

No. 19-2185

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

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; JOOYEUN 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.

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

**REPLY IN SUPPORT OF KRISTY DUMONT
AND DANA DUMONT'S MOTION TO INTERVENE**

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TABLE OF CONTENTS

INTRODUCTION	1
ARGUMENT	1
I. The Court Should Reject Plaintiffs’ Suggestion That This Motion Be Stayed.....	1
II. The Dumonts Are Entitled to Intervention as of Right.	2
A. The Dumonts Have a Substantial Legal Interest in This Appeal.....	3
B. Denial of Intervention Has Already Impaired the Dumonts’ Ability to Protect Their Interests.....	8
C. The Existing Defendants Do Not Adequately Protect the Dumonts’ Interests in this Case.....	9
III. Alternatively, This Court Should Grant Permissive Intervention Under Rule 24(b).	10
CONCLUSION.....	11

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Bradley v. Milliken</i> , 828 F.2d 1186 (6th Cir. 1987)	10
<i>Brennan v. Silvergate District Lodge, AFL-CIO</i> , 503 F.2d 800 (9th Cir. 1974)	1
<i>Dumont v. Lyon</i> , 341 F. Supp. 3d. 706 (E.D. Mich. 2018)	3
<i>Grutter v. Bollinger</i> , 188 F.3d 394 (6th Cir. 1999)	4, 6, 9
<i>Horrigan v. Thompson</i> , 1998 WL 246008 (6th Cir. 1998)	4
<i>Jansen v. City of Cincinnati</i> , 904 F.2d 336 (6th Cir. 1990)	9
<i>Jordan v. Mich. Conference of Teamsters Welfare Fund</i> , 207 F.3d 854 (6th Cir. 2000)	9
<i>Mausolf v. Babbitt</i> , 125 F. 3d 661 (8th Cir. 1997)	1
<i>Mich. State AFL-CIO v. Miller</i> , 103 F.3d 1240 (6th Cir. 1997)	3, 9
<i>Reliastar Life Ins. Co. v. MKP Inv.</i> , 565 Fed. Appx. 369 (6th Cir. 2014).....	7
<i>Texas v. United States</i> , 679 Fed. Appx. 320 (5th Cir. 2017).....	1

INTRODUCTION

Plaintiffs' response to the Dumonts' motion to intervene in this appeal misconstrues both the Dumonts' filings and this Court's precedents for one end: To stop the Dumonts from protecting their substantial interests, which combined with the divergence between the State and the Dumonts, necessitate intervention.

ARGUMENT

I. The Court Should Reject Plaintiffs' Suggestion That This Motion Be Stayed.

Plaintiffs argue that this motion should be stayed pending resolution of the Dumonts' Intervention Appeal, *Melissa Buck v. Robert Gordon*, No. 19-1959, supposedly because (i) the Dumonts "are attempting two bites at the intervention apple," (ii) the Dumonts would not be harmed by staying this motion, and (iii) the Dumonts failed to take the inessential step of filing a protective notice of appeal.¹ But Plaintiffs ignore that the Dumonts' filings are the only way they can protect their interests and prevent the evisceration of relief they already achieved in another case.

¹ There is no authority, even in other circuits, cited by Plaintiffs that a "protective notice of appeal" is a prerequisite for appellate intervention. *See Mausolf v. Babbitt*, 125 F.3d 661 (8th Cir. 1997) ("If final judgment is entered with or after the denial of intervention . . . the applicant should *be permitted* to file a protective notice of appeal as to the judgment") (emphasis added); *Brennan v. Silvergate District Lodge, AFL-CIO*, 503 F.2d 800 (9th Cir. 1974) (declining to decide whether proposed intervenor had standing to appeal judgment); *Texas v. United States*, 679 Fed. Appx. 320 (5th Cir. 2017) (holding proposed intervenor cannot appeal preliminary injunction *without seeking intervention*, and declining to treat "appellate brief [as] the equivalent of a motion to intervene").

Participating in briefing and argument on the appeal of the preliminary injunction as intervening parties will allow for the Dumonts to be heard. While the Intervention Appeal may moot the need for resolution of this motion, it is quite possible that the Intervention Appeal will *not* be “an effective means of obtaining review” because the Intervention Appeal may not be adjudicated in time for the Dumonts to participate in this appeal. Even if this Court eventually reverses the District Court’s erroneous intervention order, the Dumonts would be left with a hollow victory if briefing and argument in this appeal have concluded. Plaintiffs cannot have it both ways, complaining that the Dumonts did not do *enough* to protect their rights and simultaneously complaining that the Dumonts are doing *too much* to protect their rights by seeking to intervene to participate in the preliminary injunction appeal. In fact, neither is true.

II. The Dumonts Are Entitled to Intervention as of Right.

Plaintiffs have conceded that the Dumonts’ intervention motion was timely, and their other arguments against intervention as of right are unavailing at least because the Dumonts assert two substantial legal interests in this appeal; the Dumonts’ interests have already been impaired without intervention; and because the State of Michigan does not adequately represent the Dumonts’ interests.

A. The Dumonts Have a Substantial Legal Interest in This Appeal.

The Dumonts have two distinct substantial legal interests at stake in this appeal that satisfy this Court’s “expansive notion of the interest sufficient to invoke intervention of right”: (1) the preliminary injunction entered by the District Court subjects the Dumonts to practical and stigmatic injuries by requiring them to pursue fostering and adopting a child in a system in which child placing agencies (“CPAs”) may discriminate against them, in violation of their constitutional rights; and (2) the preliminary injunction renders the Settlement Agreement, which the Dumonts obtained in exchange for the dismissal of their constitutional claims in an earlier action, meaningless. *See Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997).

First, on the Dumonts’ stigmatic injury, Plaintiffs do not dispute that the *Dumont* court found that St. Vincent (“STVCC”)’s discrimination in the provision of public child welfare services² caused the Dumonts stigmatic and practical injuries-in-fact sufficient for Article III standing, *Dumont v. Lyon*, 341 F. Supp. 3d 706, 720–22 (E.D. Mich. 2018), and that Article III standing is a higher

² The Dumonts have never argued that STVCC is a “state actor.” *See* Plaintiffs’ Response, Dkt. 25 (“Response”) at 16 n.8. Instead, the Dumonts seek to preserve the *State’s* policy of requiring its contractors to abide by the nondiscrimination clause in their contracts and provide state-contracted public services on an equal basis.

threshold than the “substantial legal interest” required for intervention. *See Grutter v. Bollinger*, 188 F.3d 394, 398 (6th Cir. 1999) (“an intervenor need not have the same standing necessary to initiate a lawsuit”). Instead, Plaintiffs question the Dumonts’ current desire to foster and adopt a child by ignoring the Dumonts’ statements that they are “evaluating child placing agencies in [their] county” (of which STVCC is one) and “actively pursuing fostering and adopting one or more children from the Michigan public child welfare system” and “want to have the full range of options available to [them] that everyone else has.” Declaration of K. Dumont, R. 39-2, Page ID # 1518; Declaration of D. Dumont, R. 39-3, Page ID # 1522; *see also* Brief, R. 19, Page ID # 462 (“[T]he relief the *Buck* Plaintiffs seek would mean that the Dumonts would be subjected to the practical and stigmatic injuries of having to pursue their desire to adopt a child from foster care in a system in which agencies may discriminate against them.”).³ The court “must accept as true the non-conclusory allegations” of a motion to intervene. *Horrigan v. Thompson*, 1998 WL 246008, at *2 (6th Cir. 1998).⁴

³ Plaintiffs attempt to repurpose years’ old, out-of-context statements from the *Dumont* case and use them, without any factual basis, to cast doubt on the sincerity of the Dumonts’ current desire to foster and adopt a child from Michigan’s public welfare system. These irrelevant details are of no moment, not the least because they are contradicted by the Dumonts’ current allegations, which must be accepted as true.

⁴ Plaintiffs’ hearsay challenge to the Dumonts’ allegations that they have been personally denied service by STVCC should not be credited as it is beside the point

Having only a subset of agency options available to same sex couples solely because of their sexual orientation, by itself, constitutes a harm to the Dumonts even if it were true—as Plaintiffs incorrectly suggest—that any child in STVCC’s care could be placed with the Dumonts if they get licensed by another agency. Plaintiffs ignore that the Dumonts seek to *foster and* adopt a child from the public child welfare system. While STVCC says families approved by any agency can *adopt* a child in its care through the Michigan Adoption Resource Exchange (“MARE”), that leaves out all of the children who are not legally free for adoption who need foster placements. Response at 15. The overwhelming majority of children in the foster care system are not free for adoption. *See* Motion to Intervene, Dkt. 15 (“Motion”), at 11 n.3. STVCC does not deny that the Dumonts are, thus, excluded from providing a home for most of the children in the agency’s care.⁵

on a motion to intervene, where the court must accept the intervenor’s allegations as true.

⁵ This is just one of numerous misleading factual assertions contradicted by the record below that permeate Plaintiffs’ brief. For example, Plaintiffs claim that “[t]he State does not fund . . . home studies,” suggesting this is something it does independently of its State contracts, but sworn testimony from an MDHHS employee established that “[p]ayments made by the Department to a CPA, including St. Vincent, for foster care services include the home study” Declaration of Hoover, R. 34-5, Page ID # 1007. Plaintiffs assert that they are targeted by the State’s nondiscrimination policy while other CPAs are allowed to “have specialized missions,” and “refer” families to other agencies, ignoring that “all [CPAs] have the same contractual and licensing requirements and all must comply with the terms of the contract and license” and “[a]lthough an agency may focus on providing foster care case management or adoption services to children with certain needs, like those

Despite Plaintiffs' suggestion to the contrary, it is clear that *Grutter* controls and that the Dumonts have a substantial legal interest in this appeal. Like the prospective students who sought admission to the University of Michigan and wanted to "maintain[] the use of race as a factor in the University's admissions program," 188 F.3d at 398, the Dumonts seek to foster and adopt a child from the public child welfare system and maintain the State's policy of requiring compliance with the nondiscrimination clause in all CPA contracts. That the Dumonts' settlement agreement memorializing this policy is not a consent decree does not diminish this interest. *See id.* ("Jansen [does not] stand[] for the proposition that an interest must be protected by means of a consent decree or by any other particular means in order for the proposed intervenors to be able to establish that they have a substantial legal interest.").

Second, Plaintiffs' argument that the Dumonts cannot have an interest in protecting the Settlement Agreement because its language "specifically disclaims application to the extent 'prohibited by law or court order'" is completely backwards. Response at 17. The extent of the Dumonts' contractual rights, the

with disabilities, agencies do not exclusively serve those children, nor do they exclude prospective foster and adoptive parents based on race, religion, sexual orientation or marital status." Declaration of Bladen, R. 34-4, Page ID ## 997-99.

State's contractual obligations, and the Settlement Agreement's enforceability more generally hinge on the outcome of this appeal, which specifically seeks to prevent the State from enforcing its nondiscrimination policy. Rather than extinguishing the Dumonts' rights in their contract, this appeal is the only way the Dumonts can preserve their rights.

This case bears no resemblance to cases in which putative intervenors' "primary interest in the litigation is to preserve a party's financial viability in order to protect the intervenor's own economic interests." *Reliastar Life Ins. Co. v. MKP Inv.*, 565 Fed. Appx. 369, 372 (6th Cir. 2014) (punctuation omitted). To the contrary, the Dumonts assert a *direct* contractual interest in this appeal: They seek to preserve their contractual right to demand protection of their constitutional rights under the Settlement Agreement, a contractual right which the preliminary injunction jeopardizes.

Intervenors are not limited to asserting contractual rights where there is "*direct economic injury*" as Plaintiffs argue. Response at 17. In fact, in both *Linton* and *American Telephone*, intervenors asserted, like the Dumonts, that important provisions of their contracts could be effectively rewritten by another litigation without their participation. Whether or not Plaintiffs actually seek to dismantle the Settlement—and to be clear, the District Court erred in concluding that Plaintiffs do not "directly" challenge the Settlement Agreement, *see* Complaint, R. 1, Page ID ##

29–36—there is no doubt that the effect of the preliminary injunction is to eviscerate the core provisions in the Settlement Agreement the Dumonts bargained for in agreeing to dismiss their constitutional challenges. This alone gives the Dumonts a substantial interest in the appeal.

B. Denial of Intervention Has Already Impaired the Dumonts’ Ability to Protect Their Interests.

Plaintiffs argue that the Dumonts’ participation as *amici* is sufficient remedy,⁶ without acknowledging that evidence and legal arguments the Dumonts submitted in that capacity were wholly ignored in the preliminary injunction order.⁷ See Motion at 18. As shown by the Motion at 11–13, the Dumonts’ interests have *already* been impaired without intervention; they must be permitted to intervene now.

⁶ Plaintiffs seek to silence the Dumonts by arguing both that the District Court was not “obligated to consider” the Dumonts’ “*amici* arguments,” Response to Motion for Leave, Dkt. 24 at 3, *and* that there is no harm in denying the Dumonts the right to participate as parties because they participated as *amici*, Response at 19. Both cannot be true.

⁷ Plaintiffs also argue that the District Court was right to ignore the Dumonts’ evidence because it is hearsay (an objection never raised before the court below), but nothing in the District Court’s opinion suggests that it engaged in *any* evidentiary analysis of the Dumonts’ submissions; the Court simply did not address what the Dumonts put forward.

C. The Existing Defendants Do Not Adequately Protect the Dumonts' Interests in this Case.

Finally, the Dumonts have satisfied their “minimal” burden for the last prong of the intervention of right inquiry because the State has not opposed the preliminary injunction on the grounds that it violates the Establishment and Equal Protection Clauses, as the Dumonts argue. As this Court held in *Grutter*, “proposed intervenors are not required to show that the representation will in fact be inadequate.” 188 F.3d at 400. Instead, “it 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.” *Miller*, 103 F.3d at 1247; *see also Jansen v. City of Cincinnati*, 904 F.2d 336, 343 (6th Cir. 1990) (“interests need not be wholly ‘adverse’ before there is a basis for concluding that existing representation of a ‘different’ interest may be inadequate”).

Here, as in *Grutter*, the State has institutional interests in policymaking flexibility and avoiding litigation that may conflict with the Dumonts’ interests in asserting their constitutional rights. *See also Miller*, 103 F.3d at 1247 (finding inadequate representation where intervenor “would harbor an approach and reasoning for upholding the statutes that will differ markedly from those of the state, which is cast by the statutes in the role of regulator”), *cf. Jordan v. Mich. Conference of Teamsters Welfare Fund*, 207 F.3d 854, 863 (6th Cir. 2000) (no inadequate representation where intervenor “does not identify a single argument that [it] would

have made in support of its position that Plaintiffs have failed to advance”). Plaintiffs’ claim that there is “no daylight between the Dumonts’ and Michigan’s desired outcomes,” Response at 20, ignores the critical differences between not only their litigation positions but their fundamental interests: The State wishes to maintain its current nondiscrimination policy, but it has not assumed the Dumonts’ position that the Constitution *requires* this policy. Thus, as Plaintiffs’ own authority instructs, because the State has at least some “interest[s] adverse to the proposed intervenor,” *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987), it may not adequately represent the Dumonts’ interests.

III. Alternatively, This Court Should Grant Permissive Intervention Under Rule 24(b).

Plaintiffs’ sole argument against permissive intervention wholly ignores the Dumonts’ filings and the record. Plaintiffs argue the Dumonts “do not raise *any* claims or *any* separate defenses” to Plaintiffs’ claims, Response at 21–22, but this is flatly untrue. In seeking intervention before the District Court, the Dumonts filed a proposed answer, identifying unique defenses. *See* R. 18-1 at Page ID # 448 (“The relief requested by Plaintiffs is barred by the Establishment Clause of the First Amendment of the United States Constitution” and “The relief requested by Plaintiffs is barred by the Equal Protection Clause of the Fourteenth Amendment, and by the Fifth Amendment of the United States Constitution”). The Dumonts also refer to those defenses in their moving brief. *See* Motion at 20 (“Here, the Dumonts’

claims go to the heart of the constitutional issues in this litigation— the ‘common question[s] of law and fact’ include whether the First, Fifth and Fourteenth Amendments to the U.S. Constitution require, permit or prohibit the State from allowing state-contracted CPAs to turn away same-sex couples for religious reasons.”)

CONCLUSION

For the foregoing reasons and those set out in the Dumonts’ Motion, the Court should grant the Dumonts’ Motion to Intervene.

Dated: November 14, 2019

Respectfully submitted,

s/ Garrard R. Beeney

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 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.

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