No. 19-1959

In the 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 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 M. AZAR, II, 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 U.S. District Court for the Western District of Michigan, Southern Division, No. 1:19-CV-00286

APPELLEES' PETITION FOR REHEARING EN BANC

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RULE 35(b) STATEMENT AND INTRODUCTION

The panel's published decision failed to employ the abuse of discretion standard of review that applies to Fed. R. Civ. P. 24(b) permissive intervention, applying a *de novo* standard of review instead. In doing so, it departed from this Court's prior decision in *Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d 775 (6th Cir. 2007) and from the standard used by at least seven other circuits, thus creating a circuit split. *See*, *e.g.*, *S.D. ex rel. Barnett v. U.S. Dep't of Interior*, 317 F.3d 783, 787 (8th Cir. 2003) (reversal of permissive intervention "is extremely rare, bordering on nonexistent").

The decision has important consequences in this Circuit, since the new, relaxed standard gives politically motivated litigants a standing license to intervene, even if they have no practical stake in the litigation. This pressures district courts to permit intervention, even when in their judgment doing so would unnecessarily complicate litigation and delay resolution for the existing parties. Accordingly, this Court should rehear the case *en banc* in order to ensure the uniformity of this Court's decisions, avoid creating a circuit split with seven other circuits, and resolve a question of exceptional importance. *See* Fed. R. App. P. 35(b).

STATEMENT OF THE CASE

This case is one of several currently pending in this Circuit dealing with Michigan's partnership with faith-based child welfare agencies. Plaintiff-Appellee St. Vincent Catholic Charities ("St. Vincent") has long partnered with the State of Michigan to find loving homes for at-risk children. Decl., R.6-1, Page ID ## 228-229. As part of this process, St. Vincent must conduct a comprehensive evaluation of prospective foster and adoptive parents, including their intimate relationships, and decide whether to certify prospective foster parents to the State. Order, R.52, Page ID ## 1853-1854. St. Vincent's sincerely held religious beliefs preclude it from certifying same-sex or cohabitating unmarried couples. *Id.* at Page ID # 1854. Accordingly, St. Vincent refers such couples to one of dozens of other private foster agencies who can happily help. *Id.* In 2015, Michigan passed a law to protect this longstanding referral practice, determining that "[e]nsuring 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).

In 2016, proposed intervenors Kristy and Dana Dumont responded to a Facebook message from the ACLU seeking plaintiffs to challenge Michigan's law. Ex., R.37-3. After the Dumonts spoke with the ACLU, they contacted St. Vincent about adoption. Ex., R.37-4, Page ID # 1433. When they were unable to adopt through St. Vincent, the Dumonts did not pursue adoption with other agencies, but instead sued Michigan, asserting Establishment Clause and Equal Protection claims against the state in federal court. *Id.* at Page ID # 1430; Ex., R.37-10, Page ID ## 1453-1454. St. Vincent intervened in that case as of right, arguing that if the Dumonts were successful, St. Vincent would be excluded from providing foster and adoption services. Orders, *Dumont v. Lyon*, 2:17-cv-13080 (E.D. Mich. Mar. 5, 2018 & Mar. 22, 2018), ECF Nos. 31 & 34.

Initially, Michigan defended its partnership with St. Vincent. Then in March 2019, the state changed course. Op.4. Michigan's new attorney general, who had previously decried the 2015 law as a "victory for the hate mongers," determined that the law did not shield faith-based agencies like St. Vincent. Op., R.69, Page ID ## 2498-2499, 2510. Michigan settled with the Dumonts, who agreed to dismiss their Establishment Clause and Equal Protection claims with prejudice, Op.4,

which was a final adjudication on the merits of those claims. *See Pedreira v. Sunrise Children's Servs., Inc.*, 802 F.3d 865, 870 (6th Cir. 2015). St. Vincent was not party to the settlement. Op.4.

Michigan then announced a new policy stating that faith-based agencies would no longer be able to refer same-sex or unmarried couples to other agencies. Op., R.69, Page ID ## 2498-2499. That new policy prompted two lawsuits. One is currently pending in the Eastern District of Michigan. *Catholic Charities of W. Mich. v. MDHHS*, 2:19-cv-11661 (E.D. Mich. filed June 5, 2019). The other is this case, in which St. Vincent sued Michigan to keep its decades-old religious ministry open.

The Dumonts sought to intervene in this case both permissively and as of right. The Dumonts did not claim that they wished to work with St. Vincent, and at oral argument, disclosed that they were fostering with another agency. Nor did the Dumonts assert any claims of their own, instead making Establishment Clause and Equal Protection arguments in defense of the state's actions. *See* Proposed Answer, R.18-1. The district court denied intervention, finding in relevant part that the Dumonts lacked a claim or defense in common with the main action, that

Michigan adequately represented their interests, and that they could present their arguments as amici. Order, R.52, Page ID ## 1864-1865. The Dumonts were permitted to file an amicus brief and granted oral argument to oppose St. Vincent's preliminary injunction motion.

The district court later found St. Vincent likely to succeed on the merits and preliminarily enjoined Michigan from penalizing St. Vincent. Op., R.69. Initially, Michigan appealed that decision and sought an emergency stay of the injunction. A motions panel of this Court (Judges Suhrheinrich, Cook, and Bush) denied that request, similarly determining St. Vincent was likely to succeed on the merits. After that ruling, Michigan sought to dismiss its own appeal. A different motions panel of this Court (Judges Norris, Sutton, and Bush) granted the request. Order, *Buck v. Gordon*, No. 19-2185 (6th Cir. Feb. 27, 2020). The case was later stayed in the district court pending the outcome of the Supreme Court's decision in *Fulton v. City of Philadelphia*, No. 19-123, 140 S. Ct. 1104 (2020) (granting certiorari).

The Dumonts appealed the denial of intervention, which is the ruling at issue here. Op.1. The Dumonts have also sought intervention in the *Catholic Charities of West Michigan* case. *See* Mot. to Intervene, *Catholic*

Charities, 2:19-cv-11661 (E.D. Mich. July 17, 2019), ECF No. 20 (pending). The Dumonts have also sought to reopen their case against Michigan—in which they have dismissed their Establishment and Equal Protection Claims with prejudice—for the purpose of enforcing their contract with the state. Mot. to Reopen, *Dumont v. Lyon*, 2:17-cv-13080 (E.D. Mich. Feb. 24, 2020), ECF No. 87. That motion disclaims any attempt to enforce that contract to require Michigan to penalize St. Vincent. *Id.*

The panel reversed the district court, holding that the Dumonts were entitled to permissive intervention in this case.

ARGUMENT

This Court grants en banc review when a panel opinion either "directly conflicts with Supreme Court or Sixth Circuit precedent," or contains "a precedent-setting error of exceptional public importance" because it, for example, "conflicts with the authoritative decisions of other [circuits]." 6th Cir. IOP 35(a); Fed. R. App. P. 35(b)(1)(B). The panel's opinion does both.

I. The panel broke with the well-established standard for reviewing permissive intervention, creating a circuit split.

"The denial of permissive intervention should be reversed only for clear abuse of discretion." *Granholm*, 501 F.3d at 784 (quoting *Purnell v. Akron*, 925 F.2d 941, 951 (6th Cir. 1991)). This is an extremely deferential standard: although the Court regularly hears such appeals, in only a handful of cases has it ever reversed on permissive intervention. The panel opinion departed from this rule in at least two ways: it weighed factors and considerations not addressed below, and reweighed—without *any* deference—the district court's conclusions and findings. *See, e.g.*, Op.10 (stating that, "to be sure," alignment of interests is a factor, but reversing because "their interests are not completely aligned"). Worse, rather than remand to allow the district court to address these issues, the panel decided them in the first instance and without the benefit of the district court's expertise and perspective. That amounts to *de novo* review, in direct conflict with prior decisions of this Court. It also opens the door for intervention by parties with ideological axes to grind, but no direct stake in the litigation.

A. The panel departed from the longstanding rule reviewing a denial of permissive intervention with great deference.

The panel reviewed the request for permissive intervention with fresh eyes. This approach is inconsistent with this Court's case law, *Granholm*, 501 F.3d at 784, and precedent from at least seven other courts of appeal holding that, when reviewing denial of permissive intervention, a district court is entitled to *additional* deference even beyond the already deferential abuse of discretion standard. Of these, the Eighth Circuit may have put it best: "[r]eversal of a decision denying permissive intervention is extremely rare, bordering on nonexistent." *S.D. ex rel. Barnett*, 317 F.3d at 787.

Other circuits have ruled similarly. The Second Circuit held that "[r]eversal of a district court's denial of permissive intervention is a very rare bird indeed, so seldom seen as to be considered unique." *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 73 (2d Cir. 1994). The Seventh Circuit adopted that approach. *See Shea v. Angulo*, 19 F.3d 343, 346 n.2 (7th Cir. 1994) (quoting *Pitney Bowes*). As the Fifth Circuit explained,

> Permissive intervention is wholly discretionary with the district court even though there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied. Accordingly, when we are asked to review a denial of permissive intervention, the question on appeal is not

> whether the factors which render permissive intervention appropriate under Federal Rule of Civil Procedure 24(b) were present, but is rather whether the trial court committed a clear abuse of discretion in denying the motion.

New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 470-71 (5th Cir. 1984) (en banc) (cleaned up); *accord Purcell v. BankAtlantic Fin. Corp.*, 85 F.3d 1508, 1513 (11th Cir. 1996).[1] *See also* § 1913 Discretion of Court, 7C Wright & Miller, Federal Practice & Procedure § 1913 (3d ed. 2020) ("[I]t is wholly discretionary with the court whether to allow intervention under Rule 24(b), and even though there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied, the court may refuse to allow intervention.").

The panel opinion, however, departs from this broad consensus. While purporting to apply the right standard, the opinion's analysis applied a different one. It assessed in the first instance "the benefits of resolving

[1] *See also Tri State Generation and Transmission Ass'n, Inc. v. N.M. Public Regulation Comm'n*, 787 F.3d 1068, 1075 (10th Cir. 2015) (noting that "decisions holding that the district court abused its discretion in denying permissive intervention are predictably rare," then calling this an "understatement" as the appellant was unable to find a single one); *McHenry v. Comm'r of Internal Revenue*, 677 F.3d 214, 219 (4th Cir. 2012) (requiring "*clear* abuse of discretion") (emphasis in original); *Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 641 (1st Cir. 1989) ("broad discretion" and "unique circumstances" required).

the legal question presented by the Dumonts in the same action as St. Vincent's claim." Op.9. Far from assessing whether the district court abused its discretion, the panel answered a question the district court did not—and did not need to—ask. If that's what "clear abuse of discretion" permits, the standard is effectively *de novo* review.

The panel then opined that it "discern[ed] no danger of undue delay or prejudice to the existing parties that would exceed the benefits of having both sides of this constitutional dispute litigated in a single action." Op.9. The panel never deferred to the district court's analysis; it instead substituted its own reasoning, focusing not on the contractual claims at the center of the district court analysis, but instead on to the Dumonts' constitutional arguments. Op.9-10.

Rather than review the district court's reasoning, the panel employed *de novo* review, considering only the parties' appellate arguments. This is a departure from the highly deferential standard of review applied by other circuits and previously applied by this Court. Such error warrants en banc review. *See Perez v. Aetna Life Ins. Co.*, 150 F.3d 550 (6th Cir. 1998) (granting en banc review to determine proper standard of review). Under the panel's decision, review of permissive intervention in this

Circuit will be abuse of discretion in theory, but *de novo* in fact. This pressures district courts to simply permit intervention, even by parties with little stake in the case, and even where the district court believes that it will unnecessarily complicate the litigation before it.

B. The panel departed from prior precedent by reversing rather than remanding for further consideration.

Not only did the panel fail to employ an abuse of discretion standard of review, it compounded the error by failing to remand and allow the district court the opportunity to consider these factors in the first instance. This, too, conflicts with prior precedent. In *Miller*, this Court described the proper procedure: "Had we not concluded that the district court should have granted . . . intervention as of right, we would be compelled to remand for further development of the record as to the appropriateness of permissive intervention." *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997). But here, the panel departed from *Miller* by weighing these factors itself and reversing, rather than remanding. In doing so, it further undermined the uniformity of this Court's decisions. Only twice before, in *League of Women Voters* and *Liberte Capital*, has this Court reversed rather than remanded. As Judge Cook noted in her *Liberte Capital* dissent, "even if the district court did

abuse its discretion in denying permissive intervention, the proper course would be to remand to allow the district court to reevalaute its denial, rather than grant intervention." *Liberte Capital Grp., LLC v. Capwill*, 126 F. App'x 214, 221 (6th Cir. 2005) (citing *Miller*).

The panel's *de novo* reweighing of factors best left to the trial court (prejudice, timeliness, undue burden) also robs this Court of the benefits of the abuse of discretion standard. Indeed, when intervention calls for "[t]he close balance of fact-specific considerations," this "ordinarily counsel[s] deferring to the district court's discretion." *United States v. City of Detroit*, 712 F.3d 925, 931 (6th Cir. 2013). The district court is uniquely situated to consider Rule 24(b)'s factors, which require a fact-specific analysis and on-the-ground judgment calls. By reversing instead of remanding, the panel struck out on its own without the benefit of the district court's expertise; creating not only more work for this Court but also a greater likelihood of disruptive intervention and a subsequent interlocutory appeal by whichever party lost below.

C. The panel's failure to apply the proper standard led to errors in the application of Rule 24(b).

By applying the wrong standard, the panel went further than this Court has gone before, allowing a party with no personal stake in the

litigation to intervene. Permissive intervention requires a proposed intervenor to demonstrate that it "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). Following the abuse of discretion standard and the plain text of this rule, this Court has only rarely overturned denials of permissive intervention. When it has, it has done so for parties who "ha[ve] a claim or defense"—a justiciable legal claim belonging to the intervenors, or a defense to potential liability of the intervenors. By contrast, the panel's rule will allow ideologically interested groups to intervene, not by showing that they had claims of their own or needed to defend against potential liability, but merely by asserting defenses belonging to existing parties.

As far as counsel has been able to ascertain, this Court has only reversed a denial of permissive intervention five times. In the first three instances, the permissive intervenors had—as the Rule requires—an actual "claim or defense." In *United States v. City of Detroit*, the permissive intervenors were labor unions asserting § 1983 claims arising out of the district court's abrogation of their contracts with the city. 712 F.3d 925 (6th Cir. 2013). In *Liberte Capital Group, LLC v. Capwill*, the

permissive intervenors were banks who asserted defenses to the liability they themselves faced by the district court's appointment of receivers. 126 F. App'x 214, 218 (6th Cir. 2005). And, in *Purnell v. City of Akron*, the intervenors were the original parties to the suit, who had been replaced as administrators of the estate and sought intervention to continue to pursue claims and take part in any recovery. 925 F.2d 941 (6th Cir. 1991). Thus, in each of these cases, the permissive intervenors either raised defenses of their own to claims raised against them or they affirmatively filed a cross- or counter-claim. In the fourth case, *League of Women Voters*, this Court allowed intervenors to assert defenses of existing parties, but noted that the case could "affect the Congressmen directly and substantially" by redrawing their districts. *League of Women Voters of Michigan v. Johnson*, 902 F.3d 572, 579 (6th Cir. 2018).

The fifth case was the decision below, which went even further than *League of Women Voters* by *mandating* permissive intervention for parties who merely asserted defenses belonging to the existing defendant. Op.7. This Court had previously rejected that approach in two unpublished decisions. In *Kirsch v. Dean*, 733 F. App'x 268 (6th Cir. 2018), this Court affirmed denial of permissive intervention. There, the

proposed intervenor raised a position relevant to the case, but "did not raise a *claim* against [the existing party] that is *justiciable*." *Id.* at 280 (emphasis added and internal quotation marks and citation omitted). This Court affirmed, noting that this lack of a justiciable claim demonstrated that the movant did not satisfy "Rule 24(b)'s base requirements." *Id.*; *see also Bay Mills Indian Cmty. v. Snyder*, 720 F. App'x 754, 757-58 (6th Cir. 2018) ("any party wishing to intervene to support one side of a lawsuit could simply reiterate the pleadings of that side and thus meet the 'common question' requirement. Permissive intervention cannot be interpreted so broadly.").

Here, the permissive intervenors did not put forward *any* claims, nor did they raise any defenses personal to them. They filed a proposed answer, but no counter- or cross-claims, nor did they assert any defenses to claims that would expose them to justiciable harm or legal liability. *See* Proposed Answer, R.18-1. Nor could they, as they had already dismissed their own claims with prejudice in prior litigation. Instead, they simply re-asserted Michigan's defenses—namely, they defended the State's actions on Establishment Clause grounds. *Id.* To the extent the Dumonts ever had a viable Establishment Clause claim of their own, they

already dismissed it with prejudice in a separate action and cannot revive it here. The panel simply ignored Rule 24(b)'s "claim or defense" requirement, articulating a much lower standard for permissive intervention: "Because the Dumonts timely moved to intervene, we first examine whether they presented a common question of law or fact for resolution by the district court. They did." Op.7.

The district court's opinion was consistent with Rule 24(b)'s plain text. Rule 24(b) requires that the intervenor "*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) (emphasis added). The Rule's use of the word "has" is telling. The claim or defense raised must *belong* to the movant. The movant cannot, as the Dumonts did here, merely assert someone else's defenses. The Dumonts may have had buyer's remorse about settling their case against the State, but that is hardly grounds to grant them permissive intervention. The district court denied permissive intervention, leaving open the possibility that the Dumonts might be able to intervene in the future if relief granted "affects the Dumonts in some way" or the Dumonts had some defenses "uniquely available" to them.

R.52-14, Page ID #1865. This was consistent with the plain text of the rule, yet the panel rejected it. Op.7 (quoting this language).

D. Left uncorrected, the panel's decision will open the floodgates for intervention.

The panel's doctrinal errors have practical consequences. This rule has already resulted in the expansion of permissive intervention. In *Public Interest Legal Foundation, Inc. v. Winfrey*, the plaintiffs sued the City of Detroit's Clerk seeking an injunction requiring more aggressive ineligible voter purging. No. 19-13638, 2020 WL 2781826 (E.D. Mich. May 28, 2020). The League of Women Voters sought intervention. The district court characterized League of Women Voters' interest not as a "claim or defense" but as a "facially legitimate interest." *Id.* at *3, *5. The district court granted permissive intervention, relying upon the panel decision here: "[t]he Sixth Circuit has recognized that where the resolution of a legal dispute can end with the adoption of only one of several competing positions, the interests of advocates for all of those various positions are sufficiently diverse to mitigate in favor of intervention." *Id.* at *5. The panel decision is thus already being used to permit ideologically interested, but not practically affected, parties to intervene in disputes simply to "advocate[]" for "various positions." *Id.*

This panel's opinion thus takes the law precisely to the place this Court previously warned of. By erasing a core limitation on permissive intervention, "Rule 24 [may] be abused as a mechanism for the over-politicization of the judicial process." *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 346 (6th Cir. 2007). *See also Granholm*, 501 F.3d at 782-83 (expressing the same concern). Indeed, courts have long recognized that "where a suit is of large public interest, the members of the public often desire to present their views to the court in support of the claim or the defense. To permit a multitude of such interventions may result in accumulating proofs and arguments without assisting the court." *Allen Calculators v. Nat'l Cash Register Co.*, 322 U.S. 137, 141–42 (1944).

* * *

The panel opinion created confusion in this Court's decisions and a split with other circuits. It applied *de novo* review instead of the abuse of discretion standard, reversed when it should have remanded, and opened the doors of intervention to parties who have no personal stake in the case. The result? Courts in this Circuit will be flooded with intervention motions from ideologically interested parties, and district courts will fear

reversal for any denial, pressuring them to allow intervention even when proposed intervenors have no practical stake in the case. This will make litigation more acrimonious and less administrable, as those who would ordinarily act as an amicus (as proposed intervenors did here) can simply become parties instead.

CONCLUSION

For the foregoing reasons, this Court should grant en banc review.

Dated: June 25, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because it contains 3,783 words. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface (Century Schoolbook 14-point type) using Microsoft Word 2016.

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CERTIFICATE OF SERVICE

I certify that on June 25, 2020, this petition for rehearing en banc was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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APPENDIX

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 20a0143p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MELISSA BUCK, et al.,
Plaintiffs-Appellees,

ST. VINCENT CATHOLIC CHARITIES,
Plaintiff-Appellee,

v.

ROBERT GORDON, et al.,
Defendants,

KRISTY DUMONT; DANA DUMONT,
Amicae Curiae-Appellants.

No. 19-1959

Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids.
No. 1:19-cv-00286—Robert J. Jonker, District Judge.

Argued: March 12, 2020

Decided and Filed: May 11, 2020

Before: GRIFFIN, WHITE, and NALBANDIAN, Circuit Judges.

COUNSEL

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OPINION

GRIFFIN, Circuit Judge.

The State of Michigan finds itself in a tug-of-war between faith-based child placement agencies and same-sex couples who wish to foster or adopt children. In an earlier round of litigation, appellants Kristy and Dana Dumont claimed the State violated their First and Fourteenth Amendment rights by allowing faith-based child placement agencies to refuse them service based on their sexual orientation. Michigan settled that suit by agreeing to enforce a policy prohibiting discrimination on the basis of sexual orientation against faith-based child placement agencies. That settlement spawned this litigation. Plaintiff St. Vincent Catholic Charities claims the State violated its First and Fourteenth Amendment rights by directing it to perform its duties in a manner that violates its sincerely held religious beliefs.

This appeal deals not with the merits of the underlying constitutional dispute, but rather with whether the district court erred as a matter of law in denying the Dumonts' motion for intervention as of right or, in the alternative, whether it abused its discretion in denying their motion for permissive intervention. For the reasons explained below, we reverse the district court's order regarding permissive intervention and remand for further proceedings consistent with this opinion.

I.

A.

The Michigan Department of Health and Human Services (MDHHS) is responsible for the care of more than 13,000 children within the state foster-care system due to abandonment or neglect. It has opted to contract out the majority of its fostering and adoption services to private

child-placing agencies (CPAs). The State presently licenses and holds contracts with more than 50 private CPAs.

Before becoming eligible as a foster or adoptive parent in Michigan, a person must first obtain a license from the State. Private CPAs play a significant role in the licensing process by performing a home evaluation of the prospective parent(s). The home evaluation is "an exhaustive review of the family's eligibility" to act as foster or adoptive parents and requires the agency to assess "the relationships between all of the adults living in the home[.]" It includes both objective and subjective components and requires the CPA to make a final recommendation on whether or not the State should grant a license.

Some of the State's contracted CPAs are faith-based organizations, including plaintiff St. Vincent Catholic Charities.[1] Affiliated with the Catholic Diocese of Lansing, Michigan, St. Vincent is a Michigan non-profit corporation organized for charitable and religious purposes. It has provided fostering and adoption services for more than 70 years. St. Vincent shares the religious beliefs and teachings of the Roman Catholic Church regarding same-sex marriage. Therefore, it asserts that it "cannot provide a written recommendation to the State evaluating and endorsing a family situation that would conflict with [its] religious beliefs." It thus refers out home evaluations for same-sex or unmarried couples to other CPAs that do not share its religious beliefs.

Historically, MDHHS permitted St. Vincent to refer out cases that could pose a conflict with the agency's sincerely held religious beliefs. And in 2015, the Michigan Legislature codified this practice, enacting a statute designed to "[e]nsur[e] that faith-based child placing agencies [could] continue to provide adoption and foster care services" in line with their religious beliefs. *See* M.C.L. § 722.124e(1)(g) ("2015 Law"). It provides 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." § 722.124e(2).

[1]St. Vincent was originally one of four plaintiffs. However, the district court has dismissed the other plaintiffs, and that ruling is not yet appealable. We will thus refer to plaintiff in the underlying suit as "St. Vincent" for ease of reading.

B.

After Michigan enacted the 2015 Law, the Dumonts filed suit in the United States District Court for the Eastern District of Michigan. *Dumont v. Lyon*, No. 2:17-cv-23080 (E.D. Mich. Sept. 20, 2017) ("the *Dumont* litigation"). They alleged that they were a same-sex couple interested in fostering and adoption, but that St. Vincent refused to assist them with the licensing process because of their sexual orientation. Based on this alleged discrimination, the Dumonts contended that MDHHS was violating their First and Fourteenth Amendment rights by permitting taxpayer-funded CPAs to use religious criteria to screen foster and adoptive parents.

St. Vincent successfully moved to intervene; indeed, the Dumonts did not oppose it. Both the MDHHS and St. Vincent then moved to dismiss the Dumonts' complaint, with St. Vincent raising its own constitutional rights as affirmative defenses to the Dumonts' claims. The district court denied both motions. *Dumont v. Lyon*, 341 F. Supp. 3d 706 (E.D. Mich. 2018).[2]

Michigan elected a new governor and a new attorney general in 2018. Thereafter, the State's position in the litigation changed and the State ultimately entered into a settlement agreement with the Dumonts in March 2019. In exchange for the Dumonts dismissing their constitutional claims with prejudice, the MDHHS agreed that "unless prohibited by law or court order," it would consider sexual-orientation discrimination by a faith-based child placement agency as violating the anti-discrimination clause under its existing contracts. St. Vincent was not included in the settlement discussions and is not a party to the agreement.

C.

St. Vincent commenced this lawsuit one month later in the United States District Court for the Western District of Michigan. It claimed that the State's shift in policy violated its First and Fourteenth Amendment rights, along with the Religious Freedom Restoration Act. And it sought to enjoin the defendants from enforcing the State's change in policy by terminating or suspending its contract.

[2]The court limited itself to addressing whether the plaintiffs had stated Establishment Clause and Equal Protection claims, consistent with Federal Rule of Civil Procedure 12, and expressly disclaimed any opinion on the affirmative defenses raised by St. Vincent and the other intervenor-defendants. *Dumont*, 341 F. Supp. 3d at 748–49.

The Dumonts moved to intervene before any defendant filed an answer and requested expedited consideration under the district court's local rules. St. Vincent opposed the Dumonts' motion. Agreeing with St. Vincent, the district court denied the motion. On mandatory intervention, the district court reasoned as follows:

> The proposed intervenors rest their claim for intervention as of right on their interest in maintaining the Settlement Agreement. But that is an insufficient basis to support intervention as of right for at least two reasons. First, Plaintiffs are not asking for any relief directed at the Settlement Agreement itself. They do not seek to interpret its terms. Nor do they seek to invalidate any of its terms. From Plaintiffs' point of view, the Settlement Agreement is beside the point and irrelevant to the constitutional and statutory claims asserted. Second, the State is fully capable of protecting any interest the Dumonts have in the terms of the Settlement Agreement in any event. The State Defendants and the Dumonts are fundamentally aligned at this time in not only their views of the Settlement Agreement, but also their views of the merits (or more accurately, the demerits) of Plaintiffs' claims.

Regarding permissive intervention, the court observed:

> It is possible to imagine a basis for permissive intervention if the interests of the State Defendants and the proposed intervenors diverge; or if the Court grants some or all of the preliminary injunctive relief Plaintiffs seek in a way that potentially affects the Dumonts in some way it does not affect the State Defendants; or if later developments in the case create a basis for defenses or counterclaims – Establishment Clause theories, for example – that may be uniquely available to the Dumonts.

Despite recognizing this common question of law, the district court concluded that the Dumonts and the State were "aligned in all material respects" and that the Dumonts' "unique contribution" could be made as amici, rather than as parties to the suit. Thus, the court denied the Dumonts' motion to intervene without prejudice. The Dumonts then refiled their opposition to the motion for a preliminary injunction as an amicus brief in support of the defendants. They also timely filed this interlocutory appeal of the district court's denial of their motion for intervention.

D.

Shortly after its rulings on the motion to intervene, the district court granted St. Vincent's motion for a preliminary injunction.[3] The State appealed the preliminary injunction and unsuccessfully sought a stay in our Court. *See Buck v. Gordon*, No. 19-2185 (6th Cir. Nov. 19, 2019). It then changed course and moved to dismiss the appeal, which we granted. *Buck v. Gordon*, No. 19-2185, 2020 WL 1862309 (6th Cir. Feb. 27, 2020). Back at the district court, St. Vincent moved to stay further proceedings pending the Supreme Court's decision in a case involving similar claims, *Fulton v. City of Philadelphia*. No. 19-123, 140 S. Ct. 1104 (2020) (granting certiorari). The district court granted the motion, reasoning that "*Fulton* is likely to illuminate and shape the legal standards controlling this case and may be outcome-determinative." Accordingly, the case has been stayed until the Supreme Court resolves *Fulton*.

II.

The only issues presented in this appeal are (1) whether the district court erred as a matter of law in denying the Dumonts intervention as of right, and (2) whether the district court abused its discretion in denying the Dumonts permissive intervention. Because we hold that the Dumonts "are entitled to permissive intervention, we address only those arguments." *League of Women Voters of Mich. v. Johnson*, 902 F.3d 572, 577 (6th Cir. 2018).

Federal Rule of Civil Procedure 24(b)(1) 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." In deciding whether to allow a party to intervene, "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." *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997) (emphasis added).

[3]The Dumonts appeared through their counsel at the hearing on the motion and were allowed to present argument.

A.

Because the Dumonts timely moved to intervene,[4] we first examine whether they presented a common question of law or fact for resolution by the district court. They did.

St. Vincent maintains that the First and Fourteenth Amendments guarantee it the right to refrain from certifying same-sex couples for adoption. The Dumonts' position is the inverse; they claim that the State may not allow St. Vincent to turn away same-sex couples without violating prospective foster or adoptive parents' First and Fourteenth Amendment rights. There can be only one winner in this clash of constitutional guarantees, so the Dumonts have presented a common question of law that can be resolved by the district court. Even the district court recognized this, indicating that pending unspecified "later developments," the Dumonts could present defenses or counterclaims which were "uniquely available" to them. Specifically, it highlighted the Dumonts' invocation of the Establishment Clause as a potential affirmative defense to St. Vincent's claims.

St. Vincent resists this conclusion by contending that the Dumonts "do not even allege a claim or defense common to this action" and raise only "Michigan's claims or defenses for it." Appellee's Br. at 49; *see also id.* at 50 ("[The Dumonts'] proposed answer merely parrots that of the State Defendants, raising only defenses that would shield the State from liability."). The record says otherwise. The Dumonts have raised Establishment Clause and Equal Protection defenses that have not been asserted by the State. *Compare* Dumonts' Proposed Answer, R. 18-1 at PID 448 ("The relief requested by [St. Vincent] is barred by the Establishment Clause of the First Amendment of the United States Constitution.") *with* State Defendants' Answer, R. 77 at PID 2685–86 (raising no affirmative defense related to same-sex couples' constitutional rights).[5]

[4]There is no dispute that the Dumonts' motion was timely; they filed their motion at the very outset of the suit, before any defendant had filed an answer. (In fact, the motion to intervene was filed more than five months prior to any defendant answering the suit.).

[5]We also note that when St. Vincent intervened into the *Dumont* litigation, it was in the exact position the Dumonts are now. In other words, if the Dumonts raise "only Michigan's claims or defenses for it," as St. Vincent suggests, then the same was also true of its position in the prior case.

Nor does *Kirsch v. Dean* support St. Vincent's no-common-ground-of-law position. 733 F. App'x 268 (6th Cir. 2018). There we discussed how permissive intervention is not appropriate where "a proposed intervenor . . . submit[s] a filing that 'substantially mirror[s] the positions advanced' by one of the parties." *Id.* at 279 (quoting *Bay Mills Indian Cmty. v. Snyder*, 720 F. App'x 754, 757–58 (6th Cir. 2018)). We then held that the district court did not abuse its discretion by denying an untimely motion for intervention, where the *sole* basis was the proposed intervenor's desire to have opposing counsel disqualified for an alleged violation of the attorney-client privilege. *Id.* at 279–80. There is no comparison to be drawn with *Kirsch*—the Dumonts asserted affirmative defenses the State forwent, while the *Kirsch* intervenors parroted the existing party's positions solely to have opposing counsel disqualified. *Id.*

B.

Having determined that the Dumonts' motion was timely and that it presented a common question of law, we turn to the remaining factors in Federal Rule of Civil Procedure 24(b)(3).

We begin with the risk of undue delay or prejudice to the existing parties. *Miller*, 103 F.3d at 1248; *see also* Fed. R. Civ. P. 24(b)(3) ("In exercising its discretion, the court *must* consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." (emphasis added)). But this is precisely where the district court went astray; it made no apparent effort to weigh the benefits of resolving the common question of law presented by the Dumonts against the risk of undue delay or prejudice to the original parties. This failure constitutes an abuse of discretion.

A "district court operates within a 'zone of discretion' when deciding whether to allow intervention under Rule 24(b)[.]" *League of Women Voters of Mich.*, 902 F.3d at 577 (quoting *Kirsch*, 733 F. App'x at 279). But that discretion has bounds—unless the basis for the decision is obvious from the record, the court must "provide enough of an explanation for its decision to enable us to conduct meaningful review." *Id.* (internal quotation marks and brackets omitted). Here, the district court's departure from Federal Rule of Civil Procedure 24(b)'s "must consider" language leaves us with a "definite and firm conviction that the trial court committed a clear error of judgment" warranting reversal. *See Tahfs v. Proctor*, 316 F.3d 584, 593 (6th Cir. 2003)

(citation omitted). And this is because the relevant factors weigh substantially in favor of permissive intervention.

Consider the benefits of resolving the legal question presented by the Dumonts in the same action as St. Vincent's claim. The core dispute between the Dumonts and St. Vincent has spawned at least three actions in federal district court, two appeals to our court, and one motion for certification of a question to the Michigan Supreme Court. No case has yet reached a final judgment on the merits. Absent intervention, these numbers are likely to increase. Strong interest in judicial economy and desire to avoid multiplicity of litigation wherever and whenever possible therefore supports permissive intervention.

We also discern no danger of undue delay or prejudice to the existing parties that would exceed the benefits of having both sides of this constitutional dispute litigated in a single action, either now or, more importantly, at the time the Dumonts moved to intervene. *See* Fed. R. Civ. P 24(b)(3); *see also* Wright & Miller, Federal Practice & Procedure, § 1913 (3d ed.) ("It has been said that this language is a caution to the Court so that in its zeal to avoid a multiplicity of suits it will not hamper or vex the claims of the existing parties." (internal quotation marks omitted)). Particularly because the case has already been stayed by the district court—on St. Vincent's motion—the Dumonts' intervention will not unduly prejudice St. Vincent. Nor do we find persuasive St. Vincent's speculation about protracted or unduly burdensome discovery if we allow the Dumonts to intervene. The Dumonts and St. Vincent have *already* engaged in substantial discovery in the *Dumont* litigation, cutting *against* a finding of undue delay or prejudice because the same facts are relevant to the case brought by St. Vincent. Moreover, were the Dumonts to abuse discovery after being allowed to intervene, the district court could resolve the dispute as necessary to meet the dictates of Federal Rules of Civil Procedure 26 and 37. *See* Fed. R. Civ. P. 26(b)(b)(1)–(2); Fed. R. Civ. P. 37.

Two other unique aspects of this case support our decision to reverse the district court's order regarding permissive intervention. First, the district court's decision to deny the motion to intervene without prejudice and to allow its renewal is difficult to square with Federal Rule of Civil Procedure 24(b). Timeliness of the motion is one of the primary factors. It makes little sense then to invite the Dumonts to renew their motion for intervention at some unspecified point

in the future, when their motion will be less timely, and the case will have progressed to a point where undue delay or prejudice to the existing parties is more probable. *See League of Women Voters of Mich.*, 902 F.3d at 580. Second, the district court strayed too far from the legal standard set out in Federal Rule of Civil Procedure 24(b) by treating the dispositive issue as whether the Dumonts' and the State defendants' interests were "aligned." To be sure, "we have recognized that identity of interest is one of several 'relevant criteria' under Rule 24(b)." *Id.* (quoting *Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 784 (6th Cir. 2007). But as explained above, their interests are not completely aligned. Moreover, by analyzing the identity of interests, and *not* the risk of undue delay or prejudice to the existing parties, which plainly favored the Dumonts, the district court applied the wrong standard.

St. Vincent's remaining arguments are unconvincing. It asserts that because the district court allowed the Dumonts to participate in the litigation as amicus parties, it did not abuse its discretion in denying the motion. But there is more at stake for the Dumonts "than just the opportunity to present argument to the district court." *Miller*, 103 F.3d at 1245. The Dumonts also "desire[] . . . the ability to seek appellate review." *Id.*; *see also Fidel v. Farley*, 534 F.3d 508, 512 (6th Cir. 2008) ("Generally, non-parties cannot appeal from an order of the district court, unless they have first sought leave to intervene as a party."). We have already seen this play out, as the Dumonts asserted at oral argument that they would not have abandoned the appeal of the preliminary injunction as the State did. Thus, the Dumonts' participation in the case as amicae does not shift the balance.

Nor do we find persuasive St. Vincent's assertion that permitting the Dumonts to intervene will open the floodgates to all same-sex couples who may wish to intervene. Permissive intervention has always been a discretionary decision, dictated by the particular circumstances of the case. The district court retains broad discretion to exclude additional parties—even parties presenting common questions of law or fact—based on the totality of the circumstances.

District courts are afforded wide latitude to determine whether a party with a common question of law or fact may join a particular suit. *See Miller*, 103 F.3d at 1248. But sometimes, a court steps outside its "zone of discretion," and thus abuses its discretion. *Id.* This is just such

a case. The Dumonts filed a timely motion to intervene which raised a common question of law that was not outweighed by any countervailing factors, warranting permissive intervention. We therefore hold only that based on the unique facts and circumstances of this case, the district court abused its discretion by providing a cursory explanation of its denial of permissive intervention, failing to address the relevant legal factors or the unique circumstances of the case, and denying the motion without prejudice to be revisited in the future. Upon remand, "the district court retains broad discretion in setting the precise scope of intervention" going forward. *United States v. City of Detroit*, 712 F.3d 925, 933 (6th Cir. 2013).

III.

For these reasons, we reverse the denial of permissive intervention and remand to the district court for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19-1959

MELISSA BUCK, et al.,

Plaintiffs,

ST. VINCENT CATHOLIC CHARITIES,

Plaintiff - Appellee,

v.

ROBERT GORDON, et al.,

Defendants,

KRISTY DUMONT; DANA DUMONT,

Amicae Curiae - Appellants.

FILED
May 11, 2020
DEBORAH S. HUNT, Clerk

Before: GRIFFIN, WHITE, and NALBANDIAN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the district court's denial of permissive intervention is REVERSED, and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk