by *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), in which the Supreme Court made clear that the proper analysis looks to the historical purposes of the Establishment Clause. Proposed Intervenors are thus not adequately represented on this argument.

Inadequacy of representation can also be shown where a government entity has an interest in purchasing services from a proposed intervenor. In *Linton*, the State was unable to adequately represent the interests of the nursing homes because the State was "both a regulator and a purchaser of movants' services thereby creating

inherent inconsistencies between movants' interests and those of the State." 973 F.2d at 1320–21. So too, here, where the State purchases St. Vincent's services and emphasized that its contracts with St. Vincent control Proposed Intervenor's behavior at issue in this lawsuit. *See, e.g.*, Dkt. 16 at 12-13 (“[A]lleged injuries cannot be ‘fairly traceable’ to the Department because the contracts between the Department and the CPAs prohibit CPAs from discriminating against potential applicants.”).

Finally, here Defendants may eventually want to settle this case with Plaintiffs. But the burden of settlement would fall on Proposed Intervenor. Were Proposed Intervenor unable to immediately appeal and protect their interest, the right to litigate their interest separately would be cold comfort after St. Vincent's programs were closed, the children it helps displaced, and its staff laid off. *See Michigan State AFL-CIO*, 103 F.3d at 1248 (different potential strategy on appealing demonstrates inadequacy of representation); *Americans United for Separation of Church & State v. City of Grand Rapids*, 922 F.2d 303, 306 (6th Cir. 1990) (inadequacy demonstrated where a failure to appeal “effectively would destroy” proposed intervenor's interest on a time-sensitive basis). Thus, the Court should find that the existing parties do not adequately represent the interests of Proposed Intervenor and allow them to intervene as of right.

**II. Alternatively, this Court should exercise its discretion to allow intervention.**

Even if the Court were to find that Proposed Intervenors are not entitled to intervene as a matter of right, this Court should exercise its discretion to grant permissive intervention. Fed. R. Civ. P. 24(b)(1). For the same reasons as above, Proposed Intervenors satisfy this standard.

**CONCLUSION**

For all of the reasons discussed above, the Court should grant the motion and allow Proposed Intervenors to intervene.

Dated: December 18, 2017

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Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2017, I electronically filed the above document(s) with the Clerk of Court via CM/ECF, which will provide electronic copies to counsel of record.

/s/ Stephanie H. Barclay  
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# Exhibit 2

**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.

Civil Action No.:

**COMPLAINT**

**INTRODUCTION**

1. Plaintiffs bring this complaint to challenge Defendants’ 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 and to turn away qualified families on the basis of sexual orientation. This practice harms vulnerable children by denying them access to loving families that they desperately need and violates the Establishment and Equal Protection Clauses of the United States Constitution. This action does not in any way challenge the right of any private child placing agency to practice its religion, but when the State of Michigan (the “State”) hires private child placing agencies to provide child welfare services for children

in state custody, it must ensure that those services are provided based on the needs of the children and in accordance with the United States Constitution.

2. The Michigan Department of Health and Human Services (“DHHS”) 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 by the State due to abuse or neglect or otherwise became wards of the State. Among the State’s responsibilities to these children is finding appropriate foster and adoptive families to care for them.

3. 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. Some of these agencies refuse to accept prospective families headed by same-sex couples or to place children with same-sex parent families due to the agencies’ religious objections to such families. DHHS is aware that these agencies are turning away these potentially qualified families solely for religious reasons but DHHS has not stopped them from engaging in this conduct.

4. By statute, the State is responsible for the care of the children who are in Michigan’s foster care system, and the State can neither categorically turn away gay and lesbian prospective parents nor use religious criteria in making decisions related to child welfare. When the State delegates its statutory child-welfare responsibilities to private agencies, those private agencies must execute their state-contracted responsibilities subject to the same requirements applicable to the State.

5. Plaintiffs Kristy and Dana Dumont and Erin and Rebecca Busk-Sutton are two prospective adoptive families that were turned away by state-contracted and

taxpayer-funded child placing agencies based on those agencies' religious objections to same-sex couples. These couples are ready, willing, and able to provide a "forever family" to children in the foster care system.

6. Plaintiff Jennifer Ludolph was in the Michigan foster care system when she was a teenager. As a taxpayer, she objects to her taxpayer dollars funding child-placing agencies that make it even harder for foster children to find families by turning away loving and qualified families simply because of the agencies' religious objections to those families.

7. All Plaintiffs are Michigan taxpayers who object to their taxpayer dollars being used to pay for public child welfare services that are provided based on religious standards rather than professional child welfare standards. And all Plaintiffs object to the use of taxpayer funds to underwrite and endorse religious beliefs to which they do not subscribe.

8. This action concerns only the State's provision of taxpayer-funded government services based on religious and discriminatory criteria. It does not challenge any private agency's provision of private adoption services or use of non-public funds.

9. DHHS itself could not deny children in the foster care system access to qualified prospective foster and adoptive parents based on religious criteria. For example, DHHS could not reject applicants on the basis of a religious objection to placing children with non-Christian, single-parent or same-sex parent families. Nor could DHHS refuse to accept prospective foster and adoptive parents on the basis of sexual orientation. The same is true when the State delegates this government function to

private agencies and pays them with taxpayer dollars. In other words, private agencies performing a public function with taxpayer dollars and under contract with the State cannot perform actions that would be unconstitutional if performed directly by the State.

10. The Establishment Clause of the First Amendment bars the State from providing or refusing to provide government services, such as the care of children in the foster care system, based on religious criteria. The Establishment Clause also prohibits the State from delegating a government function to religious organizations and then allowing those organizations to perform that government function pursuant to religious criteria.

11. The State's practice of funding and contracting with private religious organizations that use religious criteria to screen potential foster and adoption applicants is not a permissible accommodation of religion because it fails to take adequate account of the burdens imposed on children—specifically, the children whom the State hires these agencies to serve. The State's practice of allowing religious-based exclusions of prospective foster and adoptive parents reduces placement options for the most vulnerable children. As a result, some children may be placed with families that are less well-suited to meet their needs, some children may be separated from siblings and some children may age out of foster care without ever becoming part of a family.

12. Moreover, the Equal Protection Clause of the Fourteenth Amendment prohibits the State from discriminating on the basis of sexual orientation through instrumentalities of the State.

13. Accordingly, Plaintiffs bring this action pursuant to 42 U.S.C. § 1983 and seek declaratory and injunctive relief directing officials of DHHS and its sub-agency, the Children’s Services Agency (“CSA”), to ensure that private child placing agencies that are contracted by the State and funded with tax dollars to provide adoption and foster care services to children, do not turn away same-sex couples or other potentially qualified families based on religious eligibility criteria.

### **JURISDICTION AND VENUE**

14. This is an action for declaratory and injunctive relief to enforce the constitutional rights of Plaintiffs under the First and Fourteenth Amendments of the United States Constitution.

15. This Court has subject matter jurisdiction over Plaintiffs’ claims arising under the First and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983 pursuant to 28 U.S.C. § 1331 (general federal question jurisdiction) and § 1343 (civil rights actions).

16. This Court has personal jurisdiction over Defendants because all Defendants are located, domiciled or incorporated in, or otherwise are present and conducting a continuous and systematic part of their general business within, the State.

17. This Court has jurisdiction to render the declaratory relief requested under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

18. Venue is proper in this district under 28 U.S.C. § 1391(b) because Plaintiffs Erin and Rebecca Busk-Sutton and Jennifer Ludolph reside in this district, DHHS

operates branch offices in this district, and a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this district.

### **PARTIES**

19. Plaintiffs Kristy and Dana Dumont are married and reside in Dimondale, Michigan. They desire to adopt children from the public foster care system and have been turned away by taxpayer-funded child placing agencies working under contract with the State due to religious objections to working with same-sex couples. At all relevant times, Kristy and Dana Dumont have been, and continue to be, taxpayers of the State of Michigan.

20. Plaintiffs Erin and Rebecca Busk-Sutton are married and reside in Detroit, Michigan. They also desire to adopt children from the public foster care system and have been turned away by taxpayer-funded child placing agencies working under contract with the State due to those agencies' religious objections to working with same-sex couples. At all relevant times, Erin and Rebecca Busk-Sutton have been, and continue to be, taxpayers of the State of Michigan.

21. Plaintiff Jennifer Ludolph is a resident of Detroit, Michigan. She has been, and continues to be, a taxpayer of the State of Michigan.

22. Defendant Nick Lyon is the Director of DHHS, the State agency responsible for foster care and adoption services for children in state custody. DHHS contracts with private child placing agencies, such as Bethany Christian Services ("Bethany") and Catholic Charities, to provide public foster care and adoption services.

DHHS has its central offices in Lansing, Michigan, and operates branch offices in each of Michigan's 83 counties.

23. Defendant Herman McCall is the Executive Director of CSA, a sub-agency of DHHS that, in addition to having oversight over the work of taxpayer-funded state-contracted child placing agencies, is mandated by law to “[r]eview, investigate, evaluate, and assess all programs within [DHHS] related to services and programs for children,” including by advising on policy related to “children’s services and programs including, but not limited to, services for foster children, juvenile justice, and homeless youth.” Mich. Comp. L. § 400.227.

### **FACTS GIVING RISE TO THIS ACTION**

#### **A. Michigan’s Child Welfare System**

24. DHHS is responsible for all children in the Michigan foster care system. A child’s case with DHHS typically starts after Child Protective Services removes the child from his or her family for abuse or neglect and a court orders that the child be placed into foster care. If a child ultimately cannot be reunited with his or her parents despite the provision of services to the parents and the parents’ parental rights are terminated, DHHS seeks to find a permanent family for the child, typically through adoption. DHHS’s responsibilities for children who come into its care include recruiting and identifying appropriate families to care for these children either temporarily as foster parents until the children can be reunited with their families or permanently as with adoptive families.

25. DHHS performs this public function in part by contracting with private agencies that are licensed by DHHS’s Division of Child Welfare Licensing (“DCWL”) as

“child placing agencies” to recruit, screen, train and license prospective foster and adoptive parents and to place children in appropriate foster or adoptive homes, as authorized by Michigan statute. *See* Mich. Comp. L. §§ 722.11(1)(c), 722.115(3), 722.922. Although DHHS retains ultimate supervisory responsibility in all cases, much of the on-the-ground foster care and adoption work is performed by taxpayer-funded child placing agencies.

26. Through rulemaking authorized by statute, DHHS has conferred authority on private child placing agencies to make decisions regarding licensing foster parents and certifying adoptive parents, as well as the placement of children into foster and adoptive homes. *See* Mich. Admin. Code R. 400.12301(1), 400.12701. With this authority comes the obligation of child placing agencies to maintain ongoing recruitment programs “to ensure an adequate number of suitable and qualified homes” to meet the needs of children served by the agency. *Id.* R. 400.12304(1), 400.12706. The rules also give the agencies substantial discretion in evaluating applicants for foster homes or adoptive parents, *id.* R. 400.12310, 400.12605, as well as selecting an appropriate placement for a child into a foster or adoptive home, *id.* R. 400.12404, 400.12709.

27. After an agency accepts a child’s case from DHHS, it immediately begins receiving per diem compensation from the State. For example, some agencies receive at least \$40 per day from the State for each adoption case that they handle. These per diem payments cease after a certain amount of time or when the child is permanently placed. The agencies also receive a lump-sum payment after placement, depending upon the outcome of the case.

28. To fund the state's child welfare system, the Michigan legislature annually makes appropriations for adoption and foster care services. With these appropriated funds, DHHS pays private child placing agencies under contract with the State to provide foster care and adoptive services.

29. DHHS has entered into adoption and foster care service contracts with more than 100 private child placing agencies statewide, and many of these agencies operate in multiple counties.

30. Many of the private child placing agencies under contract with the State are religiously affiliated.

31. The contracts entered into between DHHS and child placing agencies require the contracting agencies to comply with DHHS's non-discrimination statement, which mandates that agencies "will not discriminate against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs or disability." This requirement "applies to all applications filed for adoption of [DHHS] supervised children, including [DHHS] supervised children assigned to a contracted agency."

32. The contracts entered into between DHHS and child placing agencies also require each contracting agency to "develop and implement a plan for adoptive home recruitment, retention, and support consistent with" DHHS's licensing standards applicable to the agency's license.

33. Families interested in fostering or adopting a child out of the foster care system must submit an application for a foster care license or to be certified to adopt.

34. Upon information and belief, each private child placing agency maintains a roster of families that it has licensed or certified that it generally uses for family placements for children assigned to its care.

35. The eligibility requirements for families interested in adopting children from the foster care system are provided in the DHHS Adoption Program Statement, also known as Publication 255. According to the Adoption Program Statement, DHHS “will not discriminate against any individual or group because of race, religion, age, national origin, color, height, weight, marital status, sex, sexual orientation, gender identity or expression, political beliefs or disability.” The Adoption Program Statement also states that “[t]he eligibility criteria for adoption of [DHHS]-supervised wards must not be more restrictive than the criteria in DHS Publication 255 when a contracted adoption agency is providing DHS adoption services.”

36. DHHS is contractually entitled to terminate its agreement with a child placing agency if the agency “[e]ngages in any conduct that may expose [DHHS] to liability” or “fails to cure a breach” of the agreement after receiving notice. The contracts also provide DHHS the right to “immediately terminate this Agreement in whole or in part without penalty and for any reason.”

37. Nonetheless, although it is aware of certain child placing agencies’ refusal to accept same-sex couples to foster or adopt children in the child welfare system, upon information and belief, DHHS has not taken any remedial action under its contracts against any private child placing agency for failure to comply with the DHHS non-discrimination statement, DHHS Publication 255, or the United States Constitution.

**B. 2015 Michigan House Bills Nos. 4188, 4189, and 4190**

38. For years, some private agencies providing foster care and adoption services under contract with the State have refused to accept same-sex couples as foster or adoptive parents because of the agencies' religious beliefs.

39. Starting as early as 2013, members of the Michigan legislature attempted to introduce legislation that would codify and authorize the practice of permitting agencies to turn away same-sex couples on the basis of the agencies' religious objection. The purpose of this legislation was clear. At that time, marriage for same-sex couples had been legalized in many states and some state governments, over the objection of some religiously affiliated child placing agencies, had introduced rules requiring taxpayer-funded and state-contracted agencies providing public foster care and adoption services to accept adoption and foster care applications from same-sex couples on equal terms as different-sex couples.

40. In 2013, the Families, Children and Seniors Committee of the Michigan House of Representatives considered a package of three bills, House Bills 4927, 4928, and 4991, which would preclude any state or local agency from taking "adverse action against a child placing agency on the basis that the child placing agency has declined or will decline to provide services that conflict with the child placing agency's sincerely held religious beliefs."

41. In discussions before the Michigan House Families, Children and Seniors Committee, the lead sponsor of the package reportedly stated that the goal of these bills

was to codify DHHS's practices related to entering into contracts for foster care and adoption case management services with private child placing agencies.

42. Those bills did not pass, but the effort to encode State policy and practices delegating decision-making power over child welfare services to organizations acting pursuant to religious criteria and providing protection to private agencies discriminating on the basis of sexual orientation was reprised in the 2015-2016 legislative session with Michigan House Bills 4188, 4189, and 4190.

43. During a hearing before the House on the bills on February 18, 2015, the director of clinical services at St. Vincent Catholic Charities confirmed that the organization would not work with gay and lesbian prospective parents, explaining that when prospective parents to whom they were religiously opposed approached them: "If they let us know that they're unmarried, or they're gay or lesbian, we immediately recommend, make a referral to another agency."

44. The Michigan House of Representatives passed the bills in March 2015.

45. In support of the bills, some religiously affiliated child placing agencies communicated with Michigan Governor Rick Snyder. A letter from the President of Bethany asserted that to require Bethany to adhere to principles of non-discrimination would present them with "an untenable choice" of "choos[ing] between their desire to help children and families and their fidelity to their religious principles." He stated further that "House Bills 4188–4190 are necessary" to "codify into state law what has been in practice," and threatened that "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.”

46. The President and CEO of the Michigan Catholic Conference also weighed in by letter to the Governor. He stated that Catholic agencies “handl[e] approximately twenty percent of the active foster care and adoption cases in Michigan,” and then went on to say that, “with profound concern and a sense of urgency,” he was concerned that there were objections to “the religious manner by which faith-based child placement agencies operate.”

47. On June 10, 2015, the Michigan Senate passed the bills, and the following morning, Governor Snyder signed the bills into law as 2015 Public Acts 53, 54, and 55, codified in Michigan Compiled Laws 400.5a, 722.124e, 722.124f, and 710.23g.

48. The statutes provide in relevant part that, “[t]o 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. L. § 722.124e(2). Additionally, the statutes provide that, “[t]o the fullest extent permitted by state and federal law, the state or a local unit of government shall not take an adverse action against a child placing agency on the basis that the child placing agency has declined or will decline to provide any services that conflict with, or provide any services under circumstances that conflict with, the child placing agency’s sincerely held religious beliefs.” *Id.* § 722.124e(3). Under the statute, “services” are defined to “include[] any

service that a child placing agency provides, except foster care case management and adoption services provided under a contract with [DHHS].” *Id.* § 722.124e(7)(b).

49. Some child placing agencies, including Bethany and Catholic Charities, appear to interpret these statutes as permitting taxpayer-funded state-contracted child placing agencies to turn away prospective families for children in foster care based on religious criteria.

50. In a July 2016 letter to the Michigan Attorney General’s office, counsel for Plaintiffs explained that they had received reports that some religiously affiliated taxpayer-funded state-contracted child placing agencies refused to accept same-sex couples who contacted them inquiring about adopting a child from foster care. Counsel for Plaintiffs requested a meeting to clarify the State’s position with respect to such practices. However, the Attorney General’s office refused to meet, and it did not disclaim the practice.

**C. Defendants’ Authorization of Religious-Based Exclusions by Child Placing Agencies Harms Children.**

51. There is a shortage of foster and adoptive families in Michigan.

52. As a result of that shortage, some children in State custody have and may continue to have multiple temporary placements before a suitable permanent home is found; other children have been and may continue to be separated from their siblings or placed in foster homes far from their school and community; some other children have been and may continue to be placed in group homes; and still other children have been

and may continue to be unable to be adopted at all and have and will instead reach the age of majority without ever being placed with a permanent family.

53. Each time a prospective parent who is able to provide a loving and caring family for a child is turned away by a child placing agency because of a religious objection to their sexual orientation (or any other religious objection), the pool of families available for the children in the child welfare system diminishes, reducing children's options for an appropriate placement, or any placement at all.

54. Every major professional organization dedicated to children's welfare, including the Child Welfare League of America, the National Association of Social Workers, the National Adoption Center, the American Psychological Association, the American Psychiatric Association, the American Academy of Family Physicians, the American Academy of Pediatrics, and the American Medical Association, affirmatively states that gay and lesbian parents are as likely as heterosexual parents to provide supportive and healthy environments for their children and opposes any discrimination based on sexual orientation in matters of adoption and foster care.

55. The loss of potentially qualified families exacerbates this shortage and means some children will remain in foster care longer than necessary before being adopted into the security of a "forever family" and the State will spend more taxpayer dollars to care for them.

56. Even if there were an abundance of families willing and able to care for children in the foster care system, the religious-based exclusion of capable families means some children may be denied the family that is best matched to meet their

individual needs. Placing children is not a one-size-fits-all endeavor, as every child has unique needs and every family brings different qualities. Unsuitable matches are less likely to be successful, and can lead to children being subjected to the instability of multiple placements.

#### **D. Plaintiffs' Interest in Challenging DHHS's Practices**

##### ***Kristy and Dana Dumont***

57. Plaintiffs Kristy and Dana Dumont have been together as a committed couple for 11 years. They married in 2011.

58. Kristy works at Michigan State University in the College of Education advising students. She is also working on her Ph.D. in Higher Adult and Lifelong Education. Dana works in the Michigan Department of Natural Resources.

59. Kristy and Dana would like to adopt a child from the foster care system. The reason they are pursuing adoption through foster care is that they want to give a permanent home to a child who needs one.

60. Kristy and Dana hope to adopt a child in foster care who may have difficulty finding a family. Kristy and Dana recently moved to the village of Dimondale because of its high-quality school district; there, they live in a home with a yard and extra bedrooms in the anticipation of children.

61. In July 2016, Kristy called St. Vincent's Catholic Charities in Lansing and said that she and her wife were interested adopting a child from foster care. She was told that the agency does not work with same-sex couples.

62. Kristy tried calling St. Vincent's Catholic Charities again in March 2017. She told the person who answered the phone that she was calling to inquire about adopting a child from foster care and was transferred to the voicemail of someone in the child welfare department. Kristy left a detailed message explaining that she had previously been told that the agency did not work with same-sex couples, and asking if that was still the case. She did not get a return call.

63. Also in March 2017, Kristy called Bethany in Lansing and said that she and her wife were interested in adopting a child from the foster care system. The Bethany representative told Kristy that Bethany does not work with same-sex couples.

64. Kristy and Dana are Michigan taxpayers who object to the use of taxpayer funds to underwrite and endorse religious beliefs to which they do not subscribe.

***Erin and Rebecca Busk-Sutton***

65. Plaintiffs Erin and Rebecca Busk-Sutton have been together as a committed couple for eight years. They married in 2014.

66. Erin works with children helping them study and prepare for standardized tests and Rebecca is a resident physician in internal medicine.

67. Erin and Rebecca would like to adopt a child from the foster care system. They are especially interested in adopting an older child or LGBT young person who may have difficulty finding a supportive family. Erin wants to use her skills as an educator to potentially assist a foster youth who may have gaps in his or her education.

68. On May 5, 2017, Erin called Bethany in Madison Heights and told the representative that she and her wife were interested in adopting a child from the foster

care system. The Bethany representative told Erin that same-sex couples “aren’t our area of expertise” and offered to recommend a different child placing agency in Sterling Heights or Ann Arbor. Erin told the Bethany representative that those locations were far away and asked if Bethany would be willing to work with them. The Bethany representative responded again that “same-sex couples aren’t our area of expertise” and that she “didn’t think they would have a good experience with [Bethany].”

69. Erin and Rebecca are also Michigan taxpayers who object to the use of taxpayer funds to underwrite and endorse religious beliefs to which they do not subscribe.

***Jennifer Ludolph***

70. Jennifer Ludolph is 33 years old and lives in Detroit. She works as a pharmacy technician at the University of Michigan’s hospital in Ann Arbor.

71. At the age of 13, Jennifer and her siblings were removed from their parents’ care and placed into the Michigan foster care system. After four years of instability, at age 17 she was placed with a loving couple that provided a stable home for her and three of her siblings. She feels lucky that she and her siblings landed in such a devoted and nurturing family that enabled them to thrive.

72. Jennifer now has children of her own and has also served as a foster parent.

73. Jennifer is strongly opposed to the State allowing taxpayer-funded child placing agencies hired by the state to care for children in foster care to turn away prospective foster and adoption families based on religious criteria. She believes that such practices could have prevented her from finding her family because her foster father is an atheist. She cares about the children currently in the foster care system who might

not be placed with a loving family because suitable prospective parents are turned away for religious reasons.

74. Jennifer is a Michigan taxpayer and objects to the use of taxpayer funds to underwrite and endorse religious beliefs to which she does not subscribe.

## **CLAIMS FOR RELIEF**

### **COUNT I**

#### **First Amendment to the United States Constitution**

75. Plaintiffs reincorporate the allegations in paragraphs 1 to 74 as if fully set forth herein.

76. DHHS has delegated to religious organizations the public function of managing foster care and adoption cases for children in Michigan's foster care system, which includes the responsibilities of recruiting and screening foster and adoptive parents and making family placements for the children the State assigns into their care.

77. DHHS pays these religious organizations with public funds for the adoption and foster care work they perform.

78. DHHS permits these taxpayer-funded and state-contracted religious organizations to use religious eligibility criteria when screening prospective foster and adoptive families and making placement decisions for children and DHHS is aware that some of these agencies are turning away prospective families headed by same-sex couples because of religious objections.

79. DHHS's actions harm children in the foster care system by denying them access to needed families and result in discrimination against same-sex couples like

Plaintiffs Kristy and Dana Dumont and Erin and Rebecca Busk-Sutton. Plaintiffs collectively are harmed by the use of taxpayer funds to underwrite and endorse religious beliefs to which they do not subscribe.

80. DHHS's conduct described above has deprived and continues to deprive Plaintiffs of their rights protected by the Establishment Clause of the First Amendment to the United States Constitution and made actionable by 42 U.S.C. § 1983.

81. Plaintiffs have no adequate remedy at law to redress the wrongs alleged herein, which are of a continuing nature and will cause irreparable harm.

**COUNT II**  
**Fourteenth Amendment to the United States Constitution**

82. Plaintiffs reincorporate the allegations in paragraphs 1 to 74 as if fully set forth herein.

83. Some private child placing agencies working under contract with the State treat gay and lesbian couples unequally to heterosexual couples by categorically excluding same-sex couples from applying for and being considered to be foster or adoptive parents.

84. DHHS, through private child placing agencies that provide adoption and foster care services to children under contract with the State, is turning away same-sex couples seeking to adopt out of the foster care system, such as the Dumonts and the Busk-Suttons, because of their sexual orientation.

85. DHHS, through agencies with which it contracts, is turning away same-sex couples based on religious objections to placing children with such families.

86. There is no legitimate government interest served by denying children access to potentially qualified families based on a religious exclusion.

87. Defendants, acting under color of state law, have violated and continue to violate the Equal Protection Clause of the United States Constitution by contracting with and funding private agencies that, in providing public adoption and foster care services, discriminate against same-sex couples seeking to become foster or adoptive parents.

88. Defendants are liable under 42 U.S.C. § 1983 for the violation of Plaintiffs' rights.

89. Plaintiffs have no adequate remedy at law to redress the wrongs alleged herein, which are of a continuing nature and will cause irreparable harm.

**RELIEF REQUESTED**

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and:

A. Declare, pursuant to 28 U.S.C. § 2201, that the State's practice of allowing state-contracted, taxpayer-funded child placing agencies to disqualify prospective families headed by same-sex couples based on agencies' religious beliefs violates the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983;

B. Enter an order enjoining Defendants, in their official capacities, from contracting with or providing taxpayer funding to private child placing agencies that exclude same-sex couples from consideration as foster or adoptive parents or otherwise employ religious criteria in decisions regarding the screening of prospective foster and

adoptive parents and, other than accommodating a particular child's religious traditions or preferences, the placement of children into foster and adoptive homes;

C. Enter an order directing Defendants, 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 placing agencies;

D. Award Plaintiffs the costs and fees and expenses for this action, including, *inter alia*, attorneys' fees and costs incurred in connection with this action, pursuant to 42 U.S.C. § 1988;

Award such other relief as this Court deems just and proper.

/s/ Jay D. Kaplan

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# Exhibit 3

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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

Case No. 17-cv-13080

Paul D. Borman  
United States District Judge

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.

\_\_\_\_\_ /

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.

\* \* \*

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.

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.

\* \* \*

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 intervenor 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<sup>1</sup>) 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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<sup>2</sup> 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. *Coalition 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

# Exhibit 4

**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,

*Defendant-Intervenors.*

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

HON. PAUL D. BORMAN

MAG. ELIZABETH A.  
STAFFORD

**DEFENDANT-INTERVENORS’  
PROPOSED MOTION TO  
DISMISS**

ORAL ARGUMENT  
REQUESTED

Defendant-Intervenors St. Vincent Catholic Charities, Melissa and Chad Buck, and Shamber Flore move this Court under Fed. R. Civ. P. 12(b)(1) and (6) to dismiss the Complaint, for the reasons below and explained more fully in the attached Brief.

1. Plaintiffs lack standing as they have failed to demonstrate a legally cognizable injury that is redressable by a decision in their favor. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). No one is preventing Plaintiffs from adopting or fostering children if they want to. Plaintiffs do not have a constitutional right to be licensed specifically through St. Vincent rather than any other adoption agency. And even if they did, the relief Plaintiffs seek would result in St. Vincent closing its programs to everyone, and Plaintiffs would *still* be unable to work with St. Vincent.

2. Plaintiffs' Establishment Clause claim fails under the historical test required by *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014). Adoption agencies have long been free to ensure placements are consistent with their religious beliefs. Governments do not establish religion when they accommodate religious practices or contract with religious organizations to provide social services. *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334 (1987); *Bowen v. Kendrick*, 487 U.S. 589 (1988).

3. For similar reasons, Plaintiffs have failed to state an Equal Protection claim. The State has made no suspect classification or favored any particular religious group, so rational basis applies. *Scarborough v. Morgan Cty. Bd. of Educ.*, 470 F.3d 250, 260-61 (6th Cir. 2006). If anything, Equal Protection concerns in this case

weigh heavily against the policy Plaintiffs seek, as it would result in a devastating disproportionate impact on a minority racial groups.

4. Furthermore, the Court cannot constitutionally grant the relief Plaintiffs request because it would violate the First Amendment. The Free Exercise Clause prohibits states targeting religious activity or excluding religious organizations from a public benefit. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017). And under Free Speech doctrine, government may not compel organizations to adopt the government's view on an issue as a condition of receiving government funding. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 133 S. Ct. 2321, 2330 (2013). Here, Plaintiffs want the State to force Defendant-Intervenors to recommend couples against their religious beliefs.

4. Pursuant to Local Rule 7.1(a), on the morning of December 18, 2017, counsel for Defendant-Intervenors contacted Plaintiffs' and Defendants' counsel to determine if they would concur in the relief sought, explaining the nature of and basis for the motion and offering to confer. Defendants' counsel said they "concur in [Intervenor-Defendants'] request." Plaintiffs' counsel said they were unable to provide a response today.

Dated: December 18, 2017

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Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2017, 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  
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**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,*

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NICK LYON, in his official capacity as  
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*Defendants,*

and

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

*Defendant-Intervenors.*

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

HON. PAUL D. BORMAN

MAG. ELIZABETH A. STAFFORD

**DEFENDANT-INTERVENORS'  
BRIEF IN SUPPORT OF  
PROPOSED MOTION TO  
DISMISS**

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## CONCISE STATEMENT OF ISSUES PRESENTED

1. Defendant-Intervenors incorporate by reference Defendants' first issue presented.
2. Defendant-Intervenors incorporate by reference Defendants' second issue presented.
3. Whether Plaintiffs have stated a claim under the Establishment Clause when there is a rich history of our country protecting the work of religious adoption agencies and protecting important partnership between government and faith-based charities.
4. Defendant-Intervenors incorporate by reference Defendants' fourth issue presented.
5. Whether Plaintiffs' requested relief would result in religious discrimination against Defendant-Intervenors in violation of the Free Exercise Clause.
6. Whether Plaintiffs' requested relief would result in content-based compelled speech contrary to the First Amendment.

## CONTROLLING OR MOST APPROPRIATE AUTHORITY

*Hein v. Freedom From Religion Foundation*, 551 U.S. 587, 607 (2007); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 565 U.S. 171 (2012); *Scarborough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250 (6th Cir. 2006); *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013).

## INTRODUCTION

Plaintiffs' claims must be dismissed, both because they would turn the First Amendment on its head—forcing the State to engage in religious discrimination and free speech violations—and because Plaintiffs have suffered no injury traceable to Defendants' conduct or redressable by this Court.

Michigan adoption agencies refer families to other agencies for a wide variety of reasons, from personality conflicts to convenience of location. Plaintiffs' lawsuit challenges just one type of referral: a referral for religious reasons. But allowing this longstanding and historic practice to continue does not violate the Constitution. In fact, Michigan would violate the Free Exercise Clause if it tried to eliminate religious referrals in the way Plaintiffs seek. And it would violate the Free Speech Clause if it tried to force religious agencies to make a policy change regarding written referrals as a condition of partnering with the State.

This court need not reach those constitutional issues because Plaintiffs have a more fundamental problem: they have suffered no legally cognizable injury sufficient for standing. Neither Defendants nor St. Vincent is stopping Plaintiffs from adopting if they want to. Consistent with state law, St. Vincent refers unmarried and same-sex couples who wish to be licensed to other capable adoption agencies, just as other agencies frequently refer families elsewhere for many secular reasons.

In fact, the named Plaintiff couples in this case live much closer to multiple other adoption agencies. They had to go out of their way to target St. Vincent. But that targeting cannot create a constitutional right to the licensing services of a particular religious non-profit. And Plaintiffs' suit—which asks this court to drive St. Vincent from the adoption field completely—would not give Plaintiffs the services they supposedly seek anyway.

St. Vincent did not and does not prevent other agencies from placing children with Plaintiffs or other same-sex couples. And St. Vincent cares for children who need homes, regardless of sexual orientation. Once licensed, Plaintiffs are not restricted to children in the care of their chosen licensing agency, and they could be matched with children in St. Vincent's care. Thus, allowing agencies like St. Vincent to continue their work does nothing to take away LGBT rights or prevent same-sex couples from adopting.

But Plaintiffs' failure to demonstrate injury does not mean that no one here faces harm. In fact, the children of Michigan would face significant and irreversible harm if Plaintiffs succeed in this lawsuit. As the ACLU has recognized, Michigan has 13,000 children in the foster care system and “it doesn't have enough families willing and able to meet their needs. . . . Some children wait years for an adoptive

family and some age out of foster care without ever becoming part of a family.”<sup>1</sup> Plaintiffs may think it wise to exacerbate this problem by shutting down religious adoption agencies and reducing the pool of adoptive families, but the Constitution does not require—and in fact forbids—that harmful and misguided approach.

Ultimately, Plaintiffs’ lawsuit reveals itself as one that is not at all about protecting children. It is about scoring cheap political points at the expense of children. For the reasons set forth herein, and for those set forth by the State, this Court should dismiss this meritless lawsuit and reject the invitation to cause further and needless harm to children who have already suffered enough.

## **BACKGROUND**

Defendant-Intervenors incorporate by reference the facts as set forth in Defendant-Intervenors’ Memorandum in support of their Motion to Intervene. *See* Dkt. 18 at 2-14.

## **LEGAL STANDARDS**

When ruling on a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), courts must consider whether the “complaint . . . contain[s] sufficient

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<sup>1</sup> Leslie Cooper, Same-Sex Couples Are Being Turned Away From Becoming Foster and Adoptive Parents in Michigan. So We’re Suing, ACLU, (Sept. 20, 2017) <https://www.aclu.org/blog/lgbt-rights/lgbt-parenting/same-sex-couples-are-being-turned-away-becoming-foster-and-adoptive>.

factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This standard of review requires more than the bare assertion of legal conclusions. *Twombly*, 550 U.S. at 555 (citing Fed. R. Civ. P. 8(a)). Courts “need not accept as true legal conclusions or unwarranted factual inferences.” *DirectTV, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007) (quoting *Gregory v. Shelby Cty.*, 220 F.3d 433, 446 (6th Cir. 2000)).

## ARGUMENT

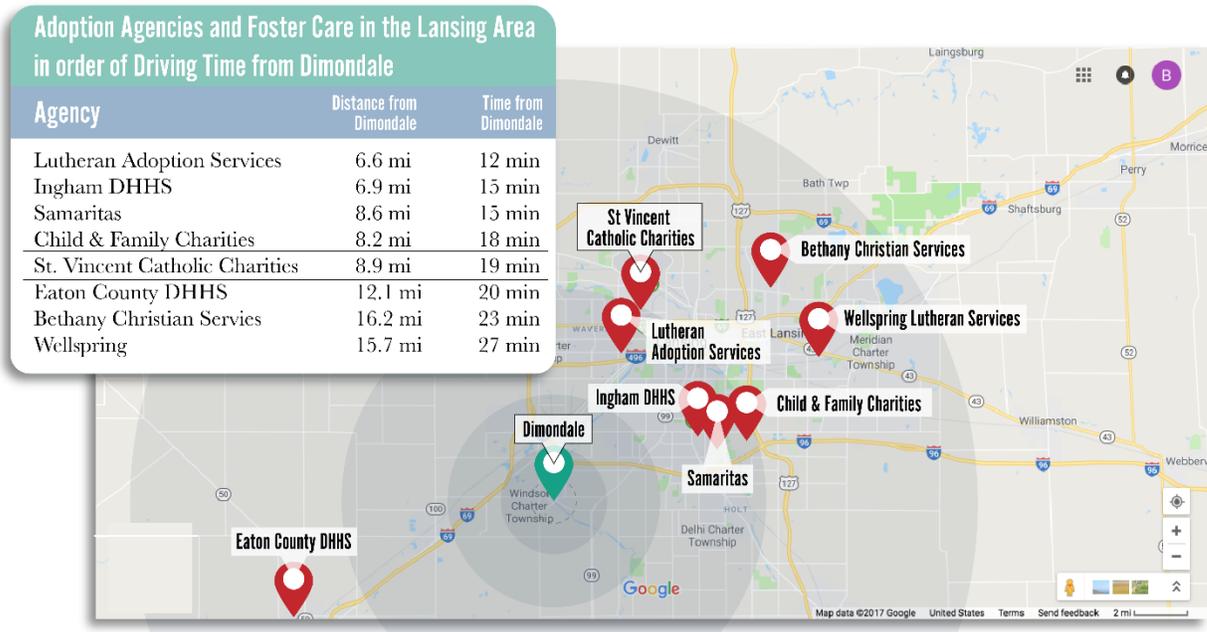
### **I. Plaintiffs have not demonstrated an injury that is cognizable for standing or redressable by this court.**

To establish standing, Plaintiffs bear the burden of showing an injury in fact caused by Defendants’ conduct and likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Here, Plaintiffs have not demonstrated any injury that gives rise to standing, and the outcome they seek would not redress any alleged harm. Their claims must be dismissed.

Plaintiffs can show neither injury nor causation nor redressability. St. Vincent does not stop Plaintiffs or other couples from adopting children. *See* Dkt. 18 at 10. Nor do the Defendants. The four Plaintiffs who claim they want to adopt children from foster care remain free to do this with the many other agencies in Michigan. *Id.* ¶ 9. For example, Kristy and Dana Dumont chose to call St. Vincent, but they could

easily have sought licensing with an agency closer to their house.

See Dkt. 18 Ex. 1 ¶ 8, Attach A.



Once licensed, Plaintiffs are not restricted to children in the care of their chosen licensing agency, and they could be matched with children in St. Vincent’s care.

*Id.* ¶ 10. Neither St. Vincent nor Defendants has injured Plaintiffs at all.

Finally, forcing St. Vincent to end its services would do nothing to redress their alleged injury. Plaintiffs do not have a constitutional right to be licensed specifically through St. Vincent rather than any other adoption agency. And even if they did, the relief Plaintiffs seek would result in St. Vincent closing its adoption and foster programs to everyone, and Plaintiffs would *still* be unable to receive their license through St. Vincent. *See Id.* ¶ 13. Plaintiffs have not even attempted to explain why

the many alternative adoption agencies in the State are insufficient for their needs. *See Id.* ¶ 9, Attach B.

Nor could Plaintiffs establish “taxpayer standing.” *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 130 (2011). “[T]he mere fact that a plaintiff is a taxpayer is not generally deemed sufficient to establish standing in federal court.” *Id.* The only exception is where a taxpayer specifically challenges “exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution.” *Flast v. Cohen*, 392 U.S. 83, 102-03 (1968). It is not sufficient to allege “an incidental expenditure . . . in the administration of an essentially regulatory statute.” *Id.* Nor is there taxpayer standing to challenge “expenditures resulted from executive discretion.” *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 605 (2007). Here, the State has not allocated any specific funds to any program Plaintiffs challenge, and any spending is the result of executive discretion. Thus, Plaintiffs’ claims are not justiciable.

## **II. Plaintiffs’ constitutional claims lack merit.**

### **A. Allowing faith-based agencies to refer couples does not violate the Establishment Clause.**

Plaintiffs’ Establishment Clause argument cannot be squared with Supreme Court precedent or the extensive history of religious involvement with adoption. Furthermore, Plaintiffs’ overbroad reading of the Establishment Clause would

invalidate a host of state and federal laws providing religious protections and allowing government to partner with religious organizations to serve the neediest members of society.

**1. History of Religious Adoption.** Defendants rely on the three-part test established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See* Dkt. 16 at 16. Plaintiffs’ claims would fail under *Lemon*, but that test has been superseded by *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), in which the Supreme Court made clear that the proper analysis looks to the historical purposes of the Establishment Clause. “[T]he Establishment Clause must be interpreted ‘by reference to historical practices and understandings.’” *Id.* at 1819 (quoting *Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989)) (emphasis added). The Court started from the premise that an “establishment of religion” had a defined meaning at the time of the founding, and that history is an important guide to interpreting what that means to courts today. *Id.* The historical understanding of “establishments” in some cases requires broad exemptions for religious employers, even in the context of anti-discrimination laws. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 565 U.S. 171, 181-87 (2012).

In this case, the historical record supports granting private organizations a large measure of autonomy in helping connect children with adoptive homes. The

adoption and foster care system was largely developed by private, mostly religious, organizations such as orphanages which were tasked with taking care of children without parents. E. Wayne Carp, *Adoption in America: Historical Perspective* 3-4 (2002). State adoption laws were largely meant to facilitate the work of private charitable institutions. *Id.* at 5. In the late 19<sup>th</sup> century, minority religious groups such as Catholics increasingly established societies to facilitate adoptions precisely so that children could be adopted by families that shared the faith. *Id.* at 7; Paula E. Pfeffer, *A Historical Comparison of Catholic and Jewish Adoption Practices in Chicago, 1833-1933* in E. Wayne Carp, *Adoption in America: Historical Perspective* 103-105 (2002) (discussing how Catholic adoption agencies in Chicago were founded to prevent Catholic children from being taken away from Catholic homes). And these organizations frequently received government funding to facilitate those adoptions. Carp, *supra* at 4. State laws guaranteed “religious protection” by allowing, and in some instances requiring, religious organizations to make placements consistent with the religious beliefs of the religious adoption agency. Ellen Herman, *Kinship by Design: A History of Adoption in the Modern United States* 60, 125 (2008).

Through referrals between adoption agencies, or religion matching laws, children were routinely placed with families of the same faith. Barbara Melosh, *Strangers and*

Kin: *The American Way of Adoption* (2002) (describing how religious organizations referred adoptive parents to each other based on the parents' religious beliefs). Agencies were free to require prospective parents to meet faith-based requirements of belief and conduct. *Id.* 83-84 (describing how a Catholic adoption agency in Delaware imposed such standards). The historical record therefore affirms that the Michigan law is wholly consistent with our nation's long history of allowing religious adoption agencies to place children consistent with their religious beliefs and mission. That history alone is sufficient to uphold the Michigan law under the Establishment Clause.

**2. *Government Partnership with Private Organizations.*** Even under *Lemon*, the Establishment Clause could not prohibit the government from partnering with private religious organizations to serve the needy. Plaintiffs' argument to the contrary proves too much. Dkt. 1 at 4. Taken to its logical extreme, Plaintiffs' reading would bar the Government from partnering with any religious organizations at all, even religious hospitals providing medical care for the poor through Medicaid.

The Establishment Clause does not prohibit government contracts with religious organizations for the provision of social services. In *Bowen v. Kendrick*, 487 U.S. 589 (1988), the Supreme Court upheld the constitutionality of a government program that partnered with organizations "that were affiliated with religious denominations

and that had corporate requirements that the organizations abide by religious doctrines” to provide publicly funded social services to combat teen pregnancy. *Id.* at 599. And it did so even though the law “*expressly contemplated* that some of those moneys might go to projects involving religious groups.” *Hein v. Freedom From Religion Foundation*, 551 U.S. 587, 607 (2007) (emphasis added).

The Supreme Court emphasized that Congress was entitled to recognize the valuable role that religious organizations play in addressing social problems, and to allow such organizations access to federal funding on an equal basis with secular organizations. *Bowen*, 487 U.S. at 606-608. Fatally to Plaintiffs’ case, the Supreme Court rejected the claim “that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs,” *id.* at 608, and emphasized that a “symbolic link” between the government and the religious organization did not constitute an establishment of religion. *Id.* at 613.

The Supreme Court has also already upheld the government’s ability to accommodate religious organizations like St. Vincent, consistent with the Establishment Clause. In *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987), the Supreme Court considered and unanimously rejected an Establishment Clause challenge to an exemption to the Civil Rights Act which allowed religious employers to hire and fire employees on

the basis of religion. The Court noted that it had “long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.” *Id.* at 334 (quoting *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 144-45 (1987)). And in *Hosanna-Tabor*, the Supreme Court held that the Establishment Clause actually *required* accommodating a religious organization from anti-discrimination laws. 565 U.S. 171.

Furthermore, the Establishment Clause only applies against state actors, and this Court has already rejected the claim that St. Vincent and other adoption agencies qualify as state actors. In *Brent v. Wayne County Department of Human Services*, this Court held that several foster care agencies were not state actors. *Brent v. Wayne Cty. Dep’t of Human Servs.*, No. 11-10724, 2012 WL 12877988, at \*11 (E.D. Mich. Nov. 15, 2012), *aff’d in part, rev’d in part on other grounds sub nom. Brent v. Wenk*, 555 F. App’x 519 (6th Cir. 2014). The Court thoroughly analyzed the state actor claims under the “three tests” recognized by the Sixth Circuit: “(1) the public function test; (2) the state compulsion test; and (3) the nexus test.” *Id.* The Court concluded that, although there was a “co-dependent” relationship between the agencies and the State, none of them “were so controlled by or intertwined with the State that their actions and decisions can be deemed to be those of the State under

the relevant tests and precedent.” *Id.* at \*13; *see also Molnar v. Care House*, 574 F. Supp. 2d 772 (E.D. Mich. Sept. 5, 2008) (private non-profit agency to which governmental entity referred minor child was not a state actor). Since organizations like St. Vincent are not state actors, their religious exercise cannot violate the Establishment Clause.

**B. Allowing faith-based agencies to refer couples does not violate the Equal Protection Clause.**

In *Amos*, the Supreme Court rejected the claim that giving accommodation to religious organizations violated the Equal Protection Clause. The Court emphasized that laws “affording a uniform benefit to *all* religions” would be analyzed under rational basis review so long as they satisfied the Establishment Clause. *Amos*, 483 U.S. at 339. Here, the State has made no suspect classification, and there is no claim that the State has favored any particular religious group, so rational basis applies. *Scarborough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 260-61 (6th Cir. 2006).

As discussed below, the State’s interest in protecting referrals for religious reasons on the same basis as referrals for secular reasons is not only rational, it is required by the First Amendment. *See* Part III. And for the same reasons St. Vincent is not a state actor for Establishment Clause purposes, St. Vincent is also not a state actor for Equal Protection purposes. In fact, if all adoption agencies were state actors, that could prohibit the important work of some agencies who specialize in placing

children with Native American families,<sup>2</sup> or in finding homes for black children.<sup>3</sup>

If anything, Equal Protection concerns in this case weigh heavily against the policy Plaintiffs seek, as it would result in a devastating disproportionate impact on minority racial groups. Only 21 percent of Michigan children are from black or mixed-race backgrounds,<sup>4</sup> but 42 percent of children in foster care are black and mixed race.<sup>5</sup> The majority of children currently in St. Vincent's care are of African

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<sup>2</sup> Sault Ste. Marie Tribe of Chippewa Indians, *Child Placement*, <https://www.saulttribe.com/membership-services/acfs/child-placement> (last visited Dec. 15, 2017) (“The Sault Tribe Binogii Placement Agency is our tribal child placement agency. The agency is licensed by the state of Michigan to provide foster care and adoption services to children ages 0-19 who reside within the tribe’s seven-county service area. The agency services children who are enrolled or eligible for enrollment as Sault Ste. Marie Tribe of Chippewa Indians members and Sault Tribe households.”).

<sup>3</sup> Michigan Adoption Resource Exchange, *Find a Licensed Agency*, <http://mare.org/For-Families/New-to-Adoption/Find-a-Licensed-Agency> (listing Homes for Black Children) (last visited Dec. 15, 2017); AdoptUSKids, *Minority Specializing Agency and Resource Directory*, 4, <https://www.adoptuskids.org/assets/files/NRCRRFAP/resources/minority-specializing-agency-directory.pdf> (discussing how Homes for Black Children focused on the “adoptive placement of black children”).

<sup>4</sup> The Kids Count Data Center: Child population by race, The Anne E. Casey Foundation (2017) <http://datacenter.kidscount.org/data/tables/103-child-population-by-race?loc=1&loct=2#detailed/2/24/false/870,573,869,36,868/68,69,67,12,70,66,71,72/423,424>

<sup>5</sup> The Kids Count Data Center: Children in foster care by race and Hispanic origin, The Anne E. Casey Foundation (2017) <http://datacenter.kidscount.org/data/tables/6246-children-in-foster-care-by-race-and-hispanic-origin?loc=1&loct=2#detailed/2/24/false/573,869,36,868,867/2638,2601,2600,2598,2603,2597,2602,1353/12992,12993>

American, Hispanic, or Native American descent. Dkt. 18 Ex. 1 ¶ 3. The majority of youth who age out of foster care without a permanent family are African American, and a recent study showed that these youth are particularly vulnerable to ending up in poverty, without an education, and back on the streets.<sup>6</sup> Thus, if the State prevents more families willing to adopt and foster by closing St. Vincent's programs, this would disproportionately impact minority children. Such a result requires "careful consideration" and skepticism by this court. *United States v. Blewett*, 746 F.3d 647, 667 (6th Cir. 2013) (Moore J, concurring). Plaintiffs offer no reason for this Court to impose that disparate burden.

### **III. Plaintiffs seek relief that would violate the First Amendment.**

#### **A. Discriminating against religious agencies violates the Free Exercise Clause.**

Plaintiffs' requested relief would violate the Free Exercise Clause on three independent grounds: it would (1) explicitly target religious activity, (2) selectively enforce prohibitions against activity for religious purposes while allowing it for secular purposes, and (3) exclude religious groups from a generally available public benefit program.

##### **1. *Explicit Targeting.*** In *Church of the Lukumi Babalu Aye, Inc. v. City of*

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<sup>6</sup>Erick Eckholm, *Offering Help for Former Foster Care Youths*, The New York Times (Jan. 27, 2007), <http://www.nytimes.com/2007/01/27/us/27foster.html>.

*Hialeah*, 508 U.S. 520 (1993), a Santeria priest challenged four municipal ordinances that restricted the killing of animals. In a 9–0 decision, the Supreme Court struck down the ordinances. The ordinance was problematic for multiple reasons, one of which was that it targeted religious conduct “on its face.” *Id.* at 532. Thus, the ordinance violated the “minimum requirement of neutrality.” *Id.*

Similarly here, under the legal scheme Plaintiffs seek, an adoption agency would be barred from partnering with the State if it ever referred couples elsewhere based on “religious criteria.” Dkt. 1 at 21-22 (asking this Court to enjoin the State “from contracting with or providing taxpayer funding to private child placing agencies that . . . employ religious criteria in decisions regarding the screening of prospective foster and adoptive parents”). If the State adopted (or this Court ordered) that kind of policy, explicitly prohibiting “religious” decision-making, that would be direct religious targeting clearly prohibited by the Free Exercise Clause. Such a policy would be “enacted ‘because of,’ not merely ‘in spite of,’ [its] suppression of [religious conduct].” *Lukumi*, 506 U.S. at 540 (quoting *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

**2. Selective Enforcement.** Under the Free Exercise Clause, government may not “in a selective manner impose burdens only on conduct motivated by religious belief.” *Lukumi*, 508 U.S. at 543. This rule “protect[s] religious observers against

unequal treatment.” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (citation and internal quotation marks omitted). In *Lukumi*, the ordinances were not “neutral” because they accomplished a “religious gerrymander”—that is, they burdened “Santeria adherents but almost no others.” 508 U.S. at 535-38. And the ordinances were not “generally applicable” because they were substantially “underinclusive”—that is, they failed to prohibit nonreligious killing “that endanger[ed] [the government’s] interests in a similar or greater degree” than Santeria sacrifice did. *Id.* at 543-44. In this vein, courts have struck down laws that had only narrow exemptions for secular conduct,<sup>7</sup> laws that provided only occasional individualized exemptions,<sup>8</sup> laws that were not enforced uniformly,<sup>9</sup> and laws that had a combination of exemptions and administrative insensitivity toward religious conduct.<sup>10</sup>

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<sup>7</sup> *Mitchell Cty. v. Zimmerman*, 810 N.W.2d 1 (Iowa 2012) (prohibition on steel wheels was not generally applicable where it exempted school buses, but not Mennonite tractors).

<sup>8</sup> *Blackhawk v. Pennsylvania*, 381 F.3d 202, 211 (3d Cir. 2004) (Alito, J.) (wildlife permitting fee was not generally applicable where it exempted zoos and circuses, but not Native Americans).

<sup>9</sup> *Tenafly Eruv Ass’n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 166-67 (3d Cir. 2002) (a local ordinance broadly banned the placement of any signs or other materials on any public utility poles but the government only enforced this prohibition against Orthodox Jews)

<sup>10</sup> *Rader v. Johnston*, 924 F. Supp. 1540 (D. Neb. Apr. 5, 1996) (exemptions allowed “in a broad range of circumstances not enumerated in the rule”).

Here, the result Plaintiffs seek would require an inappropriately selective—and anti-religion—prohibition on agency referrals. Right now an adoption agency *can* refer a couple or individual to another agency for a myriad of other reasons, including the following: (1) the family may live further away than the agency would like to drive for home visits, so they refer them to a closer agency, (2) the agency already has a waiting list, (3) the family has not been satisfied with the agency’s services, and (4) the family is looking for a specific type of child not currently in that agency’s care. Dkt. 18 Ex. 1 ¶ 14. Some agencies even specialize in placing children with Native American families,<sup>11</sup> or in finding homes for black children.<sup>12</sup> Allowing referrals for these secular reasons—but not for religious reasons—would create a double standard impermissibly “singl[ing] out the religious for disfavored treatment.” *Trinity Lutheran*, 137 S. Ct. at 2020-2021. That is forbidden by the Free Exercise Clause.

**3. Exclusion from a Public Benefit.** In *Trinity Lutheran*, the Supreme Court affirmed that a religious organization could not be excluded from a government benefit program because it is religious. 137 S. Ct. at 2019. In a 7-2 opinion, the Supreme Court held that this “exclusion of [a religious organization] from a public

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<sup>11</sup> See *supra* n.2.

<sup>12</sup> See *supra* n.3.

benefit for which it is otherwise qualified . . . is odious to our Constitution . . . and cannot stand.” *Id.* at 2025. States cannot exclude organizations because they are religious, nor can they exclude organizations because they act religiously. *Id.* at 2026 (Gorsuch, J., concurring in part and concurring in judgment: “I don’t see why it should matter whether we describe that benefit, say, as closed to Lutherans (status) or closed to people who do Lutheran things (use). It is free exercise either way.”).

Here, the relief Plaintiffs seek would exclude St. Vincent and similarly situated agencies from a publicly available benefit for which they are otherwise qualified—the ability to partner with the State in offering adoption and foster services to families and vulnerable children—entirely because their actions are based on religious principles.

Excluding St. Vincent because of its religious actions would hurt both St. Vincent and Michigan children. St. Vincent would be barred from helping foster children and adoptees if it loses its contract with the State. Dkt. 18 Ex. 1 ¶ 13. To be sure, St. Vincent is not in this for the money—it loses more money than it makes when providing foster services. *Id.* But losing this contract would require St. Vincent to close down this program, and it would have severe additional financial impacts on other services St. Vincent offers as well. *Id.*

Plaintiffs argue that St. Vincent is not prohibited from exercising its religion. But

the Free Exercise Clause also “protects against indirect coercion or penalties on the free exercise of religion” such as “the denial of or placing of conditions upon a benefit or privilege.” *Trinity Lutheran*, 137 S. Ct. at 2022 (citing *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 450 (1988), and *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)) (internal quotation marks omitted). Here, if the government were to ban religious referrals, St. Vincent would have to choose between participating in the program or remaining true to its mission as a religious institution. *See* Dkt. 18 Ex. 1 ¶ 7.

**4. Strict Scrutiny.** Laws that target the religious for special disabilities are “subject[] to the strictest scrutiny” and “can be justified only by a state interest ‘of the highest order.’” *Trinity Lutheran*, 137 S. Ct. at 2019 (citing *Lukumi*, 508 U.S. at 533 and *McDaniel v. Paty*, 435 U. S. 618, 628 (1978)). But Plaintiffs cannot show that any compelling interest would be furthered through the religious discrimination they advocate. In fact, to the extent Plaintiffs seek to be licensed by St. Vincent, their requested relief—which would force St. Vincent to stop licensing altogether—would not even achieve that goal. By contrast, Michigan has a strong interest in ensuring children and families receive quality care and services. Its continued collaboration with St. Vincent, an agency that has recruited more families than seven of the eight agencies in its service area, furthers the government’s interest in finding

families for children.

Protecting the Free Exercise rights of St. Vincent does nothing to prohibit same-sex couples from fostering or adopting children. As described above, the Plaintiffs live closer to a number of other adoption agencies than the faith-based agencies they sought out to name in their Complaint. Dkt. 18 Ex. 1 ¶¶ 8-9. The Dumont Plaintiffs, for example, bypassed four adoption agencies that were closer to them in order to target St. Vincent. *Id.* ¶ 8.

Nor does St. Vincent do anything to prevent children in its care from being placed by another agency with a same-sex couple. *Id.* ¶ 10. Families working with other adoption agencies are not restricted to children in the care of their chosen licensing agency, and any family could be matched with children in St. Vincent's care through the Michigan Adoption Resource Exchange. Dkt. 18 at 10.

In sum, protecting the Free Exercise rights of St. Vincent will do nothing to prevent unmarried or same-sex couples from becoming adoptive or foster parents. And driving St. Vincent out of the adoption and foster market will do nothing to help more same-sex couples become adoptive or foster parents. But driving St. Vincent out of the market *will* leave a gaping void that results in fewer families recruited, fewer services offered to families like the Bucks with special needs children, and fewer individuals like Shamber who are able to find a permanent and loving home.

In *Trinity Lutheran*, the consequence of religious discrimination was a few more scraped knees. Here, the consequences of religious discrimination are far more serious. Plaintiffs can provide no justification for such a result, and certainly not a compelling one.

**B. Requiring agencies to recommend couples against their religious beliefs would unconstitutionally compel speech.**

Government may not compel content-based speech as a condition of receiving government funding. In *Agency for International Development*, the court was faced with a government program to combat HIV/AIDS which permitted funding only to organizations which “explicitly agree with the Government’s policy to oppose prostitution and sex trafficking.” *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205 (2013). The court struck down the requirement, holding that “[b]y demanding that funding recipients adopt—as their own—the Government’s view on an issue of public concern, the condition by its very nature affects ‘protected conduct outside the scope of the federally funded program.’” *Id.* at 2330 (quoting *Rust v. Sullivan*, 500 U.S. 173, 197 (1991)). Because the requirement was not limited to restricting the activities funded, but compelled recipients “to pledge allegiance to the Government’s policy,” it could not stand. *Id.* at 2332. The Court affirmed the “basic First Amendment principle that freedom of speech prohibits the government from telling people what they must say.” *Id.* at 2327 (citation and quotation omitted).

Here, if Plaintiffs' lawsuit succeeded, St. Vincent would be compelled to speak in two ways. First, as a pre-condition to partnering with the State, St. Vincent would have to adopt a policy to cease making religiously motivated referrals. This is precisely the sort of "pledge allegiance to the Government's policy" as a condition of partnership that the First Amendment prohibits. *Id.* at 2332. Second, to add insult to injury, the service such a policy would require is that St. Vincent provide the State with *written assessments* that conflict with St. Vincent's religious beliefs. Like other adoption agencies, St. Vincent does not have authority to make any final determinations regarding the placement of children in homes for purposes of adoption or foster care. Dkt. 18 Ex. 1 ¶ 6. Instead, the agency's responsibility simply includes providing written evaluations and recommendations to the State regarding foster licensing and approval of adoption for families.<sup>13</sup> The ultimate determination about placement of children and licensing of families for foster and adoptive purposes is made by DHHS. Thus, in order to carry out their work in finding homes for children, agencies must tell DHHS in writing whether they endorse a home.

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<sup>13</sup> Mich. Admin. Code R 400.12325 ("An agency shall recommend to the department the appropriate licensing action consistent with facts contained in the foster home evaluation and any special evaluations."); Mich. Admin. Code R 400.12605 ("An agency social service worker shall complete a written adoptive evaluation within 90 days of the family signing an adoption application and prior to approving a family for adoption."); Mich. Admin. Code R 400.12607 ("An agency shall recommend the appropriate action consistent with the facts contained in the adoptive evaluation.").

St. Vincent cannot provide written recommendations and endorsements of unmarried or same-sex couples, consistent with its Catholic mission. Dkt. 18 Ex. 1 ¶ 7. Nor does St. Vincent want to send the State written recommendations that all unmarried or same-sex couples who come to it are *unsuitable* for adoption. *Id.* Rather, on this sensitive and important issue, St. Vincent would simply rather stand aside, and allow other qualified agencies to make recommendations on behalf of unmarried or same-sex couples. *Id.* Furthermore, it is difficult to believe that the Plaintiffs actually want to have their evaluations performed by an organization with religious objections; one would think the preference would be to *not* be evaluated by St. Vincent in that circumstance.

Plaintiffs' lawsuit would essentially prohibit St. Vincent from stepping aside and instead force them to speak and "to adopt [the] particular belief," in a written recommendation to the State, inconsistent with their religious beliefs about marriage. *Agency for Int'l Dev*, 133 S. Ct. at 2330. This would clearly contravene "the individual's right to speak his own mind" and instead allow "public authorities to compel him to utter what is not in his mind." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943).

Laws "that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as those "that suppress,

disadvantage, or impose differential burdens upon speech because of its content.” *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994). For the same reasons Plaintiffs cannot satisfy strict scrutiny under Defendant-Intervenors’ Free Exercise defense, it cannot withstand strict scrutiny required under the compelled speech doctrine. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429-30 (2006) (whether strict scrutiny is triggered by the Free Speech Clause or RFRA, “the consequences are the same”). Thus, First Amendment speech protections require that Plaintiffs’ claims be dismissed.

### CONCLUSION

For the reasons stated above, this Court should grant Defendant-Intervenors’ Motion to Dismiss.

Dated: December 18, 2017

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Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2017, I electronically filed the above document(s) with the Clerk of Court via CM/ECF, which will provide electronic copies to counsel of record.

/s/ Stephanie H. Barclay  
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# Exhibit 5

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

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

Plaintiffs,

v.

ROBERT GORDON, in his official  
capacity as the Director of the Michigan  
Department of Health and Human  
Services; and JENNIFER WRAYNO, in  
her official capacity as the Acting  
Executive Director of the Michigan  
Children’s Services Agency,

Defendants,

and

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

Intervenor Defendants.

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

HON. PAUL D. BORMAN

MAG. ELIZABETH A. STAFFORD

**STIPULATION OF  
VOLUNTARY DISMISSAL  
WITH PREJUDICE**

Plaintiffs Kristy Dumont, Dana Dumont, Erin Busk-Sutton, and  
Rebecca Busk-Sutton (collectively, “Plaintiffs”) and Defendants Robert Gordon and

Jennifer Wrayno<sup>1</sup> (collectively, “State Defendants”) file this stipulation of dismissal of the above-captioned action (the “Action”) under Rule 41(a)(2) of the Federal Rules of Civil Procedure. Plaintiffs and State Defendants state as follows:

On September 20, 2017, Plaintiffs filed the complaint in the Action with the U.S. District Court for the Eastern District of Michigan against the State Defendants. (ECF No. 1.)

On December 18, 2017, St. Vincent Catholic Charities, Melissa and Chad Buck, and Shamber Flore (“Intervenor Defendants”) moved to intervene in this case (ECF No. 18), which motion was granted on March 22, 2018. (ECF No. 34.)

On September 14, 2018, this Court denied in substantial part the motions to dismiss filed by State Defendants and Intervenor Defendants. (ECF No. 49 at 93.)

On September 17, 2018, the Court entered a schedule for discovery and briefing to “manage the progress of the case” (the “September 17 Scheduling Order”). (ECF No. 51 at 1.)

On October 31, 2018, all Parties jointly moved to modify the September 17 Scheduling Order. (ECF No. 61.) On November 2, 2018, this Court granted in part and denied in part that motion. (ECF No. 62.)

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<sup>1</sup> Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, this stipulation reflects the substitution of Herman McCall, a party in his official capacity who has ceased to hold office during the pendency of the Action, for Jennifer Wrayno, who is “automatically substituted as a party.”

On November 13, 2018, this Court issued an Amended Scheduling Order. (ECF No. 63.)

The Parties have engaged in substantial discovery, including the exchange of written discovery and document production.

On January 23, 2019, Plaintiffs and State Defendants moved this Court to stay proceedings as Plaintiffs and State Defendants actively worked to reach a resolution. (ECF No. 74.) On that same day, Plaintiffs filed a Joint Motion for Immediate Consideration of the Motion to Stay Proceedings. (ECF No. 75.)

On January 24, 2019, this Court granted in part Plaintiffs' and State Defendants' Joint Motion to Stay Proceedings, entering a thirty (30) day stay of proceedings. (ECF No. 76.)

On February 22, 2019, State Defendants moved this Court to stay proceedings as Plaintiffs and State Defendants actively worked to reach a resolution. (ECF No. 79.) On that same day, State Defendants filed a Motion for Immediate Consideration of the Motion to Stay Proceedings (ECF No. 80) and this Court granted State Defendants' Motion to Stay Proceedings, entering a thirty (30) day stay of proceedings (ECF No. 81).

Plaintiffs and State Defendants have since entered into a Settlement Agreement, disposing of all claims asserted in the Action. An executed copy of the Settlement Agreement is attached hereto as Exhibit A. Intervenor Defendants,

who have asserted no claims and against whom no claims have been asserted, are not party to the Settlement Agreement.

Plaintiffs and State Defendants have agreed that all costs and attorneys' fees are the responsibility of the party incurring same. For the foregoing reasons, Plaintiffs and State Defendants respectfully request that the Court enter an order to dismiss all of Plaintiffs' claims in the Action.

Dated: March 22, 2019

/s/ Ann-Elizabeth Ostrager

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**EXHIBIT A**  
**Settlement Agreement**

## **SETTLEMENT AGREEMENT**

*Dumont et al. v. Gordon et al.*

USDC EDMI Case No. 2:17-cv-13080-PDB-EAS

This Settlement Agreement (the “Agreement”) between Kristy Dumont, Dana Dumont, Erin Busk-Sutton and Rebecca Busk-Sutton (collectively, the “Plaintiffs”), and Robert Gordon, in his official capacity as the Director of the Michigan Department of Health and Human Services (“MDHHS”), and Jennifer Wrayno, in her official capacity as the Acting Executive Director of the Michigan Children’s Services Agency (“MCSA”) (Gordon, Wrayno, MDHHS and MCSA collectively referred to herein as the “Department”), resolves Plaintiffs’ claims against the Department in the case captioned *Dumont et al. v. Gordon et al.*, Case No. 2:17-cv-13080-PDB-EAS, pending in the United States District Court for the Eastern District of Michigan (the “Litigation”), as stated herein. Throughout this Agreement, Plaintiffs and the Department may be referred to as a “Party” or collectively referred to as “Parties.”

WHEREAS, the Department contracts with licensed child placing agencies (“CPAs”) to provide adoption-related services for permanent wards placed with the Department for care, supervision, and adoption (“Adoption Services Contracts”).

WHEREAS, the Department contracts with licensed CPAs to provide foster care case management related services for children placed with the Department for care, supervision, and foster care placement (“PAFC Services Contracts”). Throughout this Agreement, the Adoption Services Contracts and the PAFC Services Contracts are collectively referred to as “Contracts.”

WHEREAS, the Department may contract with one or more licensed CPAs (“Contractors”) to subcontract with other licensed CPAs to provide adoption related services, in substantial compliance with the terms of the Adoption Services Contract, for permanent wards placed with the Department for care, supervision, and adoption (“Adoption Services Subcontracts”).

WHEREAS, the Department may contract with one or more Contractors to subcontract with other licensed CPAs to provide foster care case management related services, in substantial compliance with the terms of the PAFC Services Contracts, for children placed with the Department for care, supervision, and foster care placement (“PAFC Services Subcontracts”). Throughout this Agreement, Adoption Services Subcontracts and PAFC Services Subcontracts are collectively referred to as “Subcontracts.”

WHEREAS, the Contracts and the Subcontracts include a non-discrimination provision mandating that contracted CPAs comply with the Department’s non-discrimination statement prohibiting discrimination “against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs, or disability” in the provision of services under contract with the Department (the “Non-Discrimination Provision”).

WHEREAS, on September 20, 2017, Plaintiffs filed a complaint asserting claims against the Department in the Litigation. Thereafter, St. Vincent Catholic Charities, Melissa Buck, Chad Buck, and Shamber Flore intervened as defendants (collectively, “Intervening Defendants”) in the Litigation. Plaintiffs have asserted no claims, and have no current intention to assert any claims,

against Intervening Defendants in the Litigation. Likewise, the named Defendants have asserted no claims, and have no current intention to assert any claims, against Intervening Defendants in the Litigation. Intervening Defendants have not asserted any claims, counter-claims or cross-claims against Plaintiffs, Defendants, or any third party in the Litigation.

WHEREAS, Plaintiffs and the Department wish to resolve the Litigation; the Parties agree that they are entering into this Agreement for that purpose only and it is not to be construed as an admission of any liability or wrongdoing.

THEREFORE, in addition to the foregoing, and in the interest of resolving the Litigation, the Parties agree as follows:

Section 1. Unless prohibited by law or court order:

- a. The Department shall continue including in Contracts, and shall continue requiring all Contractors to include in Subcontracts, the Non-Discrimination Provision, or a materially and substantially similar provision (“Similar Provision”).
- b. For the avoidance of doubt, policies and practices prohibited under the Non-Discrimination Provision include, without limitation,
  - i. turning away or referring to another contracted CPA an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the CPA for services under a Contract or a Subcontract;
  - ii. refusing to provide orientation or training to an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the CPA for services under a Contract or a Subcontract;
  - iii. refusing to perform a home study or process a foster care licensing application or an adoption application for an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the CPA for services under a Contract or a Subcontract; and
  - iv. refusing to place a child accepted by the CPA for services under a Contract or a Subcontract with an otherwise qualified LGBTQ individual or same-sex couple suitable as a foster or adoptive family for the child;

in each case, without regard to whether such individual or couple has identified any particular child for foster placement or adoption.

- c. The Department shall enforce the Non-Discrimination Provision or Similar Provision against a CPA that the Department determines is in violation of, or is unwilling to comply with, such provisions (collectively, a “Contract”).

Violation”), up to and including termination of the Contracts in accordance with the termination provisions therein, including without limitation:

- i. In the event a CPA refuses to comply with the Non-Discrimination Provision or Similar Provision within a reasonable time after notification by the Department of a Contract Violation, the Department will terminate the CPA’s Contracts.
  - ii. The Department will initiate an investigation when made aware of an alleged Contract Violation. In the event the Department determines that a CPA has committed a Contract Violation, the Department will provide the CPA with notice and a reasonable opportunity to implement a Department-approved corrective action plan mandating immediate, regular, and continuous provision of foster care case management services or adoption services, as applicable, in compliance with the Non-Discrimination Provision or Similar Provision; where the CPA fails to demonstrate compliance after a reasonable opportunity to implement the approved corrective action plan, the Department will terminate the CPA’s Contracts.
- d. The Department shall require all Contractors to enforce the Non-Discrimination Provision or Similar Provision against a CPA that the Contractor or the Department determines is in violation of, or is unwilling to comply with, such provisions (collectively, a “Subcontract Violation”), up to and including termination of the Subcontracts in accordance with the termination provisions therein, including without limitation:
- i. In the event a CPA refuses to comply with the Non-Discrimination Provision or Similar Provision within a reasonable time after notification by the Contractor or the Department of a Subcontract Violation, the Department will require the Contractor to terminate the CPA’s Subcontracts.
  - ii. The Department will require a Contractor to initiate an investigation when made aware of an alleged Subcontract Violation. In the event the Contractor or the Department determines that a CPA has committed a Subcontract Violation, the Department will require the Contractor to provide the CPA with notice and a reasonable opportunity to implement a Contractor-approved corrective action plan mandating immediate, regular, and continuous provision of foster care case management services or adoption services, as applicable, in compliance with the Non-Discrimination Provision or Similar Provision; where the CPA fails to demonstrate compliance after a reasonable opportunity to implement the approved corrective action plan, the Department will require the Contractor to terminate the CPA’s Subcontracts.

- e. The Department shall provide ongoing training as part of the Department's existing training programs to Department employees, Contractors, and contracted CPAs with respect to:
  - i. the Litigation and the obligations under this Agreement;
  - ii. the obligations of, and reporting channels available to, the Department's employees and Contractors to report any Contract or Subcontract Violation or suspected Contract or Subcontract Violation by contracted CPAs, including, without limitation, to the Department's Division of Child Welfare Licensing via the "Online Complaint Form" accessible on the Department's website;
  - iii. the Department's obligations to investigate any Contract Violation or suspected Contract Violation reported verbally or in writing to the Department and to enforce the Non-Discrimination Provision or Similar Provision; and
  - iv. a Contractor's obligations to investigate any Subcontract Violation or suspected Subcontract Violation by contracted CPAs reported verbally or in writing to the Contractor, and to enforce the Subcontracts.
- f. The Department shall publish and maintain a hyperlink to the Department's Division of Child Welfare Licensing "Online Complaint Form" in a prominent place on the landing page of the Department's website; and
- g. The Department shall make a public announcement in substantially the following form:

The Department's contracts with child placing agencies prohibit discrimination against any individual or group because of race, religion, age, national origin, color, height, weight, marital status, sex, sexual orientation, gender identity or expression, political beliefs or disability.

Examples of prohibited discriminatory conduct include:

- turning away or referring to another contracted CPA an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the CPA for contracted services;
- refusing to provide orientation or training to an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the CPA for contracted services;

- refusing to perform a home study or process a foster care licensing application or an adoption application for an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the CPA for contracted services; and
- refusing to place a child accepted by the CPA for contracted services with an otherwise qualified LGBTQ individual or same-sex couple suitable as a foster or adoptive family for the child.

If you are aware of a violation or suspected violation of these nondiscrimination provisions, a complaint may be made via the Online Complaint Form accessible on the Department's website.

- Section 2. For the avoidance of doubt, nothing in this Agreement shall require the Department to take adverse action against any CPA on the basis that such CPA has decided to accept or not accept a referral from the Department of a particular child for services under a contract with the Department.
- Section 3. Subject to Section 1, nothing in this Agreement shall affect the Department's obligations, authority, or discretion to audit, train, diligently investigate, or vigorously enforce the terms of the Contracts or Subcontracts in accordance with applicable laws, rules, regulations, policies, court orders, and contract terms.
- Section 4. Subject to Section 1, the Department retains sole authority and sole discretion on all matters pertaining to all Contracts and Subcontracts, including without limitation all training, all aspects of investigating an alleged Contract or Subcontract Violation, determining whether a Contract or Subcontract Violation occurred, and all enforcement measures.
- Section 5. Subject to Section 1, nothing in this Agreement expands the Department's obligation to monitor CPA compliance with Contracts and Subcontracts beyond that which is required under applicable law, rules, regulations, and policies.
- Section 6. This Agreement is intended for the direct benefit of the following individuals injured by a breach of this Agreement: (i) the Parties hereto, (ii) any LGBTQ individual or same-sex couple that seeks to foster a child accepted by a CPA for foster care case management services or adoption services under a Contract or Subcontract and the CPA is alleged to have committed a Contract Violation or Subcontract Violation directly involving the individual or couple, (iii) any LGBTQ individual or married same-sex couple that seeks to adopt a child accepted by a CPA for foster care case management services or adoption services under a Contract or Subcontract and the CPA is alleged to have committed a Contract Violation or Subcontract Violation directly involving the individual or couple, and (iv) any child accepted by a CPA for foster care case management services or adoption services under a Contract or Subcontract and the CPA is alleged to have committed a Contract Violation or Subcontract Violation directly involving the

child. Each person described in subclauses (ii), (iii) and (iv) of the immediately preceding sentence shall be a direct third-party beneficiary of, and may, to the extent of their injury and ability to satisfy standing requirements, independently enforce the terms of this Agreement as if it were a party hereto.

Section 7. In the event any Party or a third-party beneficiary asserts that another Party is not in compliance with one or more of its obligations in this Agreement, the Parties and any third-party beneficiaries shall address such alleged breach in good faith and act promptly in an attempt to resolve it. The asserting Party or third-party beneficiary shall provide the other Party with written notice of such assertion and a ninety (90) day opportunity to cure such noncompliance prior to taking legal action. Notice shall be made via certified mail, return receipt requested as follows:

**Michigan Department of Health  
and Human Services  
State of Michigan**  
Director, Bureau of Legal Affairs  
333 South Grand Avenue  
Lansing, MI 48909  
517.241.0048

**American Civil Liberties Union  
Fund of Michigan**  
Jay D. Kaplan / Michael J. Steinberg  
2966 Woodward Avenue  
Detroit, MI 48201  
(313) 578-6823  
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msteinberg@aclumich.org

Section 8. Specific performance shall be the sole and exclusive remedy available to each Party and each third-party beneficiary asserting any claim relating to the Department’s failure to meet its obligations under this Agreement. Each Party and each third-party beneficiary asserting any claim relating to the Department’s obligations under this Agreement waives all rights to recover any damage, loss, attorney fees, costs, or any other expense arising out of asserting such claims. The Parties also agree that, regardless of the failure of the sole and exclusive remedy, the Department will not be liable to any Party or third-party beneficiary asserting any claim relating to the Department’s obligations under this Agreement for any incidental or consequential damages of whatsoever kind or nature. The Parties intend the exclusion of incidental and consequential damages as an independent agreement apart from the sole and exclusive remedy herein. The limitations of this Section 8 apply only to claims relating to the Department’s obligations under this Agreement.

Section 9. Upon signing this Agreement, Plaintiffs shall file a Stipulation of Voluntary Dismissal with Prejudice substantially in the form attached to as Annex A and submit a Proposed Order on Stipulation of Dismissal substantially in the form attached hereto as Annex B. This Agreement becomes effective upon entry of the Proposed Order on Stipulation of Dismissal by the district court.

Section 10. The Parties shall bear their own attorneys’ fees and costs associated with the Litigation.

- Section 11. The Parties understand that this Agreement is a public record that may be disclosed in response to a proper request under Michigan’s Freedom of Information Act.
- Section 12. The Parties acknowledge and agree that this Agreement shall be governed by and construed in accordance with the laws of the State of Michigan without giving effect to conflict of laws, rules or statutes.
- Section 13. The Parties acknowledge, understand, and agree that they are entering into this Agreement knowingly, voluntarily, and of their own free will and volition, without coercion or undue influence.
- Section 14. Each Party has been represented by counsel and cooperated in the drafting and preparation of this Agreement. Hence, this Agreement shall not be construed against any Party on the basis that the Party was the drafter.
- Section 15. This Agreement may be executed in any number of counterparts, and each such counterpart shall be deemed to be an original instrument, but all such counterparts shall constitute one Agreement.
- Section 16. The undersigned represent that they are authorized to sign this Agreement.
- Section 17. Each Party represents that they believe there is no state or federal law, rule, regulation, policy, contract term, or other obligation that prevents it from complying with its obligations under this Agreement; *provided*, that solely for purposes of this Section 17, the obligations in Section 1 shall be read without the introductory phrase “Unless prohibited by law or court order.”
- Section 18. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and permitted assigns. No Party may assign this Agreement or any rights or obligations hereunder without the prior written consent of each other Party hereto.
- Section 19. No modification or waivers of any provision of this Agreement shall be valid or binding unless made in writing and signed by each Party or by a person authorized to sign on behalf of such Party.

[Signature Page Follows]

IN WITNESS WHEREOF, this Agreement is executed as of March 22, 2019.

**PLAINTIFFS**

  
\_\_\_\_\_  
Kristy Dumont

  
\_\_\_\_\_  
Dana Dumont

\_\_\_\_\_  
Erin Busk-Sutton

\_\_\_\_\_  
Rebecca Busk-Sutton

**DEFENDANTS**

\_\_\_\_\_  
Robert Gordon, in his official capacity as  
Director, Michigan Department  
of Health and Human Services

\_\_\_\_\_  
Jennifer Wrayno, in her official capacity  
as Acting Executive Director, Michigan  
Children's Services Agency

IN WITNESS WHEREOF, this Agreement is executed as of March 22, 2019.

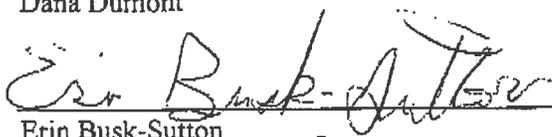
**PLAINTIFFS**

---

Kristy Dumont

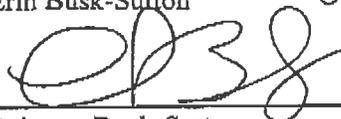
---

Dana Dumont



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Erin Busk-Sutton



---

Rebecca Busk-Sutton

**DEFENDANTS**

---

Robert Gordon, in his official capacity as  
Director, Michigan Department  
of Health and Human Services

---

Jennifer Wrayno, in her official capacity  
as Acting Executive Director, Michigan  
Children's Services Agency

*{Signature Page to Settlement Agreement}*

IN WITNESS WHEREOF, this Agreement is executed as of March 22, 2019.

**PLAINTIFFS**

---

Kristy Dumont

---

Dana Dumont

---

Erin Busk-Sutton

---

Rebecca Busk-Sutton

**DEFENDANTS**



---

Robert Gordon, in his official capacity as  
Director, Michigan Department  
of Health and Human Services



---

Jennifer Wrayno, in her official capacity as  
Acting Executive Director, Michigan  
Children's Services Agency

**Annex A**

**Stipulation of Voluntary Dismissal with Prejudice**

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

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

Plaintiffs,

v.

ROBERT GORDON, in his official  
capacity as the Director of the Michigan  
Department of Health and Human  
Services; and JENNIFER WRAYNO, in  
her official capacity as the Acting  
Executive Director of the Michigan  
Children’s Services Agency,

Defendants,

and

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

Intervenor Defendants.

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

HON. PAUL D. BORMAN

MAG. ELIZABETH A. STAFFORD

**STIPULATION OF  
VOLUNTARY DISMISSAL  
WITH PREJUDICE**

Plaintiffs Kristy Dumont, Dana Dumont, Erin Busk-Sutton, and  
Rebecca Busk-Sutton (collectively, “Plaintiffs”) and Defendants Robert Gordon and

Jennifer Wrayno<sup>1</sup> (collectively, “State Defendants”) file this stipulation of dismissal of the above-captioned action (the “Action”) under Rule 41(a)(2) of the Federal Rules of Civil Procedure. Plaintiffs and State Defendants state as follows:

On September 20, 2017, Plaintiffs filed the complaint in the Action with the U.S. District Court for the Eastern District of Michigan against the State Defendants. (ECF No. 1.)

On December 18, 2017, St. Vincent Catholic Charities, Melissa and Chad Buck, and Shamber Flore (“Intervenor Defendants”) moved to intervene in this case (ECF No. 18), which motion was granted on March 22, 2018. (ECF No. 34.)

On September 14, 2018, this Court denied in substantial part the motions to dismiss filed by State Defendants and Intervenor Defendants. (ECF No. 49 at 93.)

On September 17, 2018, the Court entered a schedule for discovery and briefing to “manage the progress of the case” (the “September 17 Scheduling Order”). (ECF No. 51 at 1.)

On October 31, 2018, all Parties jointly moved to modify the September 17 Scheduling Order. (ECF No. 61.) On November 2, 2018, this Court granted in part and denied in part that motion. (ECF No. 62.)

---

<sup>1</sup> Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, this stipulation reflects the substitution of Herman McCall, a party in his official capacity who has ceased to hold office during the pendency of the Action, for Jennifer Wrayno, who is “automatically substituted as a party.”

On November 13, 2018, this Court issued an Amended Scheduling Order. (ECF No. 63.)

The Parties have engaged in substantial discovery, including the exchange of written discovery and document production.

On January 23, 2019, Plaintiffs and State Defendants moved this Court to stay proceedings as Plaintiffs and State Defendants actively worked to reach a resolution. (ECF No. 74.) On that same day, Plaintiffs filed a Joint Motion for Immediate Consideration of the Motion to Stay Proceedings. (ECF No. 75.)

On January 24, 2019, this Court granted in part Plaintiffs' and State Defendants' Joint Motion to Stay Proceedings, entering a thirty (30) day stay of proceedings. (ECF No. 76.)

On February 22, 2019, State Defendants moved this Court to stay proceedings as Plaintiffs and State Defendants actively worked to reach a resolution. (ECF No. 79.) On that same day, State Defendants filed a Motion for Immediate Consideration of the Motion to Stay Proceedings (ECF No. 80) and this Court granted State Defendants' Motion to Stay Proceedings, entering a thirty (30) day stay of proceedings (ECF No. 81).

Plaintiffs and State Defendants have since entered into a Settlement Agreement, disposing of all claims asserted in the Action. An executed copy of the Settlement Agreement is attached hereto as Exhibit A. Intervenor Defendants,

who have asserted no claims and against whom no claims have been asserted, are not party to the Settlement Agreement.

Plaintiffs and State Defendants have agreed that all costs and attorneys' fees are the responsibility of the party incurring same. For the foregoing reasons, Plaintiffs and State Defendants respectfully request that the Court enter an order to dismiss all of Plaintiffs' claims in the Action.

Dated: , 2019

Jay Kaplan (P38197)  
Michael J. Steinberg (P43085)  
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Fund of Michigan  
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*Counsel for Plaintiffs*

---

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(517) 335-7603  
Smithj46@michigan.gov

*Counsel for State Defendants*

**EXHIBIT A**  
**Settlement Agreement**

## CERTIFICATE OF SERVICE

I hereby certify that, on March 22, 2019, 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: \_\_\_\_\_, 2019

---

SULLIVAN & CROMWELL LLP  
125 Broad Street  
New York, NY 10004-2498  
Telephone: (212) 558-4000  
ostragerae@sullcrom.com

**Annex B**

**Proposed Order on Stipulation of Dismissal**

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

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

Plaintiffs,

v.

ROBERT GORDON, in his official  
capacity as the Director of the Michigan  
Department of Health and Human  
Services; and JENNIFER WRAYNO, in  
her official capacity as the Acting  
Executive Director of the Michigan  
Children's Services Agency,

Defendants,

and

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

Intervenor Defendants.

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

HON. PAUL D. BORMAN

MAG. ELIZABETH A. STAFFORD

**[PROPOSED] ORDER ON  
STIPULATION OF DISMISSAL**

After considering the Stipulation of Voluntary Dismissal with Prejudice and the Settlement Agreement, attached thereto, provided by Plaintiffs Kristy Dumont, Dana Dumont, Erin Busk-Sutton, and Rebecca Busk-Sutton (collectively,

“Plaintiffs”) and Defendants Robert Gordon and Jennifer Wrayno,<sup>1</sup> it is hereby ORDERED that Plaintiffs’ claims in the above-captioned action (the “Action”) are dismissed with prejudice pursuant to the terms of the Settlement Agreement.

The Court retains jurisdiction over the enforcement of the Settlement Agreement in the Action. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994) (“If the parties wish to provide for the court’s enforcement of a dismissal-producing settlement agreement, they can seek to do so.”); *RE/MAX Int’l, Inc. v. Realty One, Inc.*, 271 F.3d 633, 641 (6th Cir. 2001) (“[A] district court [has] the authority to dismiss pending claims while retaining jurisdiction over the future enforcement of a settlement agreement.”).

All costs and attorneys’ fees are the responsibility of the party incurring same.

---

PAUL D. BORMAN  
UNITED STATES DISTRICT JUDGE

Dated: [date]

---

<sup>1</sup> Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, this order reflects the substitution of Herman McCall, a party in his official capacity who has ceased to hold office during the pendency of the Action, for Jennifer Wrayno, who is “automatically substituted as a party.”

### CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on *[date]*.

---

Case Manager

## CERTIFICATE OF SERVICE

I hereby certify that, on March 22, 2019, 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: March 22, 2019

/s/ Ann-Elizabeth Ostrager

SULLIVAN & CROMWELL LLP  
125 Broad Street  
New York, NY 10004-2498  
Telephone: (212) 558-4000  
ostragerae@sullcrom.com

# Exhibit 6

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

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

Plaintiffs,

v.

ROBERT GORDON, in his official  
capacity as the Director of the Michigan  
Department of Health and Human  
Services; and JENNIFER WRAYNO, in  
her official capacity as the Acting  
Executive Director of the Michigan  
Children's Services Agency,

Defendants,

and

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

Intervenor Defendants.

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

HON. PAUL D. BORMAN

**ORDER ON STIPULATION OF  
DISMISSAL**

After considering the Stipulation of Voluntary Dismissal with Prejudice and the Settlement Agreement, attached thereto, provided by Plaintiffs Kristy Dumont, Dana Dumont, Erin Busk-Sutton, and Rebecca Busk-Sutton (collectively,

“Plaintiffs”) and Defendants Robert Gordon and Jennifer Wrayno,<sup>1</sup> it is hereby ORDERED that Plaintiffs’ claims in the above-captioned action (the “Action”) are dismissed with prejudice pursuant to the terms of the Settlement Agreement.

The Court retains jurisdiction over the enforcement of the Settlement Agreement in the Action. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994) (“If the parties wish to provide for the court’s enforcement of a dismissal-producing settlement agreement, they can seek to do so.”); *RE/MAX Int’l, Inc. v. Realty One, Inc.*, 271 F.3d 633, 641 (6th Cir. 2001) (“[A] district court [has] the authority to dismiss pending claims while retaining jurisdiction over the future enforcement of a settlement agreement.”).

All costs and attorneys’ fees are the responsibility of the party incurring same.

Dated: MAR 22 2019



PAUL D. BORMAN  
UNITED STATES DISTRICT JUDGE

<sup>1</sup> Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, this order reflects the substitution of Herman McCall, a party in his official capacity who has ceased to hold office during the pendency of the Action, for Jennifer Wrayno, who is “automatically substituted as a party.”

# Exhibit 7

Gordon v. Caruso, Not Reported in F.Supp.2d (2009)

2009 WL 1346932

2009 WL 1346932  
Only the Westlaw citation is currently available.  
United States District Court,  
W.D. Michigan,  
Southern Division.

Dustin GORDON, Plaintiffs,  
v.  
Patricia L. CARUSO, et al., Defendants.

No. 1:06-cv-571.  
|  
May 13, 2009.

**Attorneys and Law Firms**

Dustin Gordon, St. Louis, MI, pro se.

John L. Thurber, MI Dept. Attorney General, Lansing,  
MI, for Defendants.

**MEMORANDUM OPINION AND ORDER  
ADOPTING THE REPORT AND  
RECOMMENDATION IN PART**

ROBERT HOLMES BELL, District Judge.

\*1 On March 23, 2009, United States Magistrate Judge Ellen S. Carmody issued a Report and Recommendation (“R & R”), recommending that Defendants’ motion for summary judgment be denied. (Dkt. No. 97.) Defendants filed objections to the R & R on April 9, 2009. For the reasons that follow, Defendants’ objections are granted in part and the R & R is adopted in part as the opinion of the Court.

This Court is required to make a *de novo* determination of those portions of a R & R to which specific objections are made, and may accept, reject, or modify any or all of the Magistrate Judge’s findings or recommendations. 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72(b).

**A. Defendants Burnett, McKee, Stoddard, Walczak, Maguire, and Schaefer**

Defendants Burnett, McKee, Stoddard, Walczak, Maguire, and Schaefer move for summary judgment because, with the exception of Defendant Burnett, they are employees of the Bellamy Creek Facility, and Plaintiff has moved to a different facility and is no longer under their control. See *Kensu v. Haigh*, 87 F.3d 172, 175 (6th Cir.1996) (dismissing as moot the prisoner’s claims for injunctive and declaratory relief against prison officials because the prisoner had moved to a different facility). The R & R denied dismissal of these Defendants because Defendants presented no evidence in support of their assertion that Plaintiff is no longer under their control.

Defendants object on the basis that the Magistrate Judge could have taken judicial notice of Plaintiff’s location, which is available at the website for the Michigan Department of Corrections, <http://www.michigan.gov/corrections/>. The Court agrees. This website indicates that Plaintiff is located at the St. Louis Correctional Facility, not the Bellamy Creek Correctional Facility that is mentioned in Plaintiff’s complaint.

Moreover, Plaintiff stated in his response to the motion for summary judgment that he “did not have a problem” with dismissal of Defendants McKee, Stoddard, Walczak, Maguire, and Schaefer. (Dkt. No. 89, Plf.’s Resp. in Opp’n to Mot. for Summ. J. 18.) Thus, the Court will dismiss these Defendants on the basis that Plaintiff’s claim for declaratory and injunctive relief against these Defendants is moot because Plaintiff is no longer under their control and because Plaintiff does not contest their dismissal.

Plaintiff did not, however, state that he would accept dismissal of Defendant Burnett. Burnett asserted in an affidavit dated January 16, 2007, that he is the Special Activities Coordinator for the Michigan Department of Corrections.<sup>1</sup> (Dkt. No. 21.) Unlike the other Defendants, there is no indication that he was employed at the Bellamy Creek Facility or that the scope of his responsibility was limited to that facility.

However, Defendants contend in their summary judgment motion that declaratory and injunctive relief against Burnett is moot because he has retired. Defendants did not provide any evidence to support this factual assertion. In their objections to the R & R, Defendants apparently contend that the Court should rely on counsel’s representations regarding Burnett’s retirement, noting that

**Gordon v. Caruso, Not Reported in F.Supp.2d (2009)**

2009 WL 1346932

Plaintiff did not provide any contrary evidence. However, on Defendants' motion *Defendants*, not Plaintiff, have the burden of submitting evidence in support of their motion to establish that there is no genuine issue of fact. Defendants have failed to meet their burden. Defendants cannot rely merely on the unsworn assertions of counsel in their pleadings, and Plaintiff is not required to respond to these assertions with contrary evidence. Finally, to the extent that Plaintiff has sued Burnett in his *official* capacity, Burnett's retirement does not require his dismissal as a named defendant; he is automatically substituted as a party by the successor to his office. [Fed.R.Civ.P. 25](#). Thus, as to Defendant Burnett, the Court adopts the R & R, denies Defendants' objections, and denies Defendants' motion for summary judgment.

**B. Summary Judgment Evidence**

\*2 Defendants also object to the finding in the R & R that the unsigned expert report submitted with their motion was inadmissible. Defendants argue in their objections that the expert report is admissible because it satisfies the hearsay exception in [Fed.R.Evid. 807](#). However, the R & R did not determine that the expert report was inadmissible because it was hearsay; it determined that the report was inadmissible because, lacking a signature, it did not satisfy the requirements of [Rule 26\(a\)\(2\)\(B\) of the Federal Rules of Civil Procedure](#). Defendants have not identified an exception to [Rule 26](#) or a reason to disregard it in this case. Thus, Defendants have not identified an error in the conclusions of the R & R.

After the R & R was entered, Defendants submitted a

## Footnotes

<sup>1</sup> Other parts of this affidavit were stricken from the record. (Dkt. No. 47.)

motion to supplement their expert report with a signed copy of the expert report, requesting the Court to reconsider their motion for summary judgment. (Dkt. No. 101.) Plaintiff opposes the motion to supplement. (Dkt. No. 107.) The Magistrate Judge is directed to consider the motion to supplement and the renewed motion for summary judgment in light of this opinion.

Accordingly,

**IT IS HEREBY ORDERED** that Defendants' objections to the Report and Recommendation of the Magistrate Judge (Dkt. No. 100) are **GRANTED IN PART** such that Section I of the Report and Recommendation is **ADOPTED IN PART** and **REJECTED IN PART**, and Section II of the Report and Recommendation is **APPROVED** and **ADOPTED** as the opinion of the Court.

**IT IS FURTHER ORDERED** that Defendants' motion for summary judgment (Dkt. No. 86) is **GRANTED** with respect to Defendants McKee, Stoddard, Walczak, Maguire, and Schaefer, and **DENIED** with respect to Defendant Burnett and the remaining Defendants.

**IT IS FURTHER ORDERED** that **JUDGMENT** is entered in favor of Defendants McKee, Stoddard, Walczak, Maguire, and Schaefer.

**All Citations**

Not Reported in F.Supp.2d, 2009 WL 1346932

# Exhibit 8

Zide Sport Shop of Ohio, Inc. v. Ed Tobergte Associates, Inc., 16 Fed.Appx. 433 (2001)

16 Fed.Appx. 433

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Sixth Circuit Rule 28.

(Find CTA6 Rule 28)

United States Court of Appeals,  
Sixth Circuit.

ZIDE SPORT SHOP OF OHIO, INC., Robert M.  
Zide, Rodney M. Zide, and Pro-Line, Inc.,  
Plaintiffs-Appellants,

v.

ED TOBERGTE ASSOCIATES, INC., d/b/a Gear  
2000, and Edward H. Tobergte,  
Defendants-Appellees.

No. 00-3183.

July 31, 2001.

### Synopsis

Plaintiffs filed action seeking trademark cancellation and declaratory relief. Subsequent to plaintiffs' filing but before being served with complaint, defendants filed suit against plaintiffs in the District of Kansas, alleging trademark infringement, unfair competition, breach of contract, tortious interference with contract, and interference with prospective business advantage. The United States District Court for the Southern District of Ohio granted defendants' motion to dismiss declaratory judgment action, and plaintiffs appealed. The Court of Appeals, [Siler](#), Circuit Judge, held that declining to enforce first-to-file rule and dismissing declaratory judgment action was not an abuse of discretion.

Affirmed.

\*435 On Appeal from the United States District Court for the Southern District of Ohio.

Before [KEITH](#), [SILER](#), and [CLAY](#), Circuit Judges.

### Opinion

[SILER](#), Circuit Judge.

\*\*1 Plaintiffs Zide Sport Shop of Ohio, Inc., Robert M. Zide ("Zide"), Rodney M. Zide ("Rodney") and Pro-Line, Inc. ("Pro-Line") filed a declaratory judgment action against defendants Ed Tobergte Associates, Inc. ("ETA") and Edward Tobergte in the Southern District of Ohio. Subsequent to the plaintiffs' filing but before being served with the complaint, the defendants filed suit against the plaintiffs in the District of Kansas. Upon defendants' motion, the Southern District of Ohio dismissed plaintiffs' declaratory judgment action. We affirm.

### I. Background

This case arises from various business dealings among the plaintiffs and defendants. Prior to its dissolution in December 1996, Gear 2000, Ltd. ("Gear 2000") purchased all rights to the Air Release shoulder pad from Zide, James Rector, and Pro-Line. Gear 2000 also purchased assets in Athletic Technologies, Inc. ("ATI"), a corporation that was chaired by Zide. Gear 2000 and ATI entered into a noncompetition agreement, which limited ATI's rights. Furthermore, Pro-Line and Zide each entered into an agreement to provide various professional services to Gear 2000. In December 1996, Gear 2000 dissolved, entering into an asset purchase agreement with ETA. Pursuant to that agreement, ETA purchased Gear 2000 assets and continued to conduct business under the name Gear 2000.

Zide, Rector, Pro-Line, and ATI were accused of violating various agreements that they had with Gear 2000. In November 1998, Robert Zide received a letter from counsel representing "Gear 2000"—counsel really represented ETA and Ed Tobergte as successors in interest to Gear 2000—that accused him of trademark infringement and breaching agreements made with Gear 2000. The letter stated that Gear 2000 would pursue a legal remedy if necessary, but that it would be willing to settle. Over the next few months, the parties made various settlement demands and offers.

No settlement offers were made after February 25, 1999. On that date, Gear 2000 sent a letter to Zide's counsel stating that "it would file suit if [it] did not receive a serious settlement offer within seven days...." Zide then obtained new counsel and, on March 3, 1999, that new counsel requested a twenty-five day extension so that he could review the matter and respond to Gear 2000's

**Zide Sport Shop of Ohio, Inc. v. Ed Tobergte Associates, Inc., 16 Fed.Appx. 433 (2001)**

previous letter. “[I]n the spirit of settlement,” Gear 2000 granted Zide a “final extension” until March 26, 1999.

On March 25, 1999, one day before the extension expired, the plaintiffs filed an action against the defendants in the Southern District of Ohio seeking trademark cancellation and declaratory relief. Rather than serving the defendants, Zide’s counsel sent them a letter listing six reasons why his clients possessed no liability. The letter was drafted on March 26, 1999, and it did not inform the defendants of the federal action filed against them a day earlier. No further communication took place among the parties until May 11, 1999.

**\*\*2** On May 11, 1999, ETA filed suit against the plaintiffs and others in the District of Kansas. ETA alleged federal and common law trademark infringement, unfair competition, **\*436** breach of contract, tortious interference with contract, and interference with prospective business advantage. That same day, the plaintiffs were served with ETA’s complaint. So that they could obtain Kansas counsel, the plaintiffs were given an extension of time, until July 2, 1999, to answer ETA’s complaint.

On July 1, 1999, Zide filed an amended complaint in the Southern District of Ohio. The amended complaint added Rodney and Pro-Line, parties named in the Kansas action, as plaintiffs. ETA, d/b/a Gear 2000 and Edward Tobergte remained the defendants. The amended complaint sought cancellation of the AIR RELEASE® trademark and declaratory relief pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201. On July 2, 1999, defendants were served with the both the original March 25, 1999 and the amended July 1, 1999 complaints.

Defendants filed a motion asking the Southern District of Ohio to exercise its discretion not to hear plaintiffs’ declaratory judgment action by either dismissing or, in the alternative, transferring that action. The Southern District of Ohio granted the motion and dismissed the action.

## II. Standard of Review

Prior to the Supreme Court’s decision in *Wilton v. Seven Falls Co.*, 515 U.S. 277, 115 S.Ct. 2137, 132 L.Ed.2d 214 (1995), this court “held that entertainment of a declaratory judgment action is discretionary with the trial court, but that that discretion is reviewable on a de novo basis by the

Court of Appeals....” *American Home Assurance Co. v. Evans*, 791 F.2d 61 (6th Cir.1986). But in *Wilton*, a declaratory judgment case where a parallel state proceeding existed, the Supreme Court stated:

[D]istrict courts’ decisions about the propriety of hearing declaratory judgment actions, which are necessarily bound up with their decisions about the propriety of granting declaratory relief, should be reviewed for abuse of discretion. We do not attempt at this time to delineate the outer boundaries of that discretion in other cases, for example. cases raising issues of federal law or cases in which there are no parallel state proceedings.

515 U.S. at 289–90, 115 S.Ct. 2137. Plaintiffs argue that *Wilton* establishes an abuse of discretion standard for declaratory judgment actions only where a parallel state proceeding exists. In cases where no parallel state proceeding exists, such as this case, they contend that this court should still apply de novo review.

We reject plaintiffs’ position that de novo review is still appropriate in cases where no parallel state proceeding exists. Since *Wilton*, we have applied the abuse of discretion standard in all cases where district courts have decided whether to entertain declaratory judgment actions. See, e.g., *Foundation for Interior Design Educ. Research v. Savannah Coll. of Art & Design*, 244 F.3d 521, 526 (6th Cir.2001) (applying the abuse of discretion standard where no parallel state proceeding existed); *Scottsdale Ins. Co. v. Routh*, 211 F.3d 964, 967 (6th Cir.2000) (applying the abuse of discretion standard where a parallel state proceeding existed). Therefore, we will review for abuse of discretion here.

## III. Discussion

**\*\*3** Plaintiffs contend that the Southern District of Ohio abused its discretion by dismissing their declaratory judgment action. They argue that a) the first-to-file rule precluded dismissal and b) the district court misapplied the standard used to determine whether it should entertain

a declaratory judgment action.

**\*437** a. First-To-File Rule

A plaintiff has 120 days after he files his complaint with the court to effect service of the summons and complaint upon a defendant. *See Fed.R.Civ.P. 4(m)*. For purposes of first-to-file chronology, the date that an original complaint is filed controls. *See Plating Res., Inc. v. UTI Corp.*, 47 F.Supp.2d 899, 904 (N.D. Ohio 1999).

The first-to-file rule is a well-established doctrine that encourages comity among federal courts of equal rank. The rule provides that when actions involving nearly identical parties and issues have been filed in two different district courts, “the court in which the first suit was filed should generally proceed to judgment.” *In re Burley*, 738 F.2d 981, 988 (9th Cir.1984). The Sixth Circuit has referenced the rule without discussing it by name, *see In re American Med. Sys., Inc.*, 75 F.3d 1069, 1088 (6th Cir.1996); *Barber-Greene v. Blaw-Knox Co.*, 239 F.2d 774, 778 (6th Cir.1957), while other circuits have explicitly applied it. *See, e.g., Boatmen’s First Nat. Bank of Kansas City v. Kansas Pub. Employees Ret. Sys.*, 57 F.3d 638 (8th Cir.1995); *E.E.O.C. v. University of Pennsylvania*, 850 F.2d 969 (3d Cir.1988); *In re Burley*, 738 F.2d at 981.

District courts have the discretion to dispense with the first-to-file rule where equity so demands. A plaintiff, even one who files first, does not have a right to bring a declaratory judgment action in the forum of his choosing. *See, e.g., Tempco Elec. Heater Corp. v. Omega Eng’g, Inc.*, 819 F.2d 746, 749–50 (7th Cir.1987) (“[T]he mere fact that [plaintiff] filed its declaratory judgment action first does not give it a ‘right’ to choose a forum. This circuit has never adhered to a rigid ‘first to file’ rule. We decline [Plaintiff’s] invitation ... to adopt such a rule here.”) (internal citations omitted)). Factors that weigh against enforcement of the first-to-file rule include extraordinary circumstances, inequitable conduct, bad faith, anticipatory suits, and forum shopping. *See Alltrade, Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622, 628 (9th Cir.1991); *University of Pennsylvania*, 850 F.2d at 972.

b. Declaratory Judgment Standard

The Declaratory Judgment Act empowers the district court to entertain certain actions, but it does not compel it to exercise the jurisdiction thus granted to it. *See 28 U.S.C. § 2201(a); Wilton*, 515 U.S. at 282, 115 S.Ct. 2137. Discretion not to hear a declaratory judgment action, even where jurisdiction exists, is undisputed. *See Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 494, 62 S.Ct. 1173, 86 L.Ed. 1620 (1942).

The Sixth Circuit applies the following criteria to determine whether it is appropriate for a district court to issue a declaratory ruling:

**\*\*4** (1) when the judgment will serve a useful purpose in clarifying and settling the legal relationship in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. It follows that when neither of these results can be accomplished, the court should decline to render the declarations prayed.

*Grand Trunk Western R.R. Co. v. Consolidated Rail Corp.*, 746 F.2d 323, 326 (6th Cir.1984) (quoting E. BORCHARD, DECLARATORY JUDGMENTS 299 (2d ed.1941)). In assessing whether to exercise its discretion to accept jurisdiction in a declaratory judgment action, a district court considers five specific factors:

- (1) whether the judgment would settle the controversy;
- \*438** (2) whether the declaratory judgment action would serve a useful purpose in clarifying the legal relations at issue;
- (3) whether the declaratory remedy is being used merely for the purpose of “procedural fencing” or “to provide an arena for a race for res judicata”;
- (4) whether the use of a declaratory action would increase the friction between our federal and state courts and improperly encroach on state jurisdiction; and
- (5) whether there is an alternative remedy that is better or more effective.

*Scottsdale*, 211 F.3d at 968 (quoting *Omaha Property & Cas. Ins. Co. v. Johnson*, 923 F.2d 446, 447–48 (6th Cir.1991)).

### c. Analysis

The Ohio district court reconciled the first-to-file rule and the declaratory judgment standard with the facts of this case. Even though it recognized that the plaintiffs were eligible for the first-to-file rule since their original complaint was filed on March 25, 1999, well before the defendants' Kansas complaint was filed on May 11, 1999, the court exercised its discretion and declined to enforce the rule. Likewise, it exercised its discretion not to entertain the plaintiffs' declaratory judgment action at all. In reaching its conclusions, the court found that the plaintiffs' original complaint was filed in bad faith, and that the plaintiffs had engaged in procedural fencing.

A finding of bad faith is overwhelmingly supported in the record. The plaintiffs misled the defendants by going along with written correspondence regarding settlement while, in fact, the plaintiffs had already filed but not served an anticipatory federal action. The plaintiffs knew that if a settlement was not reached, the defendants would seek legal recourse. Thus, they filed their federal action on March 25, 1999, the day before a negotiation extension period granted to them by the defendants expired. In a March 26, 1999 letter, plaintiffs' counsel merely listed six reasons that his clients faced no liability—he did not inform defendants that a federal action had been filed against them in Ohio. As the district court stated:

If Plaintiffs' conduct was not mere deceptive gamesmanship, then they would have informed Defendants that they did not intend to make another settlement offer and would

prefer to seek a judicial resolution. If it was not gamesmanship, Plaintiffs would not have filed suit in this Court during the extension period they requested for their new counsel. If it was not gamesmanship, they would have informed Defendants in the March 26, 1999 letter that they had filed suit.

**\*\*5** The court also found that the “[d]efendants likely would have filed the Kansas action in early March 1999 and not waited until May 1999” had the plaintiffs not requested the extension period.

While [Fed.R.Civ.P. 4\(m\)](#) gives a plaintiff 120 days to serve a defendant before an action will be dismissed for lack of service, the rule does not state that a plaintiff's action cannot be dismissed during that 120 day period for other reasons. Here, the district court considered lack of service to be evidence of gamesmanship and procedural fencing, factors that also weigh in favor of dismissing a declaratory action. The plaintiffs did not serve defendants until July 2, 1999, after the plaintiffs had time to review the Kansas complaint. On July 1, 1999, in order to qualify for the first-to-file rule, the plaintiffs filed an amended complaint that incorporated parties and allegations first raised in the defendants' Kansas action.

Because the plaintiffs filed their complaint in bad faith and engaged in procedural fencing, the district court did not **\*439** abuse its discretion by dismissing the plaintiffs' action.

AFFIRMED.

### All Citations

16 Fed.Appx. 433, 2001 WL 897452

# Exhibit 9

Tu Nguyen v. Bank of America, N.A., 516 Fed.Appx. 332 (2013)

516 Fed.Appx. 332

This case was not selected for publication in the Federal Reporter.

Not for Publication in West’s Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Fifth Circuit Rules 28.7, 47.5.3, 47.5.4. (Find CTA5 Rule 28 and Find CTA5 Rule 47)

United States Court of Appeals,  
Fifth Circuit.

TU NGUYEN, Plaintiff–Appellant,

v.

BANK OF AMERICA, N.A., Defendant–Appellee.

No. 12–20573

Summary Calendar.

March 8, 2013.

Jeffrey Ray Seewald, Matt Delmore Manning, McGlinchey Stafford, P.L.L.C., Houston, TX, for Defendant–Appellee.

Appeal from the United States District Court for the Southern District of Texas, USDC No. 4:12–CV–1481.

Before SMITH, PRADO, and HIGGINSON, Circuit Judges.

**Opinion**

PER CURIAM.\*

\*\*1 Tu Nguyen, proceeding *pro se*, sued Bank of America (“BOA”), alleging wrongful foreclosure. We affirm the summary judgment in favor of BOA.

I.

This is Nguyen’s second suit against BOA related to the foreclosure on his house. Nguyen took a mortgage from BOA, which tried to foreclose on January 3, 2012, but was prevented from doing so when Nguyen sued in state court and received a temporary restraining order (“TRO”). Nguyen alleged causes of action including (1) interference with prospective contracts; (2) vicarious liability; (3) negligent hiring; (4) breach of contract; (5) civil conspiracy; (6) negligence; (7) unjust enrichment; (8) wrongful foreclosure; (9) violations of the federal Real Estate Settlement Procedures Act; (10) violations of the federal Truth in Lending Act; (11) violations of the federal Fair Debt Collection Practices Act; (12) violations of the Texas Debt Collection Act; (13) fraud; (14) negligent misrepresentation; (15) violation of the federal Home Affordable Modification Program; and (16) violation of the federal Helping Families Save Their Homes Act.

BOA removed to federal court, then Nguyen agreed to dismissal with prejudice. The case was dismissed on February 21, 2012, and the TRO was lifted. Nguyen took no further action, seeking neither appeal nor reformation of the judgment.

On April 30, 2012, Nguyen sued BOA, again in state court, and BOA again removed. This suit alleges nearly identical causes of action related to the foreclosure: (1) interference with prospective contracts; \*334 (2) breach of fiduciary

**Synopsis**

**Background:** After mortgagor agreed to the voluntary dismissal with prejudice of an action against mortgagee relating to the foreclosure of his home, mortgagor brought a second action against mortgagee alleging wrongful foreclosure. After the case was removed to federal district court, the United States District Court for the Southern District of Texas, granted summary judgment for mortgagee. Mortgagor appealed.

**Holdings:** The Court of Appeals, held that:

district court had federal diversity subject-matter jurisdiction;

mortgagor failed to show prior order was obtained by fraud; and

res judicata barred subsequent action.

Affirmed.

**Attorneys and Law Firms**

\*333 Tu Nguyen, Houston, TX, pro se.

## Tu Nguyen v. Bank of America, N.A., 516 Fed.Appx. 332 (2013)

duty; (3) vicarious liability; (4) negligent hiring; (5) breach of contract; (6) negligence; and (7) wrongful foreclosure. The district court granted BOA's motion for summary judgment based on claim preclusion and alternatively on the merits. Nguyen challenges the summary judgment on four grounds: that (1) removal was improper; (2) the court should have set aside the previous judgment as fraudulent; (3) summary judgment was improper because there was a genuine dispute of material fact; and (4) the court committed clear error in its analysis of the facts.

## II.

"Summary judgments are reviewed *de novo*." *Moussazadeh v. Tex. Dep't of Criminal Justice*, 703 F.3d 781, 787 (5th Cir.2012). Summary judgment is granted where, taking the evidence in the light most favorable to the nonmovant, there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). See FED.R.CIV.P. 56(a). We review a denial of a motion to remand *de novo*. *Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc.*, 485 F.3d 793, 796 (5th Cir.2007). Because Nguyen is proceeding *pro se*, we "liberally construe[ ]" his filings. *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976).

## III.

A defendant may remove to federal court if that court has subject-matter jurisdiction. See 28 U.S.C. § 1441. The court has subject-matter jurisdiction where "the matter in controversy exceeds the sum or value of \$75,000" and is between "citizens of different States." 28 U.S.C. § 1332(a). It is undisputed that there is complete diversity of citizenship and that the amount in controversy exceeds the threshold. Nguyen is a citizen of Texas, and BOA is a citizen of North Carolina.<sup>1</sup> The amount in controversy is the appraised value of the house, \$359,820. Nguyen does not challenge any of these facts. The court therefore had original jurisdiction under § 1332, and removal was proper.<sup>2</sup>

## IV.

**\*\*2** Nguyen argues that the court should have set aside the previous judgment. He claims that either he did not agree to the dismissal, despite the agreed motion to dismiss, or alternatively that his agreement was procured through fraud. Nguyen supports these contentions solely with his own self-serving affidavit.

**\*335** The deciding court may set aside a final judgment on a motion under Federal Rule of Civil Procedure 60(b)(3) if it is a result of fraud, "misrepresentation, or misconduct by an opposing party." A court may also provide relief from a judgment if it is a result of a "fraud on the court." FED.R.CIV.P. 60(d). "The inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question." *Universal Oil Prods. Co. v. Root Ref. Co.*, 328 U.S. 575, 580, 66 S.Ct. 1176, 90 L.Ed. 1447 (1946). The "proper forum in which to assert that a party has perpetrated a 'fraud on the court' is the court which allegedly was a victim of that fraud." *Wilson v. Comm'r*, 309 Fed.Appx. 829, 833 (5th Cir.2009). Nguyen, however, did not challenge the final judgment in his initial suit, nor did he file a Rule 60(b) motion.

"[T]he standard for fraud on the court is demanding: 'Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court.'" *Ballew v. U.S. Dep't of Justice*, 244 F.3d 138 (5th Cir.2000). Fraud is "never presumed" and "must always be proven by clear and convincing evidence." *Saenz v. Kenedy*, 178 F.2d 417, 419 (5th Cir.1949). All Nguyen has offered to support fraud is a vague statement that he did not agree to the motion to dismiss with prejudice. That is insufficient. The district court correctly concluded that the previous judgment could not be undone.

Given the finality of the previous judgment, we turn to the issue of res judicata. Claim preclusion "bars the litigation of claims that either have been litigated or should have been raised in an earlier suit." *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 571 (5th Cir.2005). Claim preclusion exists where

- (1) the parties in the subsequent action are identical to, or in privity with, the parties in the prior action;
- (2) the judgment in the prior case was rendered by a court of competent jurisdiction;
- (3) there has been a final judgment on the merits;

**Tu Nguyen v. Bank of America, N.A., 516 Fed.Appx. 332 (2013)**

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and (4) the same claim or cause of action is involved in both suits. If a party can only win the suit by convincing the court that the prior judgment was in error, the second suit is barred.

*Duffie v. United States*, 600 F.3d 362, 372 (5th Cir.2010) (internal citations omitted).

The first prong is satisfied: Nguyen and BOA were the only parties in both suits. The second prong is also met: The district court had diversity jurisdiction. The third prong is satisfied as well: The parties submitted an agreed motion to dismiss with prejudice, the district court entered an order dismissing with prejudice, and Nguyen neither challenged the judgment nor tried to reopen the case. And, as we concluded above, the judgment will not be overturned as fraudulent.

**\*\*3** Finally, the fourth prong is satisfied. Six of the seven causes of action that Nguyen urges are identical to those in the original suit. The only addition is breach of fiduciary duty, which is related to and could have been brought in the initial suit. Both actions arise out of the “the same nucleus of operative facts”: the foreclosure and foreclosure proceedings regarding Nguyen’s house. See *Southmark Corp. v. Coopers & Lybrand (In re Southmark Corp.)*, 163 F.3d 925, 934 (5th Cir.1999) (emphasis omitted). They thus involve the same claim, so claim preclusion bars this suit, and the district court properly dismissed **\*336** it on summary judgment.<sup>3</sup>

The summary judgment is AFFIRMED.

#### All Citations

516 Fed.Appx. 332, 2013 WL 1153041

#### Footnotes

- \* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.
- 1 A national bank may be considered a citizen of “the State designated in its articles of association as its main office.” *Wachovia Bank, Nat’l Ass’n v. Schmidt*, 546 U.S. 303, 318, 126 S.Ct. 941, 163 L.Ed.2d 797 (2006). BOA designates Charlotte, North Carolina, as its main office, so it is a citizen of North Carolina.
- 2 Nguyen suggests that removal was improper because “the trial Court did not have Original Jurisdiction.” His assertion misunderstands the rules of jurisdiction. Where there is complete diversity of citizenship and the amount in controversy is over the statutory threshold, the federal district court does have original jurisdiction, meaning the suit could have originally been brought there. See 28 U.S.C. § 1332. Nguyen contends that there is no federal question or issue and that this destroys jurisdiction. Again, this misunderstands § 1332; no federal question is necessary so long as there is diversity and the appropriate amount in controversy; either is sufficient. Finally, Nguyen refers to the “defendant forum rule” as barring this suit, but it is flatly inapplicable here. BOA is not a citizen of Texas, and Nguyen chose to sue in Texas state court.
- 3 Because we affirm dismissal based on claim preclusion, we need not address Nguyen’s contentions regarding the alternative judgment on the merits. The suit cannot be adjudicated based on the doctrine of res judicata, and it therefore is irrelevant whether Nguyen presented evidence to create a material factual dispute.

# **Exhibit 10**

Brown v. State of Tennessee Department of Labor and..., 64 Fed.Appx. 425 (2003)

64 Fed.Appx. 425

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Sixth Circuit Rule 28.

(Find CTA6 Rule 28)

United States Court of Appeals,  
Sixth Circuit.

Robert Louis BROWN, Plaintiff–Appellant,

v.

STATE OF TENNESSEE DEPARTMENT OF  
LABOR AND WORKFORCE DEVELOPMENT,  
DIVISION OF WORKERS' COMPENSATION;

Attorney General, State of Tennessee,  
Defendants–Appellees.

No. 02–6047.

April 2, 2003.

#### Synopsis

Claimant filed § 1983 action alleging that state's denial of worker's compensation benefits violated his constitutional rights. The United States District Court for the District of Tennessee dismissed complaint, and claimant appealed. The Court of Appeals held that: (1) state and its agencies had Eleventh Amendment immunity from liability for monetary damages, and (2) state attorney general was absolutely immune from liability for his role in state court proceedings.

Affirmed.

\*425 Before BOGGS, SUHRHEINRICH, and SILER,  
Circuit Judges.

#### ORDER

\*\*1 Robert Louis Brown, a pro se Tennessee resident, appeals a district court order dismissing his civil rights action filed pursuant to 42 U.S.C. § 1983. This case has

been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R.App. P. 34(a).

Seeking monetary relief, Brown sued the Tennessee Department of Labor, its Workers' Compensation Department, and the Attorney General of Tennessee. The action arose from the dismissal of a state court action where Brown sought workers' compensation benefits. The state trial court dismissed the suit for lack of subject matter jurisdiction and the Tennessee Court of Appeals affirmed. The district court dismissed the case as frivolous.

In his timely appeal, Brown's brief is construed as arguing that Tennessee has waived its Eleventh Amendment immunity; that a state employee committed fraud in his workers' compensation case; and that this court should review the decision of the Tennessee Court of Appeals.

The district court's order is reviewed de novo. See *McGore v. Wrigglesworth*, 114 F.3d 601, 604 (6th Cir.1997). A case is frivolous if it lacks an arguable basis in law or in fact. See \*426 *Neitzke v. Williams*, 490 U.S. 319, 325, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989).

The district court properly dismissed Brown's complaint. Contrary to Brown's arguments, Tennessee and its agencies are immune from liability for monetary damages under the Eleventh Amendment. See *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 472–73, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987); *Papasan v. Allain*, 478 U.S. 265, 276, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986); *Berndt v. Tenn.*, 796 F.2d 879, 881 (6th Cir.1986).

Brown complains of the Attorney General's representation of the state's interest in Brown's state court proceedings. Specifically, Brown contends that the Attorney General filed documents stating that the state could not be sued and that his workers' compensation claim was filed in the wrong court. The state trial court agreed with the Attorney General's position. As the Attorney General was an "advocate" for the state by defending the state in Brown's civil action in state court, the Attorney General's actions were "intimately associated with the judicial phase" of the civil process. Thus, the Attorney General is entitled to absolute immunity in Brown's civil rights action. See *Prince v. Hicks*, 198 F.3d 607, 611 (6th Cir.1999). Therefore, Brown's claims against the Attorney General are

**Brown v. State of Tennessee Department of Labor and..., 64 Fed.Appx. 425 (2003)**

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meritless.

Finally, Brown contends that this court should review the decision of the Tennessee Court of Appeals. This court's responsibility is to review the decision of the federal district court in Tennessee. It is not this court's responsibility to review the decision of the Tennessee Court of Appeals. That responsibility lies with the Supreme Court of Tennessee.

Accordingly, we affirm the district court's order. [Rule 34\(j\)\(2\)\(C\), Rules of the Sixth Circuit](#).

**All Citations**

64 Fed.Appx. 425, 2003 WL 1795899

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# **Exhibit 11**

Palmer v. Schuette, --- Fed.Appx. ---- (2019)

2019 WL 1503803

2019 WL 1503803

Only the Westlaw citation is currently available.  
This case was not selected for publication in West's  
Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally  
governing citation of judicial decisions issued on or  
after Jan. 1, 2007. See also U.S.Ct. of App. 6th Cir.  
Rule 32.1.

United States Court of Appeals, Sixth Circuit.

Brian PALMER, Plaintiff-Appellant,

v.

Bill SCHUETTE; Scott Lee Teter, Defendants-  
Appellees.

No. 17-2226

Filed April 05, 2019

ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE EASTERN DISTRICT OF  
MICHIGAN

Attorneys and Law Firms

Suzan Gabbara, Eaman & Gabbara, Troy, MI, for Plaintiff-  
Appellant

Kathryn M. Dalzell, Office of the Attorney General of  
Michigan, Lansing, MI, for Defendants-Appellees

BEFORE: NORRIS, STRANCH, and LARSEN, Circuit  
Judges.

#### Synopsis

**Background:** Former state representative brought § 1983 action against the state's then Attorney General and an assistant attorney general, stemming from press release Attorney General posted on his office's website, describing misdemeanor prosecution charging representative with willful neglect while a government official, to which he pleaded no contest. The United States District Court for the Eastern District of Michigan, Denise Page Hood, Chief Judge, 2016 WL 5477260, granted defendants' motion to dismiss, and subsequently denied representative's motion for reconsideration and request for permission to amend the complaint, 2017 WL 3977864. Representative appealed.

**Holdings:** The Court of Appeals, Alan E. Norris, Circuit Judge, held that:

Attorney General and assistant attorney general were entitled to qualified immunity under § 1983 to former state representative's due process claim, and

representative's allegation that Attorney General and assistant attorney general prosecuted representative by press release, and that the allegations in the press release falsely accused representative of a crime he did not commit, failed to state a claim under the Fourth Amendment.

Affirmed.

#### OPINION

ALAN E. NORRIS, Circuit Judge.

\*1 Plaintiff Brian Palmer, a former Michigan state representative, filed this Section 1983 action against Bill Schuette, the state's then Attorney General, and Scott Teter, an assistant attorney general. The claims stem from a misdemeanor prosecution initiated by the Attorney General charging plaintiff with willful neglect of duty while a government official in violation of Mich. Comp. Laws § 750.478. Plaintiff pleaded no contest and agreed to the use of the criminal complaint as the factual basis for his plea.

In the wake of the plea, the Attorney General posted a press release on his office's website that profiled plaintiff's prosecution. Plaintiff contends that the release contained numerous falsehoods that adversely affected his professional activities. (At the time of the charge, plaintiff no longer served in the legislature.) Plaintiff demanded that the Attorney General remove the press release from the website; he refused to do so. Plaintiff responded by filing the instant three-count complaint against Schuette, who approved the prosecution, and Teter, who investigated, brought the misdemeanor complaint, and appeared at the plea hearing. The complaint alleged that defendants violated two of plaintiff's rights under the federal Constitution: 1) his Fifth and Fourteenth Amendment right to due process; and 2) his Fourth Amendment right to be

Palmer v. Schuette, --- Fed.Appx. ---- (2019)

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free of prosecution without probable cause. The third count raised a state-law claim for defamation.

Defendants filed a Rule 12(b)(6) motion to dismiss. The district court concluded that the defendants were entitled to qualified immunity, granted the motion, and dismissed the federal counts with prejudice. It declined to retain jurisdiction over the state-law claim and dismissed it without prejudice. Plaintiff then filed a motion for reconsideration, which included a request for permission to amend the complaint. The district court denied that motion. Plaintiff appealed.

## I.

Plaintiff pleaded no contest to the following charge:

When any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every willful neglect to perform such duty, where no special provision shall have been made for the punishment of such delinquency, constitutes a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than \$1,000.00.

[Mich. Comp. Laws § 750.478](#). As the result of his plea, the court sentenced plaintiff to twelve months of probation and 320 hours of community service, which he discharged.

The press release that spawned this litigation reads in part as follows:

The conviction stems from Palmer using his position as an elected official to assist the ring-leader of a \$9 million Ponzi scheme.

The scheme, conducted by API Worldwide, Inc., defrauded more than 150 victims between 2006 and 2012.... Palmer cooperated with investigators after losing \$400,000 of his own money to one of the API ringleaders in a separate transaction.

....

From July 2006 through January 2012, API Worldwide, Inc. and its operators Jeffrey L. Ripley, 61, of Sparta, and Danny Lee VanLiere, 62, of Grand Rapids, ran a Ponzi scheme promising huge returns on investments. The two west Michigan men promised high returns on money invested, but never delivered on their promises to victims....

\*2 Ripley and VanLiere targeted elderly investors with their scam. An investigation revealed they preyed on elderly victims by convincing them to cash in certificates of deposit (CD's) and other legitimate investments in order to invest the proceeds in API Worldwide.... The investigation revealed that although some investors did receive a return, those returns were derived from other investor's funds, the trademark of a Ponzi scheme. None of the victims received any returns on their "investments," and some even lost their life savings.

### Palmer's Role

Palmer served as a state representative from 2002-2008. During that time, Palmer used his position as an elected official to assist Ripley and VanLiere in their Ponzi scheme involving API Worldwide, Inc. Prior to his involvement with API, Palmer had invested \$400,000 with Ripley on an unregistered security. Ripley lost Palmer's \$400,000 on the investment and assured Palmer that he would get his money back if Palmer helped him with API. Ripley gave Palmer credit for the \$400,000 in API investments and Palmer cooperated with API because he believed he would receive a return on his lost funds.

Palmer met with potential investors on behalf of Ripley and API. With the knowledge that Ripley was attempting to circumvent the Securities Act, Palmer did not report the conduct to proper authorities.

Palmer carried a cell phone provided by API and answered calls from potential investors even while on the House floor. To circumvent state security laws, Palmer assisted Ripley by providing documents to make the scheme appear legitimate and signed investment guarantees. And, with Palmer's knowledge, Ripley used Palmer's name and position as a public official to vouch for and sell the API scheme to potential victims.

The release goes on to describe the charge to which plaintiff pleaded guilty and the sentence imposed. It ends with the Attorney General's advice to senior citizens on steps they should take to avoid fraud.

Palmer v. Schuette, --- Fed.Appx. ---- (2019)

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Plaintiff's federal complaint lists the statements contained in the release which he considers to be materially false. As mentioned above, plaintiff agreed to accept the charges set forth in the State's misdemeanor complaint as the factual basis for his plea of no contest. That complaint contains the following summary:

This case is related to *People v. API Worldwide Holdings*. The scheme is based on the misrepresentation that Dan Hershey has millions of dollars "locked up" in overseas accounts with Lloyds Bank. The schemers then solicited money from "investors" that is supposedly to be pooled with other investors' funds and used to pay off various tax liens, fees, and other charges that are keeping Hershey's Lloyd's Bank account "locked up." Although the promises varied, the schemers usually gave the victims promissory notes that reflect 10% interest and promise a "fee" of many times the initial investment amount. The schemers usually asked for the money on short notice, and assured the "investor" that repayment was 30-90 days away. To date, API has taken in \$ 9,245,814 from over 150 victims from this same scheme from 2006 to the present.

Brian Palmer was a state representative from Romeo in Macomb County at the time of his involvement with API. Palmer told Ripley that Palmer could assist Ripley in moving money from overseas to domestic accounts. In 2006, Palmer wired \$ 11,000 to Dan Hershey for scheme-related expenses. Ripley told Palmer that he wanted to sell API Investments in a way to circumvent Michigan's security's [sic] laws. As a result, Palmer provided Ripley with sample documents for Ripley's use in the scheme including promissory notes and facilitation agreements designed to circumvent [ ] Michigan's Securities Act. In addition, Palmer carried a cell phone provided by API and answered calls from potential investors even while on the House floor. Palmer was aware that Ripley had advised several potential API "investors" that "State Representative" Palmer was also an investor who was helping API unlock the Lloyds' account. Interviews of investors confirmed that Ripley used Palmer's name and position as a public official to vouch for and sell the API scheme. Investors stated that Palmer's name provided legitimacy to the API investment. Palmer also acted as a guarantor for API "investor" Bob Carlton in 2007. The API investment paperwork was structured as a loan from the Investor to API. Palmer was guaranteeing that if API didn't repay Carlton with interest, that Palmer would repay Carlton. During the same time period according to records at the Office of Finance, Insurance and Regulation (OFIR), Palmer reported another securities scheme to OFIR but never reported API. Finally, Ripley owed Palmer \$ 400,000 from a previous loss that Ripley

repaid Palmer with API securities. Therefore, Palmer believed if he cooperated with the API scheme and it was successful, he would get that money back.

\*3 Despite these allegations, which he conceded are true, plaintiff's complaint asserted that they do not support several statements made in the press release: plaintiff denies that he pleaded no contest to a Ponzi scheme; "assisted two other men to operate a \$ 9 million Ponzi scheme that defrauded more than 150 persons between 2006 and 2012"; "used his position as an elected official to assist" in a fraudulent scheme; invested \$ 400,000 in an unregistered security; "met with potential investors on behalf of Ripley and API, with the knowledge that Ripley was attempting to circumvent the Securities Act, and that Palmer did not report the conduct to proper authorities"; "carried a cell phone provided by API and answered calls from potential investors even while on the House floor"; provided documents to make the API scheme appear to be legitimate; and, lastly, allowed Ripley to use "Palmer's name and position as a public official to vouch for and sell the API scheme to potential victims." Compl. ¶¶ 24-32.

Defendants filed a motion to dismiss pursuant to Federal Rule 12(b)(6). They contended that the Eleventh Amendment precluded any official capacity claims, that they were entitled to qualified immunity with respect to individual capacity claims, and that they were entitled to immunity with respect to the state-law claim. The district court granted that motion. It also denied plaintiff's subsequent motion to reconsider and to amend the complaint.

## II.

### Standard of Review

We "review the grant of a motion to dismiss under Rule 12(b)(6) *de novo*, construing the record in the light most favorable to the non-moving party and accepting as true all well-pleaded allegations in the complaint." *Republic Bank & Tr. Co. v. Bear Stearns & Co., Inc.*, 683 F.3d 239, 246 (6th Cir. 2012) (citations omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ... allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citing *Bell Atl.*

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*Corp. v. Twombly*, 550 U.S. 544, 556, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) ).

#### Did the Complaint State a Viable Due Process Violation?

The first count of the complaint charges that “[b]y falsely prosecuting Palmer by press release, defendants violated Palmer’s due process rights under the Fifth and Fourteenth Amendments.” Compl. ¶ 44. As the result of this constitutional violation, plaintiff alleges these injuries:

As a direct and proximate result of the defendants’ violations of Palmer’s constitutional rights, Palmer suffered severe and substantial damages. These damages include, but are not limited to, loss of earnings and loss of earnings capacity, lost business opportunities, litigation expenses including attorney fees, loss of reputation, humiliation, embarrassment, inconvenience, mental and emotional anguish, and distress.

Compl. ¶ 47.

The district court explained the well-known contours of qualified immunity: “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) (citation omitted). The Supreme Court has recently reminded us that courts “do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.” *Mullenix v. Luna*, — U.S. —, 136 S.Ct. 305, 308, 193 L.Ed.2d 255 (2015) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011) ).

Before turning to due process itself, the court first determined that plaintiff incorrectly cited both the Fifth and Fourteenth Amendments as the source of his right to due process. While the Fifth Amendment undeniably contains a due process guarantee, it applies to federal, not state, officials and thus the district court limited its analysis to

plaintiff’s claim to the due process protections of the Fourteenth Amendment. *See Scott v. Clay Cty.*, 205 F.3d 867, 873 n.8 (6th Cir. 2000).

\*4 The court then summarized the essence of plaintiff’s claim in these terms: “Plaintiff maintains that he has a clearly established liberty interest protected by the Due Process Clause of the Fourteenth Amendment with respect to his good name, reputation, honor, and integrity.” *Palmer v. Schuette*, No. 14-14820, 2016 WL 5477260, at \*4 (E.D. Mich. Sept. 29, 2016) (citing *Board of Regents v. Roth*, 408 U.S. 564, 573, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971) ). However, the court noted that subsequent cases, specifically *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), clarified that more than defamation is required to state a claim: “the defamation had to occur in the course of the termination of employment.” *Paul*, 424 U.S. at 710, 96 S.Ct. 1155. The district court reasoned that, pursuant to *Paul*, the due process protection of a person’s good name is triggered only when a plaintiff establishes that there had been a stigma to his reputation, a state action altering or extinguishing a right or status previously recognized by state law, and a contemporaneous tangible loss. *See Paul*, 424 U.S. at 708-12, 96 S.Ct. 1155. The Supreme Court further clarified the scope of viable due process claims in *Siebert v. Gilley*, 500 U.S. 226, 234, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991) (“[S]o long as such damage flows from injury caused by the defendant to a plaintiff’s reputation, it may be recoverable under state tort law but it is not recoverable in a [federal] action.”).

The district court construed these cases to require a change in the status of a protected interest, such as employment. In the instant case, the court noted that the complaint did not allege that plaintiff’s employment status was affected by the press release: “[a] stigma to reputation that affects only future employment opportunities does not give rise to a protected liberty interest.” *Mertik v. Blalock*, 983 F.2d 1353, 1363 (6th Cir. 1993).

Having had the benefit of the parties’ briefs to this court, we affirm the judgment of the district court for the reasons given in its orders granting defendants’ motion to dismiss and denying plaintiff’s motion for reconsideration.<sup>1</sup> *Palmer v. Schuette*, No. 14-14820, 2016 WL 5477260, at \*3-5 (E.D. Mich. Sept. 29, 2016); *Palmer v. Schuette*, No. 14-14820, 2017 WL 3977864, at 2-5 (E.D. Mich. Sept. 11, 2017). Despite plaintiff’s protests to the contrary, the disputed press release did not differ to any great extent from the factual statement contained in the misdemeanor complaint. In fact, plaintiff filed a parallel defamation action in the Michigan Circuit Court, which granted

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summary disposition to defendants: “Taken together, the complaint and the transcript [of his state court plea and sentencing hearings] establish that the allegedly false and defamatory statements in the Press Release were substantially, if not entirely, true.” *Palmer v. Schuette*, Mich. Cir. Ct., No. 2016-4357-NO, June 7, 2017, at 16. While a state-law defamation action does not control the outcome of a federal due process claim, it provides some perspective into the validity of the claims advanced by plaintiff.

#### Fourth Amendment Claim

Count Two of the complaint alleges the following constitutional violation:

By prosecuting Palmer by press release, where the allegations in the press release falsely accused Palmer of a crime he did not commit, the defendants have violated Palmer’s right under the Fourth Amendment to be free from prosecution for an offense where there is no probable cause to charge him with the offense.

\*5 Compl. ¶ 54.

The district court held that plaintiff had failed to establish the existence of such a constitutional right. *Palmer v. Schuette*, No. 14-14820, 2016 WL 5477260, at \*8 (E.D. Mich. Sept. 29, 2016). In doing so, it rejected plaintiff’s reliance on *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). In *Bivens*, the Court held that a plaintiff could seek damages against federal agents who violated the Fourth Amendment in the execution of a search even though no prosecution ensued. 403 U.S. at 397, 91 S.Ct. 1999. Here, however, there was no search or seizure, and plaintiff’s contention that the press release is

analogous to an unconstitutional search or seizure is strained at best.

Plaintiff refers us to *Katz v. United States*, 389 U.S. 347, 350, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), and argues that a Fourth Amendment right extends to wiretapping even where, as here, there is no *physical* intrusion into a protected space and that probable cause is required before such an invasion of privacy. Plaintiff, however, does not allege any unlawful surveilling or wiretapping occurred and has not established a reasonable expectation of privacy.

Plaintiff also points to *Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994), which hinged on a state-law requirement to report child abuse and neglect. However, that case did not involve the Fourth Amendment.

In short, the allegations and case law brought forward by plaintiff fail to state a claim under the Fourth Amendment.

#### Pendent Jurisdiction

Plaintiff asks this court to reinstate his state-law defamation claim in the event that we reverse the judgment of the district court with respect to his federal claims. Given that we affirm the judgment on the federal claims, we need not reach this issue.

### III.

The judgment of the district court is **affirmed**.

#### All Citations

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#### Footnotes

- 1 Our disposition would not change even if we were to accept the allegations that plaintiff made for the first time in his combined motion to amend his complaint. There, he alleged that he is “self-employed as a partner and the president of his own venture capital company,” was so employed at the time of the defamatory press release, and as a result of the press release, lost business. But plaintiff still has not shown that he has been deprived of a governmental right, benefit, or entitlement; he has presented no support for a conclusion that damage to or loss of self-employment is a violation of a clearly established constitutional right.

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