No. 19-1959

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; 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,

and

KRISTY DUMONT; DANA DUMONT,
Amici Curiae-Appellants.

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

BRIEF OF PROPOSED INTERVENOR DEFENDANTS-APPELLANTS

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Fed. R. App. P. 26.1 and 6th Cir. R. 26.1(a), Proposed Intervenor Defendants-Appellants make the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

   NO.

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   NO.

Respectfully submitted,

s/ Garrard R. Beeney

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a)(1), Proposed Intervenor Defendants-Appellants respectfully request oral argument in order to emphasize and clarify their substantial legal interests in this case and answer any questions the Court may have after briefing.

STATEMENT OF JURISDICTION

The complaint in this Action was filed in the United States District Court for the Western District of Michigan. Jurisdiction was invoked under 28 U.S.C. §§ 1331, 1343 and 1361. Complaint, R. 1, Page ID # 9.

Jurisdiction is proper in this Court under 28 U.S.C. § 1291. Denial of a motion to intervene is appealable as a final order. *Sales* v. *Marshall*, 873 F.2d 115, 120 (6th Cir. 1989) ("[A]n order completely denying intervention is immediately reviewable by way of an interlocutory appeal."); *see also Stringfellow* v. *Concerned Neighbors in Action*, 480 U.S. 370, 377 (1987) ("[W]hen an order prevents a putative intervenor from becoming a party in *any* respect, the order is subject to immediate review.").

On July 31, 2019, the District Court denied Kristy and Dana Dumonts' (the "Proposed Intervenor Defendants" or the "Dumonts") motion to intervene as of right and, in the alternative, for permissive intervention (the "Motion," R. 18, Page ID ## 421–242). Order, R. 52, Page ID ## 1864–65 (the "Order").

On August 26, 2019, Proposed Intervenor Defendants timely filed a notice of appeal in accordance with Rule 4(a) of the Federal Rules of Appellate Procedure from the Order. Notice of Appeal, R. 65, Page ID ## 2488–99.

STATEMENT OF ISSUES

1. Under Federal Rule of Civil Procedure 24(a)(2), did the District Court commit an error of law when it denied intervention as of right to the Proposed Intervenor Defendants where they raised substantial legal interests warranting intervention in this Action relating to (i) pursuing fostering or adopting a child from the Michigan child welfare system without being subjected to discrimination and (ii) maintaining a settlement agreement in a related action in which Proposed Intervenor Defendants' claims were dismissed, and where no party adequately represents their interests?

2. Under Federal Rule of Civil Procedure 24(b), did the District Court abuse its discretion in denying permissive intervention to the Dumonts where their defenses to Plaintiffs' claims share numerous questions of law and fact in common with the claims and defenses of the existing parties and the District Court did not analyze whether intervention would lead to undue delay or prejudice?

STATEMENT OF THE CASE

In this Action, Plaintiffs are challenging the State of Michigan's commitment and contractual obligation to ensure that state-contracted and taxpayer-funded child placing services are provided on a non-discriminatory basis to prospective foster and adoptive families headed by same-sex couples. The Action follows from *Dumont* v. *Gordon, et al.*, 2:17-cv-13080-PDB-EAS (E.D. Mich. 2019) ("*Dumont*"), which involved nearly all the same parties and the same core legal issues of how the State of Michigan must exercise its responsibility for finding foster and adoptive homes for the children in its care.

Proposed Intervenor Defendants Kristy and Dana Dumont, after being turned away by two state-contracted, taxpayer-funded child placing agencies because of the agencies' religious objections to accepting same-sex couples, initiated the *Dumont* case against the State. The Dumonts claimed that allowing the use of religious eligibility criteria to exclude same-sex couples in the public child welfare system violated the Establishment and Equal Protection Clauses of the Constitution. The Dumonts obtained a settlement vindicating their constitutional claims, whereby the Michigan Department of Health and Human Services ("MDHHS") agreed to enforce its contractual non-discrimination requirements against child placing agencies that discriminated based on sexual orientation. Plaintiffs below—one of the agencies that turned away the Dumonts, and families that worked with that

agency—were permitted to intervene in *Dumont*. After the *Dumont* settlement, Plaintiffs filed this action which, in effect, collaterally attacked the settlement the Dumonts had achieved. Notwithstanding that, the District Court denied the Dumonts intervention, and subsequently on September 26, 2019 issued a preliminary injunction contradicting the State's obligations and eviscerating the Dumonts' rights under the settlement agreement.

A. St. Vincent Catholic Charities Turns Away Prospective Foster Parents Kristy and Dana Dumont and *Dumont* Is Commenced.

In July 2016, Kristy Dumont called St. Vincent Catholic Charities ("STVCC"), a state-contracted and taxpayer-funded child placing agency ("CPA") in Michigan and told them that she and her wife, Dana Dumont, were interested in adopting a child from Michigan's public foster care system. STVCC turned the Dumonts away, stating that the agency does not work with same-sex couples. Brief in Support of Motion, R. 19, Page ID # 457. In March 2017, Kristy again called STVCC to inquire about adopting and was transferred to the voicemail of someone in the STVCC's child welfare department. Declaration of K. Dumont, R. 55-1, Page ID # 1941; Declaration of D. Dumont, R. 55-2, Page ID # 1945. Kristy left a detailed message explaining that she had previously been told that STVCC did not work with same-sex couples, and wanted to inquire as to whether that was still the case. She did not receive any response from STVCC. *Id.*

After being turned away by another CPA on the basis of a religious objection, the Dumonts, along with Erin and Rebecca Busk-Sutton (collectively, the "*Dumont* Plaintiffs"),[1] filed a complaint against Nick Lyon, in his official capacity as the Director of MDHHS, and Herman McCall, in his official capacity as the Executive Director of the Michigan Children's Services Agency (collectively, the "*Dumont* State Defendants"), in the Eastern District of Michigan, challenging the State's practice of permitting state-contracted and taxpayer-funded CPAs to use religious criteria to exclude same-sex couples from fostering or adopting children in the foster care system. Brief in Support of Motion, R. 19, Page ID # 457. The *Dumont* Plaintiffs claimed that the State's delegation of the public function of finding permanent homes for wards of the state to a religious organization and then authorizing the organization to exclude participants based on religious criteria violated the Establishment Clause. *Id.* at Page ID ## 457–58. The *Dumont* Plaintiffs further claimed that the State's policy of allowing discrimination based on sexual orientation in this government program violated the Equal Protection Clause because it furthered no legitimate government interest and, to the contrary, undermined the

[1] The claims of another Plaintiff, Jennifer Ludolph, who claimed only taxpayer standing, were dismissed. *Dumont* v. *Lyon*, 341 F. Supp. 3d 706, 714 (E.D. Mich. 2018). The Busk-Suttons have not moved to intervene in this Action.

State's interest in finding families for children by reducing their placement options. *Id.*

Melissa Buck, Chad Buck, Shamber Flore and STVCC (collectively, the "STVCC Parties"), represented by the same counsel as in this Action, moved to intervene in *Dumont*. *Id.* at Page ID # 458. The *Dumont* Plaintiffs did not oppose the motion with respect to STVCC, acknowledging that STVCC's contracts with MDHHS were at issue. *Id.* The *Dumont* Court granted the motion to intervene. *Id.*

B. The *Dumont* Court Holds That the Dumonts Adequately Alleged Establishment and Equal Protection Clause Claims.

The *Dumont* State Defendants and the STVCC Parties moved to dismiss the *Dumont* complaint. *Id.* The STVCC Parties' motion asserted (as does their complaint in this Action) that the court could not constitutionally grant the relief sought by the *Dumont* Plaintiffs because it would violate STVCC's free exercise and free speech rights. *Id.* In a 93-page opinion, the *Dumont* Court denied the motions to dismiss, holding that the *Dumont* Plaintiffs had adequately alleged that the State, by allowing state-contracted, taxpayer-funded agencies to use religious criteria to exclude same-sex couples, was violating the Establishment and Equal Protection Clauses of the U.S. Constitution. *Dumont* v. *Lyon*, 341 F. Supp. 3d 706, 714, 740, 743 (E.D. Mich. 2018). The *Dumont* Court also stated that it was "unconvinced" that STVCC could "prevail on a claim that prohibiting the State from

allowing the use of religious criteria by those private agencies hired to do the State's work would violate St. Vincent's Free Exercise or Free Speech rights." *Id.* at 749.

C. The Dumonts and the State Enter into a Settlement Agreement and Voluntarily Dismiss the *Dumont* Litigation.

Following denial of the motions to dismiss, the Dumonts, the *Dumont* State Defendants and the STVCC Parties engaged in substantial discovery, which included written discovery, document production (totaling over 66,600 pages produced by the parties), and the exchange of expert reports. Before depositions and the briefing of dispositive motions, the *Dumont* Plaintiffs and the *Dumont* State Defendants began settlement discussions and jointly moved on January 23, 2019 to stay proceedings. Brief in Support of Motion, R. 19, Page ID # 459. The *Dumont* Court entered orders staying the case for 60 days to facilitate settlement. *Id.*

On March 22, 2019, the *Dumont* Plaintiffs and the *Dumont* State Defendants entered into a settlement agreement (the "Settlement Agreement") to resolve the *Dumont* Plaintiffs' claims. *Dumont* Stipulation and Settlement Agreement, R. 31-5, Page ID ## 713–44. Pursuant to the Settlement Agreement, the *Dumont* State Defendants agreed, among other things, to continue including a non-discrimination provision in their CPA contracts that prohibits 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." *Id.* at Page ID # 722. The Settlement

Agreement confirmed the parties' understanding that "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 [state contract]" violates the non-discrimination provision. *Id.* The *Dumont* State Defendants also agreed to enforce the settlement provisions against state-contracted CPAs that MDHHS determines are in violation of or are unwilling to comply with the non-discrimination obligations up to and including termination of such contracts. *Id.* at Page ID ## 722–23. In exchange, the *Dumont* Plaintiffs agreed to dismiss their claims against the *Dumont* State Defendants with prejudice. *Id.* at 726. The court dismissed the *Dumont* case under Federal Rule of Civil Procedure 41(a)(2) and "pursuant to the terms of the Settlement Agreement." *Dumont* Dismissal, R. 31-6, Page ID ## 745–47.

Soon after the settlement, the Dumonts "resumed evaluating child placing agencies in [their] county and inquiring about fostering and adopting a child from the Michigan child welfare system." Declaration of K. Dumont, R. 55-1, Page ID # 1942; Declaration of D. Dumont, R. 55-2, Page ID # 1946. They are currently "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." *Id.*

D. The District Court Denies the Dumonts' Motion to Intervene in STVCC's Suit and Grants a Preliminary Injunction Forcing the State to Allow STVCC to Turn Away Same-Sex Couples.

On April 15, 2019, Melissa Buck, Chad Buck, Shamber Flore and STVCC ("Plaintiffs-Appellees" or "Plaintiffs"), the same parties as the STVCC Parties in *Dumont*, filed their complaint in this Action in the Western District of Michigan, seeking declaratory and injunctive relief to force the State of Michigan to allow state-contracted CPAs that have religious objections to complying with the State's non-discrimination requirement to turn away same-sex couples like the Dumonts— relief which, if granted, would contradict the State's obligations to the Dumonts under the Settlement Agreement. *See generally* Complaint, R. 1, Page ID ## 1–52. On May 21, 2019, the Dumonts moved to intervene as of right and, in the alternative, for permissive intervention, arguing that their interests in being able to pursue fostering and adopting from the Michigan public child welfare system without State-sanctioned discrimination and protecting the rights obtained under the Settlement Agreement warranted intervention. Motion, R. 18, Page ID ## 421–23. The Dumonts also explained that the State could not adequately represent their interests given the State's opposition to their constitutional claims in *Dumont* and, thus, the likelihood that the State would not or could not assert the Dumonts' affirmative constitutional defenses or counterclaims. *Id.*

On July 31, 2019, the District Court denied the Dumonts' Motion, holding that the Dumonts did not have a substantial legal interest warranting intervention as of right based on "their interest in maintaining the Settlement Agreement" because "Plaintiffs are not asking for any relief directed at the Settlement Agreement itself" and have not "sought any relief that calls for interpretation of the Settlement Agreement's terms." Order, R. 52, Page ID ## 1862, 1865. The District Court did not address the Dumonts' asserted interest in being able to adopt or foster a child from the Michigan public child welfare system free from state-sanctioned discrimination. In considering whether the State Defendants adequately represented the Dumonts' interests, the District Court noted that there are "defenses or counterclaims – Establishment Clause theories, for example – that may be uniquely available to the Dumonts" and acknowledged that the interests of the Dumonts and the State Defendants may "diverge." *Id.* Nonetheless, the District Court held that the Dumonts' interests were adequately represented by the State Defendants because "[a]t this point the [Dumonts] and the State Defendants are aligned in all material respects." *Id.*

On August 9, 2019, the Dumonts filed a motion for reconsideration of the Order, identifying the court's error in contradicting binding Sixth Circuit precedent. Motion for Reconsideration, R. 55, Page ID ## 1934–38. The next business day, the District Court denied the motion for reconsideration, stating that

the motion had "raised no new issues not already considered by this Court" and "failed to convince the Court that its prior ruling was erroneous" and reaffirmed the order denying the Dumonts' Motion to Intervene. Order Denying Reconsideration, R. 58, Page ID # 1962. On August 26, 2019, the Dumonts filed a notice of appeal from the District Court's order denying the Motion. Notice of Appeal, R. 65, Page ID ## 2488–99.

On September 26, 2019, the District Court entered a preliminary injunction (the "Preliminary Injunction") that conflicts with the State's obligations to the Dumonts under the Settlement Agreement. Order Granting Preliminary Injunction, R. 70, Page ID ## 2530–31. In entering the Preliminary Injunction, the District Court did not address the Dumonts' Establishment Clause or Equal Protection arguments (which they subsequently raised as *amici*), and wholly ignored the impact of the Preliminary Injunction on the Settlement Agreement. *See generally* Opinion Granting Preliminary Injunction, R. 69, Page ID ## 2498–529.

SUMMARY OF THE ARGUMENT

This Court should reverse the District Court and grant the Dumonts intervention as of right or, in the alternative, grant the Dumonts permissive intervention.

First, the Dumonts should be granted intervention as of right because they have a substantial legal interest in pursuing fostering or adopting a child from

the Michigan child welfare system without being subjected to discrimination and, separately, in maintaining the Settlement Agreement. *See* Brief in Support of Motion, R. 19, Page ID # 462. The District Court failed to address this second interest, which exists independent of the Settlement Agreement and alone warrants intervention as of right.

Second, with respect to the substantial legal interest in maintaining the Settlement Agreement, the District Court erred in addressing form rather than substance by concluding that the Dumonts have no interest in defending the Settlement Agreement because Plaintiffs do not "directly" seek to invalidate the terms of the agreement. The plain effect of Plaintiffs' request for relief is to undo the Settlement Agreement the Dumonts obtained. MDHHS committed to the Dumonts that MDHHS will enforce the non-discrimination requirement in CPA contracts, and the injunction requested by Plaintiffs and recently issued by the District Court prohibits MDHHS from fulfilling that obligation.

Third, where, as here, the interests of intervenors and existing parties may "diverge" and "certain defenses or counterclaims" are "uniquely available" to intervenors, binding Sixth Circuit precedent provides that intervenors are not adequately represented by existing parties. *Grutter* v. *Bollinger*, 188 F.3d 394, 400 (6th Cir. 1999) (proposed intervenors "not required to show that the representation will in fact be inadequate" and "[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.").

Fourth, the District Court abused its discretion in denying the Dumonts permissive intervention because the Dumonts' defenses share numerous questions of law and fact with Plaintiffs' claims here and there is no reason to believe that intervention would create undue delay or prejudice. The District Court's opinion failed to address the relevant standard for permissive intervention and provides no reasoning for its denial. Binding Sixth Circuit precedent providing that failure to weigh the appropriate factors and set forth reasoned analysis in denying permissive intervention requires this Court to conclude that the District Court abused its discretion in denying the Dumonts' motion for permissive intervention. *Mich. State AFL-CIO* v. *Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997) (district court abused discretion where it "did not provide [court of appeals] with its reasoning for denying permissive intervention").

STANDARD OF REVIEW

A proposed intervenor's timely motion to intervene must be granted where she "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." Fed. R. Civ. P. 24(a)(2). A district court's denial

of intervention as of right is reviewed *de novo*, except for the timeliness element, which is reviewed for an abuse of discretion. *Grutter*, 188 F.3d at 398.

The court may also permit intervention on timely motion where the movant "has a claim or defense that shares with the main action a common question of law or fact" after considering "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b)(1)(B). "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 (emphasis added).

ARGUMENT

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

A. The Dumonts' Motion Is Timely.

This Court has held that a motion to intervene is "timely as a matter of law" when it is filed when "the case was obviously in its initial stage." *Miller*, 103 F.3d at 1245; *see also Linton* v. *Comm'r of Health and Env't., State of Tenn.*, 973 F.2d 1311, 1317 (6th Cir. 1992) (identifying five factors to assess timeliness). The parties conceded that the Dumonts' motion was timely and the District Court took no issue with timeliness. The Dumonts have satisfied the timeliness requirement.

B. The Dumonts Have a Substantial Legal Interest in This Action.

This Court "has opted for a rather expansive notion of the interest sufficient to invoke intervention of right," and has held that any "close cases should be resolved in favor of recognizing an interest under Rule 24(a)." *Miller*, 103 F.3d at 1245, 1247. The Dumonts' substantial interest in this Action warrants intervention as of right and the District Court's denial of intervention as of right was reversible error. *First*, the Dumonts have a substantial legal interest in pursuing fostering and adopting a child from the Michigan public child welfare system without fear of State-sanctioned discrimination on the basis of their sexual orientation. *Second*, the Dumonts have a substantial legal interest in protecting their contractual rights under the hard-fought Settlement Agreement, which was obtained in exchange for the dismissal of their constitutional claims.

1. The Dumonts Have a Substantial Legal Interest in Pursuing Fostering or Adopting a Child From Michigan's Public Child Welfare System Without State-Sanctioned Discrimination.

The Dumonts are actively pursuing fostering and adopting a child from the Michigan public child welfare system and Plaintiffs seek to compel the State to allow STVCC and other CPAs to turn away same-sex couples like the Dumonts because they have a religious objection to accepting such families. The practice that Plaintiffs seek to impose on the State is precisely the practice that was challenged in *Dumont*, and which the *Dumont* Court found satisfied the higher Article III standard

for cognizable injuries-in-fact. *See Dumont*, 341 F. Supp. 3d at 720–22 (holding the *Dumont* Plaintiffs suffered cognizable stigmatic and practical injuries-in-fact from being turned away by STVCC based upon their status as a same-sex couple). This interest of the Dumonts alone warrants a grant of intervention as of right.

Sixth Circuit precedent confirms that this legal interest in seeking intervention is sufficient as it is based on the Dumonts' interest in maintaining a policy that ensures access to participation in a government program. *See Grutter* 188 F.3d at 398 (holding prospective minority University of Michigan applicants' "interest in maintaining the use of race as a factor in the University's admissions program" was a substantial legal interest warranting intervention as of right in action challenging admission policy); *Jansen* v. *City of Cincinnati*, 904 F.2d 336, 341–42 (6th Cir. 1990) (holding black applicants and employees of city's fire department system had substantial legal interest to intervene in lawsuit brought by white applicants challenging the department's use of a quota system).

The District Court failed to consider this independent and legally sufficient substantial legal interest. The Dumonts twice attempted to foster or adopt a child from STVCC and were turned away because of their sexual orientation. They are now "actively pursuing fostering and adopting . . . from the Michigan public child welfare system" and "want to have the full range of [agency] options available to [them]." Declaration of K. Dumont, R. 55-1, Page ID #1942; Declaration of

D. Dumont, R. 55-2, Page ID # 1946. If Plaintiffs obtain the relief they request in this Action, STVCC and other agencies will be permitted to discriminate against same-sex couples, subjecting the Dumonts to the stigma of discrimination and leaving them with fewer agency options than available to other families. The District Court's failure to consider this interest is reversible error.[2]

2. The Dumonts Have a Substantial Legal Interest in Protecting Their Contractual Rights Under the Settlement Agreement.

The Dumonts also have an interest in intervention to maintain the benefits of the Settlement Agreement. As demonstrated by the preliminary

[2] An STVCC employee stated that same-sex couples "certified through different agencies have been able to adopt children in St. Vincent's care in the past" through the Michigan Adoption Resource Exchange ("MARE"). Declaration of Snoeyink, R. 6-1, Page ID ## 235–36. *First*, Ms. Snoeyink's representation is contradicted by the Dumonts' testimony that STVCC told them, categorically, that it does not work with same-sex couples. At this stage, the Dumonts' testimony must be accepted. *Horrigan* v. *Thompson*, 1998 WL 246008, *2 (6th Cir. 1998) ("In determining whether intervention should be allowed, [the Court] must accept as true the non-conclusory allegations of the motion.") (internal quotation marks omitted). *Second*, even if the Dumonts could be licensed elsewhere and then adopt an STVCC child through MARE, permitting a state-contracted agency to impose a heightened requirement on same-sex couples—that they go elsewhere and adopt through MARE, rather than working directly with the child's STVCC caseworker—implicates a substantial legal interest. *Finally*, MARE offers services only for "children who are ***legally free for adoption*** without an identified adoptive family." Declaration of Hoover, R. 34-5, Page ID #1012 (emphasis added). Children who are in need of foster home placement but who are not legally free for adoption fall outside of the MARE program. Accordingly, even if it were true that same-sex couples could access STVCC children that are listed on MARE, same-sex couples still would not have access to all of the children in STVCC's care.

injunction entered by the District Court on September 26, *see* Order Granting Preliminary Injunction, R. 70, the relief sought by Plaintiffs directly impairs the Dumonts' contractual rights under the Settlement Agreement to compel the State to honor its non-discrimination commitments. For example, the Preliminary Injunction prevents the State from terminating or refusing to renew STVCC's contracts as STVCC continues to discriminate, whereas the Settlement Agreement requires the State to prohibit such discrimination. *Compare* Order Granting Preliminary Injunction, R. 70, Page ID # 2531 ("Unless and until the Court orders otherwise, Defendants Gordon, McCall, and Nessel, their agents, employees, and those acting in concert with them shall not terminate or suspend performance of their contracts with St. Vincent Catholic Charities, decline to renew those contracts, or take any adverse action against St. Vincent Catholic Charities based on St. Vincent's protected religious exercise"), *with Dumont* Stipulation and Settlement Agreement, R. 31-5, Page ID ## 722–23 ("The Department shall enforce the Non-Discrimination Provision . . . against a CPA that the Department determines is in violation of, or is unwilling to comply with, such provision[] . . . up to and including termination of the Contracts . . . .").

This Court has recognized that a proposed intervenor has a sufficient legal interest for intervention where the resolution of a litigation would directly impair her contractual rights. *See, e.g.*, *Linton*, 973 F.2d at 1319 (holding nursing

homes that had signed agreements with state had substantial legal interest to intervene in suit challenging State Medicaid policy where plaintiffs' relief would "impair[]" the nursing homes' "contractual" rights); *E.E.O.C.* v. *Amer. Tel. & Tel. Co.*, 506 F.2d 735, 741–42 (3d Cir. 1974) (holding union had "interest in the provisions of its collective bargaining agreements" with an employer warranting intervention in enforcement action brought by government against employer because union's "continuing ability to protect and enforce those contract provisions will be impaired or impeded" by relief sought by government agency). Indeed, it was on this basis that Plaintiffs in this Action were permitted to intervene in *Dumont*. *See Dumont* v. *Lyon*, 2018 WL 8807229, at *3 (E.D. Mich. Mar. 22, 2018) (permitting STVCC's intervention because *Dumont* "directly involves St. Vincent's ability to continue to use religious criteria when performing child welfare services for the State of Michigan").

The entry of the Preliminary Injunction, and any final relief if Plaintiffs were to prevail, directly prohibits the State from complying with its contractual obligation to ensure that MDHHS contractors abide by the non-discrimination provision of their CPA contracts, effectively gutting the Settlement Agreement and depriving the Dumonts of the full benefit of their bargain with the State. The District Court looked past this by instead concluding that the Dumonts did not have an interest in the Action because "Plaintiffs are not asking for any relief directed at the

Settlement Agreement itself . . . [and f]rom Plaintiffs' point of view, the Settlement Agreement is beside the point and irrelevant to the constitutional and statutory claims asserted," Order, R. 52, Page ID # 1865, and then promptly granted relief that directly impacts the Settlement Agreement. The distinction made by the District Court between "directly" challenging the Settlement Agreement and Plaintiffs now having obtained relief that effectively nullifies the State's obligations under the Settlement Agreement is truly a distinction without a difference. The State has committed to the Dumonts that it will enforce the non-discrimination requirement in CPA contracts, but the injunction orders the State to not do so. Far from being "beside the point and irrelevant to the constitutional and statutory claims asserted," Order, R. 52, Page ID # 1865, it is clear that this Action *is* about the State's implementation of the Settlement Agreement. Indeed, the case was filed 24 days after the Agreement was finalized and referenced by the *Dumont* Court in its dismissal order. The Dumonts therefore have a substantial legal interest in intervening in this case.

C. The Dumonts' Interests May Be Impaired Without Intervention.

Intervention as of right is further warranted because the Dumonts meet the "minimal" burden to show that "impairment of [their] substantial legal interest is possible if intervention is denied." *Miller*, 103 F.3d at 1247 (internal citation omitted). Specifically, the Dumonts' substantial legal interests in avoiding

discrimination and protecting their contractual rights under the Settlement Agreement has already been impaired without intervention because the preliminary injunctive relief granted by the District Court compels the State to allow discrimination against same-sex couples in direct conflict with the Dumonts' key contractual rights under the Settlement Agreement. In error, the District Court ignored the Dumonts' interest while granting relief that profoundly affects them.

The District Court also overlooked binding precedent in concluding that the Dumonts' interests would not be impaired. In *Jansen*, this Court held that "disposition of the present action without the proposed intervenors would indeed impair or impede their ability to protect their rights" because the resolution of the pending litigation could leave the defendant "with obligations to the proposed intervenors . . . that are inconsistent with its obligations to plaintiffs." 904 F.2d at 342. Likewise, here, adjudication of Plaintiffs' claims has already adversely impacted the Dumonts' ability to enforce the Settlement Agreement and resulted in inconsistent resolution of the constitutionality of the State-sanctioned discrimination at issue here. The Dumonts, already denied the opportunity to defend their rights as a party in District Court proceedings regarding the Preliminary Injunction, must be provided the opportunity to appeal the Preliminary Injunction and defend against any final order that impairs their rights.

D. No Other Party Adequately Represents the Dumonts' Interests.

After acknowledging that there *may* be some difference in the State Defendants' and the Dumonts' legal positions, the District Court incorrectly held that the State Defendants nonetheless adequately represent the Dumonts' interests. Order, R. 52, Page ID # 1865. The record makes clear that the District Court erred—no other party adequately represents the Dumonts' interests. Plaintiffs already have obtained preliminary injunctive relief compelling the State to allow STVCC to discriminate against same-sex couples like the Dumonts, and the State seeks to defend its policy on the basis that its non-discrimination policy does not violate Plaintiffs' First Amendment rights and is consistent with state law and federal regulations. The Dumonts not only want the State to maintain its current policy; they also contend that the State is prohibited by the U.S. Constitution from allowing state-contracted, taxpayer-funded CPAs to use religious eligibility criteria to exclude same-sex couples. In *Dumont*, the State opposed the Dumonts' efforts to prove their claims under the Establishment Clause and Equal Protection Clause, and vociferously argued against them.

In assessing the final prong under Rule 24(a)(2), this Court has explained that "proposed intervenors are 'not required to show that the representation will in fact be inadequate.'" *Grutter*, 188 F.3d at 400 (quoting *Miller*, 103 F.3d at 1247). Instead, a proposed intervenor need only show that representation

may be inadequate, including by showing "that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments." *Id*. The burden of showing inadequate representation "should be treated as minimal." *Trbovich* v. *United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972).

While the State seeks to defend its current policy, it has not argued that allowing state-contracted, taxpayer-funded CPAs to use religious criteria to exclude same-sex couples—the relief requested, and preliminarily obtained, by Plaintiffs—would violate the Establishment and Equal Protection Clauses.[3] In fact, when the Dumonts made these very arguments in *Dumont*, the State Defendants opposed them, moving to dismiss for failure to state a claim. Notwithstanding the current policy of the State, its institutional interest is to maximize the State's policymaking flexibility, which is structurally opposed to the Dumonts' interest in compelling the State to respect their constitutional rights. *See Grutter*, 188 F.3d at 401 ("[Minority students] . . . have presented legitimate and reasonable concerns about whether the [State] University will present particular defenses of the contested race-conscious admissions policies."); *see also Ne. Ohio Coal. For Homeless and Serv. Emp. Int'l Union, Local 1199* v. *Blackwell*, 467 F.3d 999, 1008 (6th Cir. 2006) (holding

[3] The Dumonts also intend to assert heightened equal protection scrutiny for discrimination against married same-sex couples, a position the State Defendants contested in *Dumont*.

Secretary of State could not adequately represent Attorney General in case challenging absentee ballot voter identification laws because "Secretary's primary interest is in ensuring the smooth administration of the election, while the State and General Assembly have an independent interest in defending the validity of Ohio laws and ensuring that those laws are enforced").

The District Court recognized that the interests of the State and the Dumonts *may* "diverge," and furthermore found that certain "defenses or counterclaims – Establishment Clause theories, for example" may be "uniquely available to the Dumonts." Order, R. 52, Page ID # 1865. Further, before the District Court was Proposed Intervenor Defendants' Proposed Answer, which included the specific constitutional defenses the Court made reference to, Proposed Answer, R. 18-1, Page ID ## 448–49, as well as the State's Response to Plaintiffs' Preliminary Injunction, R. 34, which did *not* assert those same defenses. By identifying the "possibil[ity]" for a "diverge[nce]" of interest, as well as the fact that the State cannot make all of the Dumonts' "unique[]" arguments, the Order effectively recites this Court's standard for inadequate representation, showing the motion for intervention should have been granted. But the District Court ruled that the Dumonts were adequately represented by the State because "[a]t this point the proposed intervenors and the State Defendants are aligned in all material respects." Order, R. 52, Page ID # 1865.

The District Court's finding that the interests of the Dumonts and the State are materially aligned is incorrect. Although both seek to defend the State's policy, the Dumonts seek to do so because the State is constitutionally barred from allowing the use of religious eligibility criteria or discrimination against same-sex couples in its public child welfare system, whereas the State has merely argued that the Constitution does not require it to permit discrimination. Moreover, the District Court erred as a matter of law in focusing on "where the case presently is," *id.*, as this Court has made clear that "proposed intervenors are 'not required to show that the representation will in fact be inadequate'" but rather "need show only that there is a *potential* for inadequate representation." *Grutter*, 188 F.3d at 400 (internal citation omitted) (emphasis in original); *see also C.M.* v. *G.M.*, 2000 WL 1721041, at *3 (6th Cir. Nov. 8, 2000) ("[Proposed intervenor] has shown a potential for inadequate representation of his interests by [the State].").

Again, the Preliminary Injunction itself demonstrates the error in denying intervention. Not once in the 32-page Opinion granting preliminary injunctive relief allowing Plaintiffs to discriminate did the District Court mention Proposed Intervenor Defendants or their Establishment and Equal Protection arguments, which should have resulted in a denial of preliminary injunctive relief.[4]

[4] Indeed, the District Court also failed to acknowledge or consider directly on-point factual and expert evidence that the Dumonts submitted in a brief *amici curiae* after their intervention motion was denied, presumably because the court did not

II. The District Court Abused Its Discretion in Denying Permissive Intervention.

Under Rule 24(b) of the Federal Rules of Civil Procedure, "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" after considering "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." *League of Women Voters of Mich.* v. *Johnson*, 902 F.3d 572, 577 (6th Cir. 2018) (quoting Fed. R. Civ. P. 24(b)). Although permissive intervention is discretionary, the district court "must, except where the basis for the decision is obvious in light of the record, provide enough of an explanation for its decision to enable this court to conduct meaningful review." *Miller*, 103 F.3d at 1248.

The District Court should have, at a minimum, granted permissive intervention because the Proposed Intervenor Defendants' timely Motion identified

allow the Dumonts to participate as parties. *Compare* Opinion Granting Preliminary Injunction, R. 69, Page ID # 2519 ("[T]here is nothing in the record that supports a finding that the power of CPAs to decline referrals [*i.e.*, to turn away prospective parents] limits the pool of applicants."), *with* Expert Report of David M. Brodzinsky, Ph.D., R 62-1, Page ID # 2229 ("Permitting State-contracted agencies to turn away same-sex couples can reduce family placement options for children in the child welfare system, thereby undermining their long-term well-being.") *and* Declaration of Sander, R. 62-2, Page ID # 2273, ¶ 17 ("I recall an LGBTQ prospective family who reached out to [an agency] . . . . [It] refused to work with them. The family was so discouraged that they decided not to call another agency."). The Dumonts' provision of this essential evidence, and the District Court's failure to address it, further illustrates that the Dumonts can only adequately represent their interests if they are parties.

numerous questions of law and fact in common between the Proposed Intervenor Defendants' defenses and Plaintiffs' claims. *See id.* (holding movants seeking to defend state law shared "question of law or fact in common" with existing parties seeking to invalidate state law). The common questions of law and fact included 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. Brief in Support of Motion, R. 19, at Page ID ## 468–69.

The Motion also explained that, given the Action remains in the very early stages, granting the Proposed Intervenor Defendants' Motion would not result in undue delay or prejudice to the existing parties. *Id.* at Page ID # 469. The Proposed Intervenor Defendants' proposed answer does not bring new claims but rather seeks to defend their constitutional rights using legal arguments that the State is unable or unwilling to make. And while the original parties have twice sought and received extensions of deadlines before the District Court below, Proposed Intervenor Defendants have timely met all deadlines.

Rule 24 of the Federal Rules of Civil Procedure provides that the court "shall consider" whether intervention would lead to undue delay or prejudice, and this Court has held that a district court must "provide enough of an explanation for its decision to enable this court to conduct meaningful review" and that "[i]t is

insufficient merely to quote the rule and to state the result." *Miller*, 103 F.3d at 1248. Here, the District Court failed to consider these factors, which alone is sufficient to demonstrate an abuse of discretion. More specifically, the District Court did not even quote the rule or identify the relevant factors before summarily denying permissive intervention. Order, R. 52, Page ID #1865. The District Court's "sparse reasoning for denying the [movants'] application for permissive intervention" should lead this Court "to conclude that the district court abused its discretion in denying the motion." *Liberte Cap. Grp., LLC* v. *Capwill*, 126 Fed. Appx. 214, 220 (6th Cir. 2005); *see also Miller*, 103 F.3d at 1248 ("The existence of a zone of discretion does not mean that the whim of the district court governs.").

CONCLUSION

For the foregoing reasons, the order of the District Court should be reversed and the Dumonts should be granted intervention as of right or, in the alternative, permissive intervention.

Dated: October 16, 2019

Respectfully submitted,

s/ Garrard R. Beeney

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I hereby certify that on October 16, 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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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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