

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; 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.

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

**PROPOSED INTERVENORS KRISTY DUMONT
AND DANA DUMONT'S REPLY IN SUPPORT OF THEIR
MOTION FOR LEAVE TO FILE A BRIEF IN SUPPORT OF THE
STATE'S EMERGENCY MOTION FOR STAY PENDING APPEAL**

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TABLE OF AUTHORITIES

Page(s)

Cases

Texas v. United States,
679 F. App'x 320 (5th Cir. 2017) 1

Other Authority

Fed. R. App. P. 27 3

Kristy and Dana Dumont respectfully submit this reply in further support of their motion for leave to file a brief in support of the State’s Emergency Motion for Stay Pending Appeal.

The Dumonts have an urgent need to be heard on this appeal of the preliminary injunction that requires the State to permit St. Vincent Catholic Charities (“STVCC”) to continue its discrimination against the Dumonts while providing public child welfare services. And they proffered essential arguments that have not been offered by any other party. The Dumonts therefore filed this motion for leave to file a brief in support of the State’s motion for a stay pending appeal.¹ It is within this Court’s inherent authority to consider the Dumonts’ arguments while their motion to intervene is pending. STVCC offers no authority to the contrary² and, instead, yet again seeks to silence the Dumonts.

¹ While STVCC suggests that the Dumonts should simply seek an expedited resolution of their appeal of the denial of their motion to intervene (Response, Dkt. 24 at 1), such a course would not ensure the Dumonts could participate in the State’s appeal of the grant of the preliminary injunction, including the pending motion for a stay pending appeal. And while the appeals are pending, the Dumonts are unable to pursue fostering and adopting a child from State custody with the same agency options that heterosexual couples can choose from.

² STVCC cites *Texas v. United States*, 679 F. App’x 320, 323–24 (5th Cir. 2017), which expressed doubt that a nonparty who has neither “intervened” nor “participated in the proceedings below” may “appeal.” But this case is inapposite because the Dumonts participated to the fullest extent possible in the proceedings below, through briefing and argument, have appealed the district court’s denial of their intervention, and sought to intervene in the States’ appeal. Moreover, in *Texas*

STVCC's continued efforts to block the Dumonts from participating in this litigation are astounding given that when STVCC sought to intervene in the Dumonts' lawsuit against the State of Michigan challenging the discrimination they experienced by state-contracted child placing agencies including STVCC, the Dumonts did not oppose intervention and STVCC was permitted to intervene. But now when the tables are turned, STVCC, without any rationale or on-point authority, seeks to keep the Dumonts out, arguing that they seek a mere "guest appearance" that should be denied. To the contrary, for the reasons addressed in their motion to intervene, the Dumonts have a substantial interest in this litigation and their proposed brief raises essential arguments raised by no one else that are important to this Court's consideration of the stay motion. Respectfully, this Court should grant leave to the Dumonts and consider their proposed brief.

v. *United States*, the district court had not yet ruled on the proposed intervenor's motion to intervene.

ARGUMENT

The Dumonts should be granted leave to file their brief in support of the State's motion for a stay because the Dumonts' brief will assist the Court as it makes multiple arguments that no other party has addressed.³

First, no other party has raised the constitutional infirmities of the preliminary injunction: when the State uses its police power to remove children from their families and take them into its custody, it cannot then allow religious criteria, rather than the children's own best interests, to guide which families will be approved to care for them and with whom each child will be placed. This violates the Establishment Clause and Equal Protection Clause. *See* Motion to Intervene, Dkt. 15 at 18–19. But that is precisely what the preliminary injunction requires the State to do. This Court should ensure that the district court's order comports with the Constitution and considering the Dumonts' arguments will further that goal.

Second, the Dumonts address important factual errors underpinning the district court's decision to grant the preliminary injunction, including some that were raised by no other party. For example, the Dumonts explain how the district court

³ Given the State's request for emergency consideration, the State's motion for a stay could be resolved before the Dumonts' intervention motion. If the Court grants the Dumonts' intervention motion before the State's emergency motion is decided, then this motion would be rendered moot and the Dumonts may respond to the State's emergency motion as a matter of right. *See* Fed. R. App. P. 27.

clearly erred in finding that STVCC “places children with same-sex couples certified as foster or adoptive parents” and does so “on a non-discriminatory basis,” Opinion, R. 69, Page ID ## 2520 and 2518, and the court relied on this at every stage of its legal analysis. *See* Dumonts’ Response, Dkt. 20, at 10–20. STVCC does not even attempt to refute the Dumonts’ point that it will not place the majority of children in its care—those not listed on MARE because they are not free for adoption—in foster placements with same-sex couples.

Finally, in considering the stay, this Court should consider, as the district court did not, the expert and lay testimony introduced by the Dumonts (R. 62-1, R. 62-2), which shows the harm to children and families that the preliminary injunction is causing because discrimination by any agencies deters families from pursuing foster and adoption.

CONCLUSION

For the foregoing reasons and those set forth in the Dumont’s motion, the Dumonts’ request for leave to file a brief should be granted.

Dated: November 14, 2019

Respectfully submitted,

s/ Garrard R. Beeney

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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.

s/ Garrard R. Beeney

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