

No. 19-2185

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**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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MELISSA BUCK; CHAD BUCK; SHAMBER FLORE; ST. VINCENT  
CATHOLIC CHARITIES,  
*Plaintiffs-Appellees,*

v.

ROBERT GORDON, in his official capacity as the Director of the Michigan Department of  
Health and Human Services; JOO YEUN CHANG, in her official capacity as the Executive  
Director of the Michigan Children's Services Agency; DANA NESSEL, in her official  
capacity as Attorney General of Michigan,  
*Defendants-Appellants,*

and

ALEX AZAR, in his official capacity as the Secretary of the United States Department of  
Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND  
HUMAN SERVICES,  
*Defendants.*

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On Appeal from the United States District Court for the Western District of Michigan  
1:19-cv-00286-RJJ-PJG

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**PROPOSED INTERVENORS KRISTY DUMONT AND DANA DUMONT'S  
MOTION FOR LEAVE TO FILE BRIEF IN SUPPORT OF DEFENDANTS-  
APPELLANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL**

AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION  
Leslie Cooper  
125 Broad Street, 18th Floor  
New York, NY 10004  
(212) 549-2633

SULLIVAN & CROMWELL LLP  
Garrard R. Beeney  
Ann-Elizabeth Ostrager  
Leila R. Siddiky  
Jason W. Schnier  
Lisa M. Ebersole  
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AMERICAN CIVIL LIBERTIES UNION  
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Jay Kaplan (P38197)  
Daniel S. Korobkin (P72842)  
2966 Woodward Avenue  
Detroit, MI 48201  
(313) 578-6823

125 Broad Street  
New York, NY 10004-2498  
(212) 558-4000

AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION  
Daniel Mach  
915 15th Street NW  
Washington, DC 20005  
(202) 675-2330

*Counsel for Proposed Intervenor Kristy and Dana Dumont*

Proposed Intervenors Kristy and Dana Dumont are a same-sex couple actively seeking to foster one or more children through Michigan's public child welfare system and, ultimately, to adopt. Plaintiff-Appellee St. Vincent Catholic Charities ("STVCC") turned them away on the basis of a religious objection to accepting same-sex couples, as did another state-contracted, taxpayer-funded child placing agency. The Dumonts sued and ultimately secured a settlement agreement requiring the Michigan Department of Health and Human Services ("MDHHS") to enforce the non-discrimination provisions in child placing agencies' contracts, which bar sexual orientation discrimination.

Soon thereafter, plaintiffs commenced this suit. The Dumonts moved to intervene before the district court, which was denied. The Dumonts have appealed that order in a separate appeal now pending before this Court. Appellants' Br., Dkt. No. 22, *Buck v. Gordon*, 19-CV-1959 (Oct. 16, 2019). The district court subsequently granted a preliminary injunction prohibiting the State from enforcing its non-discrimination requirement against STVCC, and the State filed this appeal. To protect their rights in this Court while their separate appeal regarding intervention in the district court remains pending, on October 28, 2019 the Dumonts moved to intervene before this Court on this appeal. Dkt. No. 15. The day after the Dumonts moved to intervene in this Court, the State filed an emergency motion for stay pending appeal. Dkt. No. 16.

Pursuant to Federal Rule of Appellate Procedure 27, the Dumonts respectfully move for leave to file a brief (attached hereto) in support of the State’s emergency motion, either as intervenor parties (if their intervention motion is ultimately granted) or as *amici curiae* (if it is denied). The brief will assist the Court’s analysis. Although the State identifies sufficient reasons why the district court erred in granting a preliminary injunction, the State has not addressed other crucial errors that are set forth in the Dumonts’ brief. The Dumonts’ brief will assist the Court by identifying additional clearly erroneous factual findings on which the district court relied. For instance, the district court found that MDHHS’s enforcement of its non-discrimination provision against faith-based agencies was a “sudden change” in policy attributable to the arrival of Attorney General Dana Nessel and her alleged anti-religious animus, R. 69, # 2520. In truth, as the Dumonts explained in the court below, MDHHS investigated other faith-based agencies for non-compliance with the non-discrimination provision long before Nessel’s arrival. *See* Dumonts’ Br. *Amici Curiae*, R. 62, # 2208; R. 67 (correcting citations). Moreover, interrogatory responses from the *Dumont* action, which the Dumonts filed in the court below, reveal that the investigation into STVCC itself was “completed and [was] pending final approval” while Attorney General Schuette was still in office. R. 62-3, # 2304.

In addition to identifying clear factual errors, the Dumonts’ brief will assist the Court by addressing constitutional arguments raised in the court below, but which neither the district court nor the State has addressed. The preliminary injunction is constitutionally infirm in light of the Establishment and Equal Protection Clauses. As the Eastern District of Michigan concluded in *Dumont*, the *Dumont* plaintiffs stated an Establishment Clause claim because they alleged that the State was “permitting their delegated agencies, carrying out a State function, to do exactly what the Constitution forbids them to do”—namely, to “turn away a same-sex couple on the basis of a religious objection.” *Dumont v. Lyon*, 341 F. Supp. 706, 740 (E.D. Mich. 2018). Likewise, the *Dumont* court found that, accepting as true the well-pleaded allegations of their complaint, the *Dumont* plaintiffs stated a claim under the Equal Protection Clause because the complaint “directly contradict[ed] the rationality of th[e State’s] alleged secular purpose, and allege[d] that allowing faith-based agencies to turn away same-sex couples actually exacerbates the shortage of qualified families who are available to adopt or foster and means that some children may be denied the family that is best matched to meet their individual needs.” *Id.* at 741 (internal quotation marks omitted).

Consistent with the conclusions of the *Dumont* court, in denying intervention in the case at bar, the district court recognized that “later developments in the case [could] create a basis for . . . Establishment Clause theories, for example,”

R. 52, # 1865; nevertheless, though the Dumonts raised those arguments, *see* Dumonts' Br. *Amici Curiae*, R. 62, ## 2199-2202, the district court did not consider them. Instead, it entered a preliminary injunction that, as the Dumonts' attached brief argues, is compelling the State to violate the Establishment and Equal Protection Clauses by permitting its agents to use religious exclusion criteria entirely unrelated to child welfare.

Finally, the Dumonts seek leave to file this brief because they placed into the record below critical expert and lay testimony showing the harm to children and families that would be caused by forcing the State to permit agencies to turn away prospective parents on the basis of sexual orientation. *See, e.g.*, Expert Report of David Brodzinsky, Ph.D., R. 62-1, PageID # 2226 (“Even if there were an abundance of families willing to foster and adopt children from the child welfare system, it would still be critical to access every qualified family to ensure that all children can be placed with families that are well-matched to meet their specific needs.”); *id.* at PageID # 2230 (“[W]hen State-contracted child placing agencies are permitted to exclude same-sex couples regardless of their qualifications, it creates a deterrent to same-sex couples’ participation in the foster care and adoption system as a whole.”); Declaration of K. Sander, R. 62-2, PageID # 2273 (discussing a same-sex couple that “was so discouraged” after being turned away by an agency that they decided not to call other agencies). Without considering or weighing this evidence,

the district court found (incorrectly) that “[t]here is nothing in this record that supports a finding that the power of [child placing agencies] to decline referrals[—*i.e.*, to turn away prospective parents—]limits the pool of applicants.” Opinion Granting Preliminary Injunction, R. 69, # 2519. The Dumonts’ brief will aid this Court because it identifies the record evidence that belies this factual finding.

For these reasons, the Dumonts respectfully request leave to file a brief in support of the State’s emergency motion for stay pending appeal.

Dated: November 5, 2019

Respectfully submitted,

*s/ Garrard R. Beeney*

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AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION  
Leslie Cooper  
125 Broad Street, 18th Floor  
New York, NY 10004  
(212) 549-2633

AMERICAN CIVIL LIBERTIES  
UNION FUND OF MICHIGAN  
Jay Kaplan (P38197)  
Daniel S. Korobkin (P72842)  
2966 Woodward Avenue  
Detroit, MI 48201  
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125 Broad Street  
New York, NY 10004-2498  
(212) 558-4000

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION

Daniel Mach  
915 15th Street NW  
Washington, DC 20005  
(202) 675-2330

*Counsel for Proposed Intervenors Kristy and Dana Dumont*

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Respectfully submitted,

*s/ Garrard R. Beeney*

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UNION FOUNDATION  
Leslie Cooper  
125 Broad Street, 18th Floor  
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(212) 549-2633

AMERICAN CIVIL LIBERTIES  
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UNION FOUNDATION

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Washington, DC 20005

(202) 675-2330

*Counsel for Proposed Intervenors Kristy and Dana Dumont*

## CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2019, I electronically filed the foregoing document through the court's electronic filing system, and that it has been served on all counsel of record through the court's electronic filing system.

*s/ Garrard R. Beeney*

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