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

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 19-1959 Case Name: Buck, et al. v. Gordon, et al.

Name of counsel: Lori H. Windham

Pursuant to 6th Cir. R. 26.1, Melissa Buck, Chad Buck, Shamber Flore, St. Vincent Catholic Charities
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on November 21, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Lori H. Windham

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiffs-Appellees respectfully requests oral argument under Federal Rule of Appellate Procedure 34. Oral argument would allow Plaintiffs-Appellees to clarify their briefing, emphasize important arguments, and resolve any confusion.

STATEMENT OF ISSUES

1. Did the district court correctly deny the Dumonts intervention under Federal Rule of Civil Procedure 24(a) in a case where they bring no claims, face no liability, have no legal interest, and are adequately represented by the State of Michigan, with whom they share an identical ultimate objective?
2. Did the district court abuse its discretion by denying the Dumonts intervention under Federal Rule of Civil Procedure 24(b) in a case where they have no common claims or defenses, are adequately represented by the State of Michigan, and are participating as *amici*?

INTRODUCTION

The Dumonts seek to intervene in a case in which they make no claims, face no liability, and seek relief admittedly identical to that sought by an existing party. Such a theoretical, tangential, and "ideological interest in the litigation" cannot justify intervention. *See Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 345 (6th Cir. 2007).

For decades, Michigan had permitted religious adoption agencies to refer same-sex couples to other agencies. This understanding was codified in 2015 when the Michigan legislature passed laws specifically designed to protect faith-based agencies like St. Vincent Catholic Charities. But, earlier this year, Michigan announced a change in policy that would require religious adoption agencies to endorse and certify same-sex couples, or close their doors. St. Vincent is challenging the State's new policy as unconstitutional.

The Dumonts lack any interest, much less the required "direct and substantial" legal interest, in this dispute between Michigan and St. Vincent. The Dumonts face no practical barrier to foster care or adoption. As the district court found, the Dumonts can adopt the same

children as every other couple in the state—even children in St. Vincent's care. Indeed, the Dumonts are even able to partner with Bethany Christian, one of only two agencies they contacted about adoption (after speaking with the ACLU) in the summer of 2016. Yet in the over three years since, the Dumonts have not fostered or adopted a child, insisting only that they want to keep their options open. The Dumonts also fail to explain how their alleged interest in upholding Michigan's new policy differs from that of anyone else who might share their views on the policy. Without more, this interest is neither direct nor substantial, and is at best a generalized grievance insufficient for intervention.

Nor is the Dumonts' alleged interest in protecting their prior settlement agreement sufficient to intervene. As the district court found, St. Vincent is seeking relief under the Constitution, not relief directed at the settlement. The Dumonts—by trading in a court case for a private settlement that expressly carved out the possibility it could be limited by laws or court orders—have received the benefit of their bargain with Michigan. They cannot use that private contract to bootstrap themselves into every future dispute concerning Michigan's foster care and adoption policies. What the Dumonts really want (as shown by, among other

things, their attempt to intervene in a similar lawsuit in a completely different city) is to act as private attorneys general, intervening in any lawsuit they please. But this Court has repeatedly rejected such tangential interests.

Moreover, the Dumonts have failed to show that the State is not adequately representing whatever interest they might have. In fact, the Dumonts *concede* that they share Michigan's ultimate goal in the lawsuit: upholding the challenged policy. Under Sixth Circuit case law, this creates a presumption that the State adequately represents the Dumonts' interests, a presumption that the Dumonts do not even acknowledge, much less overcome. For this reason alone, intervention should be denied.

Finally, the district court did not abuse its discretion in denying permissive intervention. Quite the opposite: permissive intervention is inappropriate because the Dumonts do not assert any claims nor do they raise any defenses relevant to them—instead, they simply reassert *Michigan's* own defenses.

STATEMENT OF THE CASE

A. Michigan's foster care and adoption system

Michigan has a chronic shortage of foster and adoptive homes. Op., R. 69, Page ID # 2501. There are "approximately 13,000 children in foster care, about 2,000 of whom have a permanency goal of adoption." Aff., R. 34-3, Page ID # 972. Because Michigan cannot meet this need on its own, it holds 137 contracts with 57 child placing agencies to provide foster care and adoption services. Op., R. 69, Page ID # 2501. St. Vincent is one of these agencies. As Michigan has recognized, "[h]aving as many possible qualified adoption and foster parent agencies in this state is a substantial benefit to the children of this state." Mich. Comp. Laws § 722.124e(1)(c). But an agency may only oversee foster care placements and facilitate adoptions for foster children if it obtains a license from and signs a contract with the Michigan Department of Health and Human Services ("MDHHS"). Op., R. 69, Page ID ## 2523, 2526.

Parents, too, must be licensed by MDHHS. To become a foster parent, or adopt a child from foster care, a couple must obtain a license from the State. *Id.* at Page ID # 2502. Private agencies recommend families to Michigan for licensing by performing a home study of the prospective

parents which includes a "written assessment and a recommendation" from the agency. *Id*. Among the criteria considered are the "strengths and weaknesses" of the parents, their marital status, "past level of family functioning," and the "level of satisfaction" in their relationship. *Id.*[1]

B. St. Vincent's religious ministry has seen seven decades of success

St. Vincent is one of the oldest and most effective adoption agencies in Michigan. Decl., R. 6-1, Page ID # 228. St. Vincent has served children and families for over seventy years. *Id* at Page ID # 229. As a nonprofit, faith-based organization, St. Vincent's mission is "to share the love of Christ by performing the corporal and spiritual works of mercy." *Id*. Today, St. Vincent provides a range of charitable services, including foster care and adoption. *Id*.

Faith-based agencies, like St. Vincent, are particularly effective at recruiting families that might otherwise not foster or adopt. *See* Decl.,

[1] St. Vincent uses private funds to cover the costs of home studies and recruiting, which are paid through a separate cost center. Decl., R. 6-1, Page ID ## 233-234; Ex., R. 6-8; Ex., R. 6-9. Last fiscal year, St. Vincent's foster and adoption programs operated at a significant loss based on the state funding alone, and these programs would not have been able to operate without St. Vincent's private subsidies. Decl., R. 6-1, Page ID # 237.

R. 6-2, Page ID ## 262-263. Michigan has recognized that "faith congregations have been extremely valuable partners" and "have helped us recruit loving foster and adoptive families by networking in their local communities and with other faith congregations." Ex., R. 6-5, Page ID # 281. And the State has noted that "the local faith congregations that recruit and support foster families are [] vitally important to finding loving homes for vulnerable children." *Id* at Page ID # 283.

The numbers bear this out. Between November 2017 and April 2019, St. Vincent has recruited more new foster families than all other private agencies in the tri-county foster area combined. Decl., R. 6-1, Page ID # 228. And in the last four fiscal years, St. Vincent has served an average of 74 foster children annually and finalized over 100 adoptions. *Id.* But St. Vincent's impact is about more than numbers. The record evidence demonstrates its effectiveness in serving families. Two stories illustrate these facts.

1. Melissa and Chad Buck[2]

Melissa and Chad Buck are a testament to St. Vincent's ministry. Melissa and Chad Buck envisioned having a small family with one or two children. Decl., R. 6-2, Page ID # 262. However, after years of heartbreaking infertility, the Bucks decided to adopt. *Id*. The Bucks now have five beautiful children with a range of special needs. *Id*. at Page ID # 263. Most of their children also suffered severe trauma and physical abuse before they entered foster care. *Id*.

The Bucks' adoptions involved a heart-wrenching and difficult process that would not have been possible without the services St. Vincent lovingly provided. *Id*. This included St. Vincent acting as a trusted intermediary with hostile birth parents, being available at all hours to provide emotional support, and accompanying the Bucks to countless medical appointments. *Id*. The Bucks are not aware of any other agency that goes to these lengths. *Id*.

[2] Melissa Buck, Chad Buck, and Shamber Flore are plaintiffs in this action. The district court granted the State's Motion to Dismiss on standing grounds with regard to these three plaintiffs. This decision is not immediately appealable.

2. Shamber Flore

Shamber Flore was removed from her birth home at the age of five after years of abuse, poverty, and neglect, all while being exposed to drugs, gangs, and prostitution. Decl., R. 6-3, Page ID # 272. But when St. Vincent placed Shamber and her two siblings with their new adoptive family—the Flores—Shamber was able to begin healing. *Id.*

Today, Shamber is a vibrant young woman who loves her family and mentors others at St. Vincent who have dealt with trauma and abuse. *Id.* at Page ID ## 272-273. Shamber would not have found the Flores without St. Vincent's work. *Id.* at Page ID # 272. After a negative experience with a state adoption agency, Shamber's adoptive parents would not have continued the adoption process had they not found a trusted partner and ally in St. Vincent. *Id.*

3. St. Vincent's beliefs

St. Vincent does not expect prospective families to share its faith and does not proselytize. Decl., R. 6-1, Page ID ## 231-232. And St. Vincent happily serves both LGBTQ individuals and children. Op., R. 69, Page ID # 2517. For example, St. Vincent regularly serves LGBTQ foster children in both its foster program and its group home, and St. Vincent

welcomes same-sex couples to attend its parent support group, the only such group anywhere in the tri-county area. *Id.*; Decl., R. 6-2, Page ID # 265. However, as a Catholic organization, St. Vincent cannot provide a written recommendation to the State endorsing an adult relationship that conflicts with St. Vincent's sincere religious beliefs. Op., R. 69, Page ID # 2517.

If an unmarried or same-sex couple seeks St. Vincent's endorsement, St. Vincent—consistent with State law—refers the couple to other agencies who can better help them. Decl., R. 6-1, Page ID # 235. The State has long known of St. Vincent's religious beliefs and practices. In fact, in 2015, St. Vincent's executive director testified before the Michigan legislature regarding the need for legal protection for faith-based adoption agencies. *Id.* at Page ID # 238. As the district court found, the status quo at this time was "a carefully balanced and established practice that ensure[d] non-discrimination in child placements while still accommodating traditional Catholic religious beliefs on marriage." R. 69 at Page ID # 2519.

C. Agencies can and do provide referrals all the time

Agencies sometimes refer prospective parents to another agency or to MDHHS so that they can find an agency that better meets their needs. Decl., R. 6-1, Page ID # 238. As MDHHS Children's Services Executive Director Steve Yager explained: "We create through contracts a vast array of providers to meet the very diverse needs of the children and families we serve." Ex., R. 6-7, Page ID # 288. Michigan adoption agencies have always been able to refer families to other agencies or MDHHS. A referral could happen because: (i) the family lives too far away, (ii) the agency has too many applicants, (iii) the agency does not specialize in medical or behavioral health issues, or (iv) the family is looking to adopt a child with needs or characteristics that the agency does not have the ability to support. Decl., R. 6-1, Page ID # 238.

Additionally, some agencies have specialized missions. For example, some specialize in placing children with Native American families,[3]

[3] Sault Ste. Marie Tribe of Chippewa Indians, *Child Placement,* https://perma.cc/X7JU-FJLM ("The Sault Tribe Binogii Placement Agency is our tribal child placement agency. The agency is licensed by the state of Michigan . . . The agency services children who are enrolled or eligible for enrollment as Sault Ste. Marie Tribe of Chippewa Indians members and Sault Tribe households.").

finding homes for African American children,[4] or serving children with developmental disabilities.[5] And faith-based agencies have long referred families elsewhere when they cannot provide written recommendations for a family consistent with their religious beliefs.

D. Michigan law protects religious agencies

Michigan passed the 2015 Laws to protect the status quo by "[e]nsuring that faith-based child placing agencies can continue to provide adoption and foster care services" consistent with their religious beliefs. Mich. Comp. Laws § 722.124e(1)(g). Accordingly, Michigan determined that "[p]rivate child placing agencies, including faith-based child placing agencies, have the right to free exercise of religion," which "includes the freedom to abstain from conduct that conflicts with an agency's sincerely held religious beliefs." *Id.* at § 722.124e(1)(e). Michigan also confirmed that "a private child placing agency does not receive public

[4] AdoptUSKids, *Minority Specializing Agency and Resource Directory*, 4 https://perma.cc/C62C-HT52 (discussing how Homes for Black Children focused on the "adoptive placement of black children"). Homes for Black Children has since closed for reasons unrelated to this case.

[5] Wayne Center, *Foster Parenting*, https://perma.cc/2WZT-CRYK (the agency is specifically "seeking foster parents with previous experience with persons who have a developmental disability and/or expertise in related areas").

funding with respect to a particular child or particular individuals referred by the department unless that agency affirmatively accepts the referral." *Id.* at § 722.124e(1)(h).

The law also requires faith-based agencies unable to serve a particular family for a religious reason to provide "information advising the applicant of the department's website . . . and a list of adoption or foster care service providers with contact information." *Id.* at § 722.124e(4). This law simply reaffirmed the practices already in place at faith-based agencies. If an agency complies with these requirements, as St. Vincent does, "the state or a local unit of government shall not take an adverse action against a child placing agency" based on their decision to decline to provide the requested services. *Id.* at § 722.124e(3).

MDHHS was well aware of these agency practices, including St. Vincent's practices. In order to comply with the state law, MDHHS updated its forms and contract documents to provide additional clarity. Ex., R. 6-14, Page ID # 372. MDHHS staff, some of whom were personally opposed to the law, nevertheless expressed their views that they could not penalize agencies, nor decline to contract with agencies, because those agencies referred same-sex and unmarried couples elsewhere. Ex.,

R. 6-15, Page ID # 376 ("Certainly, 2015 PA 53 permits a child placing agency to decline to provide foster care case management or adoption services, but only under specific circumstances plainly expressed in the act.").

Michigan even enforced this law by requiring agencies to follow the 2015 Laws, including directing a Catholic agency to adopt a program statement that it "serve[s] children and families through the placement and adoption of children with . . . married couples made up of two parents of the opposite sex." Ex., R. 59-1, Page ID # 1967. Michigan defended its actions in federal court, arguing that the law required it to continue working with religious agencies like St. Vincent. *See, e.g.,* Answer at Page ID # 1189, *Dumont v. Lyon*, 2:17-cv-13080, (E.D. Mich. Dec. 15, 2017), ECF No. 52.

E. The ACLU solicits the Dumonts to target religious agencies

Shortly after the 2015 Laws passed, the ACLU of Michigan began "more than two years of work" to file a lawsuit to challenge the laws. Ex., R. 37-9, Page ID # 1450. On March 21, 2016, a Facebook group for a local LGBTQ community posted a message explaining that "[t]he ACLU of Michigan is planning to challenge a state law that authorizes adoption

and foster care agencies to discriminate against prospective parents based on religious criteria," and that "[t]he ACLU would very much like to speak confidentially with same-sex couples who are considering adopting children from the foster care system now or in the future." Ex., R. 37-3. As a result, the Dumonts began communicating with the ACLU. Ex., R. 37-4, Page ID # 1433.

Roughly two months later, the Dumonts reached out to two—and only two—adoption agencies: St. Vincent and Bethany Christian Services. *Id.* at Page ID # 1430. Both agencies had been publicly associated with the passage of the 2015 Laws, with agency personnel testifying at legislative hearings.[6] The Dumonts admitted that they had not contacted a single adoption agency before they spoke with the ACLU, and they did not attempt to contact any other adoption agencies after their outreach to Bethany Christian Services and St. Vincent. *See id.*; Ex., R. 37-10, Page ID ## 1453-1454. When asked under oath why they had not pursued adoption with other agencies, the Dumonts stated "they have not begun the adoption process with another agency because through this litigation

[6] *See, e.g.,* Minutes, *House Standing Committee on Families, Children, and Seniors*, Michigan House of Representatives (Feb. 18, 2015), https://perma.cc/5YEQ-TWYD.

they seek to better understand the full scope of their constitutional rights and the options available to them with respect to fostering and/or adopting in Michigan." Ex., R. 37-10, Page ID ## 1453-1454.

The Dumonts also put the ACLU in touch with another couple, the Busk-Suttons, who were plaintiffs in the earlier litigation, but have not sought to intervene here. Ex., R. 37-4, Page ID # 1433. After speaking with the Dumonts, the Busk-Suttons only reached out to two Bethany Christian Services offices. *Id.* at Page ID # 1431. Privately, the Busk-Suttons admitted in January 2017 that "[w]e've considered [adoption], but between our concerns about same sex marriage under a Trump administration and the continuing renovations, this year isn't the year." Ex., R. 37-5, Page ID # 1436. They further admitted that they "[we]ren't in a huge rush to adopt" and "could probably go to another agency." Ex., R. 37-6, Page ID # 1438.

The Dumonts and Busk-Suttons then sued Michigan, seeking to force religious adoption agencies to directly certify same-sex couples. Compl., *Dumont*, 2:17-cv-13080 (E.D. Mich. Sept. 20, 2017), ECF No. 1. St. Vincent, together with the Bucks and Shamber Flore, intervened in that case. Orders, *Dumont*, 2:17-cv-13080 (E.D. Mich. Mar. 5, 2018), ECF

No. 31, 34. The *Dumont* plaintiffs asserted no claims against St. Vincent or any other adoption agency. *See* Compl., *Dumont*, 2:17-cv-13080 (E.D. Mich. Mar. 5, 2018), ECF No. 1. Initially, the State defended its decision to partner with St. Vincent, stating that "some child-placing agencies have a sincerely held religious belief that prevents them from licensing or adopting to same-sex couples, which is protected by [the 2015 Laws]." Answer, *Dumont*, 17-cv-13080, (E.D. Mich. Sept. 28, 2018), ECF No. 52.

F. Michigan changes course and targets St. Vincent

On January 1, 2019, Defendant Attorney General Nessel took office. During her campaign, Nessel stated that there was "no viable defense" for the 2015 Laws and that their "only purpose [was] discriminatory animus." Op., R. 69, Page ID # 2510. She also made clear that, if elected, she would not defend the 2015 Laws—while calling anyone who *did* defend these laws "hate mongers". *Id.*

After taking office, Attorney General Nessel fired the outside counsel who had defended the 2015 Laws and, rather than recuse herself, entered into settlement discussions with the *Dumont* plaintiffs.[7] On March 22,

[7] Beth LeBlanc, *Nessel plans settlement talks in lawsuit targeting same-sex adoption refusals*, The Detroit News (Jan. 24, 2019), https://perma.cc/7RBW-Q377.

2019, the *Dumont* plaintiffs voluntarily dismissed the case with prejudice. Stipulation, *Dumont*, 2:17-cv-13080 (E.D. Mich. Mar. 22, 2019), ECF No. 82. They did so pursuant to a private settlement agreement with the State. In their agreement, Michigan agreed to require religious adoption agencies to endorse same-sex couples; so long as such requirements were not "prohibited by law or court order." *Id.*

Shortly thereafter, the State of Michigan issued a memorandum to all adoption agencies requiring them to directly certify same-sex couples. Ex., R. 37-7. The State denied that the *Dumont* settlement had caused this shift in policy, but instead argued that this had been its policy all along, and that this policy was necessary to comply with federal regulations from 2016. Ex., R. 37-8; Br., R. 34, Page ID # 925 ("The Department has always enforced an agency contract's non-discrimination clause; the *Dumont* settlement did not result in a 'new' policy. It merely reaffirmed the Department's long-standing practice.").

PROCEDURAL HISTORY

In April 2019, St. Vincent filed suit challenging Michigan's new policy. Compl., R. 1. The Dumonts then moved to intervene. Mot., R. 18. The Dumonts have also sought to intervene in a separate action brought

by Catholic Charities of West Michigan, an agency they never contacted and which is located in Grand Rapids, over 70 miles away from Lansing. *See* Mot. to Intervene, *Catholic Charities of W. Mich. v. MDHHS*, 2:19-cv-11661 (E.D. Mich. July 17, 2019), ECF No. 20.[8]

Here, the district court denied the Dumonts' motion, concluding that they lacked a substantial interest in the case and, in any event, Michigan would adequately represent their position. Order, R. 52, Page ID ## 1864-1866. As the district court explained, proposed intervenors "rest their claim for intervention . . . on their interest in maintaining the Settlement Agreement." *Id.* at Page ID # 1865. But the district court concluded that St. Vincent did not seek to invalidate or interpret the settlement, explaining that the settlement was "beside the point and irrelevant" to St. Vincent's claims. *Id.*

Further, the Court found that Michigan was "fully capable of protecting" any alleged interest the Dumonts might have, and that "State Defendants and the Dumonts are fundamentally aligned at this time[.]" *Id.* Accordingly, the Court found that the "contribution of the Dumonts c[ould] be fully provided through their participation as amicus parties,

[8] That motion is still pending.

which the Court welcome[d]." *Id.* The Dumonts took that opportunity, filing an amicus brief with the district court and even participating in oral argument on Plaintiffs' preliminary injunction motion. Amicus Br. R. 62; Tr., R. 64. The Court, however, left open the possibility for "later developments in the case" to arise such that intervention might be warranted, specifically giving the Dumonts permission to renew their intervention motion at that time. Order, R. 52 at Page ID ## 1865-1866.

* * *

On September 26, 2019, the district court issued a preliminary injunction preventing Michigan from taking action against St. Vincent based on its sincere religious beliefs. The court's order maintained the *status quo* by allowing St. Vincent to continue serving children and barring the State from taking action against St. Vincent based on its sincere religious beliefs. Op., R. 69, Page ID # 2529.

The State has now appealed the district court's preliminary injunction and asked this Court to stay the injunction pending appeal. *Buck v. Gordon*, No. 19-2185 (6th Cir. filed Oct. 15, 2019). On November 19, this Court denied the State's stay request, determining that the district courts preliminary injunction would "preserve the status quo and ensure

that St. Vincent may continue to operate as it has for the past seventy years." Order at 2, *Buck*, No. 19-2185 (6th Cir. Nov. 19, 2019), ECF No. 29-2.

The Dumonts, who failed to file a protective notice of appeal in district court, also sought to intervene in that appeal. This Court has yet to decide that motion.

The Dumonts now appeal the district court's intervention denial.

SUMMARY OF THE ARGUMENT

The Dumonts lack a direct and substantial interest in this litigation. The Dumonts first claim an "interest in maintaining a policy that ensures access to participation in a government program." Appellants' Br. 17. But the district court found that the Dumonts face no practical barriers to adoption, and the Dumonts *admit* that their remaining interest is in helping support a government policy they favor—an interest not direct and substantial enough to warrant intervention. Next, the Dumonts claim an interest in "maintain[ing] the benefits of the Settlement Agreement." Appellants' Br. 18. But, as the district court found, St. Vincent is seeking relief under the Constitution, not relief directed at the settlement agreement.

And even if the Dumonts had an interest, Michigan seeks the same result, making it a presumptively adequate representative. The Dumonts do not even acknowledge, much less rebut, this presumption. Nor can the Dumonts permissively intervene: They do not assert any claims and have no relevant defenses; they simply reassert *Michigan's* defenses. And, in any event, the Dumonts' participation in this case as amici is a more than adequate substitute to intervention.

ARGUMENT

I. The Dumonts are not entitled to intervention as of right

To intervene as of right under Rule 24(a)(2), the Dumonts have to show that: (i) their intervention motion was timely, (ii) they had a substantial legal interest in the case, (iii) their ability to protect that interest might be impaired absent intervention, and (iv) the existing parties would not adequately represent their interests. *Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 779 (6th Cir. 2007). The failure to satisfy any one prong is fatal. *Id.* at 780. Except for timeliness, this Court reviews the district court's decision *de novo*. *Id.* at 779.

The Dumonts' intervention motion was timely. However, the Dumonts fail to satisfy the remaining intervention requirements.

A. The Dumonts lack a substantial legal interest in this case.

To intervene as of right, a movant must show "a direct, significant legally protectable interest," *United States v. Detroit International Bridge Co.*, 7 F.3d 497, 501 (6th Cir. 1993) (citation omitted), in the subject matter of the litigation, sufficient "to make it a 'real party in interest,'" *Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 317 (6th Cir. 2005) (citation omitted). Private individuals and groups—even those that were instrumental in changing government laws and policies—do not have a substantial legal interest in intervening when those laws are either enforced or challenged. *Cox*, 487 F.3d at 346 ("STTOP's interest in this case simply pertains to the enforceability of the statute in general, which we do not believe to be cognizable as a substantial legal interest sufficient to require intervention as of right."); *Granholm*, 501 F.3d at 779 (same); *Providence Baptist*, 425 F.3d at 317 (same).

i. The Dumonts do not have a substantial legal interest in defending Michigan's policies

The Dumonts argue that they have the right to intervene "based on [their] interest in maintaining a policy that ensures access to participation in a government program." Appellants' Br. at 17. But this

is not an interest that supports intervention. First, the Dumonts would not lose access to Michigan's child welfare system regardless of the outcome of this litigation. Second, the Dumonts have not even alleged a desire to actually work with St. Vincent—making their interest in this lawsuit even more tangential and hypothetical. Third, as a matter of law, the Dumonts' abstract interest in maintaining a policy they agree with does not support intervention—and the slim case law they cite does not suggest otherwise.

First, the Dumonts do not face any practical barriers to adopting children from Michigan's child welfare system—accordingly, no matter what happens in this lawsuit, the Dumonts will still have access to Michigan's foster care and adoption system. As the district court found, "St. Vincent does not prevent any couples, same-sex or otherwise, from fostering or adopting." Op., R. 69, Page ID # 2504. Through the Michigan Adoption Resource Exchange (MARE), the Dumonts can even adopt children in St. Vincent's care. *Id.* Thus, the Dumonts may use the same public adoption system, and adopt the same children, as everyone else. They have thus failed to explain how intervening in this lawsuit is necessary to protect their alleged interest.

The Dumonts' remaining arguments on this point confuse how the child welfare system works. For foster children, MDHHS works with multiple agencies to find a match as quickly as possible. Decl., R. 6-1, Page ID ## 234-235. And foster children who are not on MARE are either not legally free for adoption or have already been placed with a foster family (such as with a relative) who wants to adopt them. Ex., R. 42-4, Page ID # 1663.[9]

The Dumonts similarly suggest that, if St. Vincent wins, they will be unable to access all adoption agencies. Appellants' Br. 17. But this theoretical and highly speculative interest relies on a counterfactual: *No couple* has access to every private child placing agency—some are located too far away, some do not provide the specific services a couple might need, some might have a long waiting list, and some specialize in serving specific populations. *Supra* 10-11 Decl., R. 6-1, Page ID # 238. Moreover, the Dumonts' inability to access every adoption agency in no way affects

[9] The Dumonts alleged that they would like to adopt "a child in foster care who may have difficulty finding a family." And the Busk-Suttons alleged a desire to adopt "an older child or LGBT young person who may have difficulty finding a supportive family." Compl. at 16-17, *Dumont*, 2:17-cv-13080 (E.D. Mich. Sept. 20, 2017), ECF No. 1. These are *precisely* the children that are available on MARE—older children who don't have an identified home and are in desperate need of a loving family.

their ability to access every *child*. The Dumonts may adopt any child currently available for adoption, just like any other couple. Op., R. 69, Page ID # 2504.

What is more, the Dumonts are not seeking to fill out applications with every private child placing agency in the State—indeed, as explained below, the Dumonts do not allege a desire to work with St. Vincent. Their interest is therefore purely theoretical. Nor is this alleged interest unique to the Dumonts—were this interest sufficient to justify intervention, it would allow *any* LGBTQ or unmarried couple, anywhere in the state, to intervene in this dispute. Such theoretical and counterfactual assertions do not constitute a direct and substantial legal interest in this litigation.

Second, the Dumonts' alleged general desire to foster or adopt does not support intervention in this case. The Dumonts have not once in this litigation claimed that they would like to foster or adopt a child by working directly with St. Vincent. In their motion to intervene, the Dumonts did not allege any desire to work with St. Vincent, claiming only a generic desire to adopt or foster a child in the Michigan child welfare system. *See* Mot. to Intervene at 10, *Buck*, No. 19-2185 (6th Cir. Oct. 28, 2019), ECF No. 15. Likely recognizing this deficiency, the Dumonts

attempted to attach declarations to their intervention reply brief, but the district court rejected these (along with their impermissible reply). Order, R. 41. Thus, on appeal of the Dumonts' motion to intervene, there is nothing in the record below regarding whether they desire to work with St. Vincent.[10]

Nor does the Dumonts' appellate brief argue otherwise. The Dumonts claim only a desire to adopt "from the Michigan public child welfare system," something they can do right now. Appellants' Br. at 9. *See also* Mot. to Intervene at 10, *Buck*, No. 19-2185 (6th Cir. Oct. 28, 2019), ECF No. 15 (noting only that St. Vincent is caring for children in need "at the same time" the Dumonts may be pursuing adoption from the Michigan public child welfare system). They also claim that St. Vincent might "turn away same-sex couples *like* the Dumonts"—but fail to explain why this

[10] The Dumonts, undeterred, attached the same declarations to their motion for reconsideration, which was also denied. Order, R. 58. But even were this Court to consider the declarations on their merits, the Dumonts still fail to allege a desire to work with St. Vincent. All they claim is that they might have considered contacting St. Vincent, but did not do so. Decl., R. 55-1, Page ID # 1942. Contacting St. Vincent to ask about their policies is not the same as having an actual desire to partner with this agency—something the Dumonts have completely failed to do.

gives the Dumonts themselves an interest in this litigation. Appellants' Br. at 11.

But even had the Dumonts alleged such an interest, the undisputed facts would belie this claim. The Dumonts have failed to foster or adopt in the three years since they first contacted St. Vincent and Bethany. After first reaching out to Bethany and St. Vincent in the summer of 2016, the Dumonts have put forward no evidence suggesting that they have applied to any other agencies or that they have started working with Bethany Christian.[11] *Supra* 13-16; Ex., R. 37-10, Page ID # 1454; R. 55-1, Page ID # 1941.

The failure alone, even putting aside the remaining arguments against intervention, dooms the Dumonts' appeal—they do not have a direct and substantial interest in the precise scenario at issue: Whether St. Vincent can continue serving kids in need consistent with its sincere religious beliefs. The answer to this question will have no practical impact on the Dumonts. As discussed further below, these facts lie in

[11] Facing pressure from the State to either close or conform, Bethany Christian changed its policy and started providing home studies for same-sex couples. Beth LeBlanc, *Bethany Christian Services changes same-sex foster care, adoption policy*, The Detroit News (Apr. 22, 2019), https://perma.cc/PU77-CK9V.

sharp contrast to *Jansen* and *Grutter*, in which the intervenors would have suffered lost promotional opportunities and the loss of educational opportunities, respectively, if they were denied intervention. The Dumonts do not and cannot allege a similar practical, tangible harm that would result from denial of intervention.

Third, the Dumonts' "interest in maintaining a policy" is, at best, a generalized grievance that does not permit intervention in this lawsuit. Appellants' Br. 17. The Dumonts' desire to defend Michigan's unconstitutional policy is a desire they may share with numerous other members of the general public. This is because, as explained above, the Dumonts are not uniquely affected by Michigan's new policy. Nor can the Dumonts' involvement in the policy's adoption change that.

As this Court held in *Granholm*, even the organization that pushed to get the challenged law passed did not have a substantial legal interest sufficient to allow it to intervene when that law was challenged on its merits. 501 F.3d at 782 ("ACRF's status as organizations involved in the process leading to the adoption of Proposal 2 is insufficient to provide them with a substantial legal interest in a lawsuit challenging the validity of those portions of Michigan's constitution amended by

Proposal 2."). Instead, this Court explained that ACRF's desire to defend the law it helped pass "amounts to only a generic interest shared by the entire Michigan citizenry. An interest so generalized will not support a claim for intervention as of right." *Id.* (internal quotation marks and citation omitted); *see also Providence Baptist Church,* 425 F.3d at 317 (proponent of zoning ordinance could not intervene as its "interest in the negotiated settlement is so generalized it will not support a claim for intervention of right") (internal quotation marks and citation omitted).

And as the Seventh Circuit explained in *Sokaogon Chippewa Community v. Babbitt*, seeking to ensure that the government follows the law does not a substantial interest make: "As countless cases have held, however, such a generalized interest is insufficient to support standing, let alone intervention. If it did, the federal courts would be required to allow anyone with an interest—however broad or universal—to intervene in any lawsuit in which the government is a party." 214 F.3d 941, 948 (7th Cir. 2000). Instead, intervenors must "specifically . . . be adversely affected in some way, shape, or form." *Id.*; *see also Dillard v. Chilton Cty. Comm'n*, 495 F.3d 1324, 1331 (11th Cir. 2007) (same).

The undisputed facts confirm that any interest the Dumonts have here is diffuse, generalized, and political—not personal: the Dumonts desire to see Michigan uphold its new policy (an interest that is not uniquely theirs and thus cannot support intervention). *See* Appellants' Br. at 26 (the Dumonts "seek to defend the State's policy[.]"). They do not allege a more direct stake in the outcome of this case, nor could they—their ability to foster and adopt is not at issue here. It is undisputed that the Dumonts were recruited by the ACLU to be part of a lawsuit challenging Michigan's practice of working with faith-based agencies. *Supra* 13-15. And the Dumonts have for *years* known about numerous nearby agencies, yet they have not fostered or adopted.

Further confirming the purely political nature of their interest, the Dumonts have sought to intervene in a second case challenging the same Michigan policy. That case was brought by a Catholic adoption agency over 70 miles away that the Dumonts have never applied to. The Dumonts ignore the fact that they can foster or adopt a child through Bethany Christian Services—an agency that they specifically allege they reached out to and which has changed its policy to work with same-sex couples. *See* Mot. to Intervene, *Catholic Charities of W. Mich. v. MDHHS*,

2:19-cv-11661 (E.D. Mich. July 17, 2019), ECF No. 20; *supra* n.8. What the Dumonts seek is the right to act as private attorneys general, enforcing Michigan's new policy against whomever they like. *Id.* (seeking to intervene to defend same policy). This does not give them a direct and substantial interest in this case. *See Cox*, 487 F.3d at 345 (an "ideological interest in the litigation" cannot justify intervention).

In short, the Dumonts have no more right to intervene than *anyone else* who thinks they could do a better job than Michigan defending its laws, and holding otherwise would open the door to partisan politics in the court room—divorced from any actual, legal interest in the case.[12]

Finally, neither *Grutter* nor *Jansen* provides the Dumonts with a lifeline. *Jansen* held that black firefighters (who had obtained a consent decree mandating an affirmative action program) had a direct and substantial legal interest in a lawsuit brought by white firefighters challenging the terms of the consent decree because this new lawsuit "jeopardizes the 1988 minority fire recruits' positions and all future

[12] Further, St. Vincent is not a government actor, s*ee Rendell-Baker v. Kohn*, 457 U.S. 830, 840-841 (1982), and the Dumonts do not argue otherwise. Thus, any claims of stigmatic injury or lack of access cannot even be directed at St. Vincent and would not be appropriately raised in this lawsuit.

hiring and promotion decisions made regarding minority firefighters." *Jansen v. City of Cincinnati*, 904 F.2d 336, 342 (6th Cir. 1990). Indeed, as the court explained, the consent decree was directly "challenged in this [later] action." *Id.*

But the Dumonts are not parties to a consent decree, merely a private settlement. *See* Op., R. 69, Page ID # 2528 ("There is no basis to conclude that the Settlement Agreement is a consent decree, or that it binds any non-party to the Settlement Agreement, including St. Vincent."). What is more, St. Vincent seeks a form of relief contemplated in the Dumonts' settlement—the settlement explicitly states that it is valid "[u]nless prohibited by law or court order." Ex., R. 31-5, Page ID # 22. And, unlike the black firefighters in *Jansen*, who had a consent decree governing the actions of their employer (the only fire department in the city), this litigation will neither practically impair the Dumonts' ability to adopt or foster a child through Michigan's child welfare system, nor create a conflict between any court order and the private settlement agreement.

Similarly, *Grutter* focused solely on the "direct and substantial" interest the intervenor applicants had in "gaining admission to the University," which this Court found would be impaired absent

intervention. *Grutter v. Bollinger*, 188 F.3d 394, 399 (6th Cir. 1999). But, unlike these applicants, the Dumonts have not explained how this lawsuit will directly and substantially affect them *at all*. Their alleged interest in fostering or adopting a child through Michigan's child welfare system will not be impaired by this lawsuit. *See* Mot. to Intervene at 10, *Buck*, No. 19-2185 (6th Cir. Oct. 28, 2019), ECF No. 15. They have not alleged an interest in actually working with St. Vincent. As the district court found, St. Vincent's "referral practice . . . facilitates certification." Op., R. 69, Page ID ## 2519-2520. The Dumonts can foster in the same way as any other couple in the State, and can adopt any child who is available for adoption today. That will remain true regardless of what happens in this lawsuit.

ii. The Dumonts' alleged contractual interest does not justify intervention

The Dumonts next claim that they "have an interest in intervention to maintain the benefit of the Settlement Agreement." Appellants' Br. 18. But as the district court noted, the settlement specifically disclaims application to the extent "prohibited by law or court order." Order, R. 52, Page ID # 1862. And, as the court further explained, "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." *Id.* at Page ID # 1865. For this reason alone, the Dumonts' contractual interest fails: They obtained the benefit of their bargain with Michigan, and this lawsuit will not change the terms of that agreement.

Nor could this lawsuit impose inconsistent contractual obligations on Michigan. *See* Appellants' Br. 19. In the Dumonts' settlement agreement, Michigan agreed to require child-placing agencies to certify same-sex couples "*[u]nless prohibited by law or court order.*" Stipulation at Page ID # 1445, *Dumont*, No. 2:17-cv-13080 (E.D. Mich. Mar. 22, 2019), ECF No. 82 (emphasis added). Accordingly, an injunction protecting St. Vincent would not create any conflicting obligations because "the Settlement Agreement already contemplated and provided for that by building an escape clause into their agreement." Order, R. 52, Page ID # 1862. The Dumonts obtained this result by choosing to enter into a settlement agreement instead of a consent decree, and by choosing to settle rather than litigate their claims. By settling out of court, the Dumonts accepted the risk that future actions might fall under the exception carved out of their contract. Legal challenges to Michigan's subsequent statewide policy change were foreseeable, and inevitable.

The Dumonts attempt to avoid this conclusion by relying upon *Linton v. Comm'r of Health and Env't*, 973 F.2d 1311 (6th Cir. 1992). But this reliance is misplaced for three reasons. First, unlike the Dumonts, the *Linton* intervenors had a statutorily created interest in the action. 973 F.2d at 1319. Specifically, the Medicaid Act created a private right of action "enforceable by health care providers to challenge the adequacy and reasonableness of reimbursement rates." *Id.* Second, unlike the Dumonts, the district court's denial of intervention in *Linton* "precluded appellate review of the 1990 State plan which would materially prejudice the movants." *Id.* Here, the Dumonts are not materially prejudiced by the litigation, and the State has already appealed the district court's preliminary injunction order. Finally, unlike the Dumonts, the *Linton* intervenors faced a potential contractual breach. *Id.* at 1317. But, as explained above, the Dumont's private agreement expressly contemplated and carved out court orders.

And the Dumonts' reliance on *American Telephone* is even further afield. There, the court found that intervenors had an interest in opposing a consent decree which would have a *direct* impact on the operations of the intervenor by modifying their collective bargaining

agreement. *EEOC v. Am. Tel. & Tel. Co.*, 506 F.2d 735, 741 (3d Cir. 1974). There is no consent decree, and no such direct impact here.

The Dumonts' claims instead are more like those raised and rejected in *Reliastar* and *Blount Hill*. In *Reliastar*, several insurance companies sued over fraudulently obtained insurance policies. *Reliastar Life Ins. Co.* v. *MKP Invs.*, 565 F. App'x 369, 370 (6th Cir. 2014). Two banks sought to intervene, arguing that the insurance policies were the defendants' only assets, without which defendants could not satisfy contingent liabilities to the banks. *Id.* at 371. This Court rejected intervention, explaining that such contingent interests—like those the Dumonts allege here—are not sufficient to merit intervention. *Id.* at 372. The court reaffirmed that intervenors must be a "real party in interest in the transaction" and that downstream effects do not justify intervention. *Id.* at 372 (citation omitted).[13]

[13] When St. Vincent intervened in *Dumont v. Lyons*, it had a direct and substantial interest in that case: the relief sought by the Dumonts would require the State to cancel its contract with St. Vincent, completely and directly excluding St. Vincent from providing foster care and adoption services. The Dumonts do not face any similar total exclusion from Michigan's foster care or adoption system.

In *Blount-Hill*, this Court explained that White Hat did not have a sufficient legal interest at stake to intervene because its legal interest concerned a tangential threat to the funding structure underlying its contracts. As the court explained, "White Hat seeks to preserve the constitutionality of the community school's funding structure *so that it might continue to contract* with community schools." *Blount-Hill v. Bd. of Educ. of Ohio*, 195 F. App'x 482, 486 (6th Cir. 2006) (emphasis added). The court found this interest insufficient because it "does not concern the constitutional and statutory violations alleged in the litigation." *Id.* The court then concluded that White Hat did not have any other legal interest in the case because it was not "a party to any challenged contract nor is it directly targeted by plaintiffs' complaint." *Id.*

Similarly, the Dumonts are not directly targeted by Plaintiffs' complaint and are not a party to the contracts involved in this case—the contracts between the State and St. Vincent. The Dumonts' interest in protecting their private settlement with the State do not give them an interest in this litigation challenging the constitutionality of the State's foster care and adoption provider policies applied against St. Vincent. *See United States v. Tennessee*, 260 F.3d 587, 595 (6th Cir. 2001) (denying

intervention because "CMRA's claimed interest does not concern the constitutional and statutory violations alleged in the litigation" but instead concerns only "contractual rights in agreements with the State to provide community-based services" tangential to the constitutional challenges).

Were this Court to endorse the Dumonts' alleged downstream devaluation argument, it would radically loosen intervention standards and permit anyone who could be tangentially affected by any possible outcome to intervene. Thankfully, this Court has already rejected such sweeping arguments: Both *Reliastar* and *Blount-Hill* confirm that an indirect or tangential effect upon a proposed intervenor's contract or other interest does not constitute a substantial, direct, and legal interest sufficient to permit intervention.

Stripping away the varnish, it becomes clear the Dumonts' real interest is in defending a government policy they support. But the Dumonts have no legal interest—much less a substantial and direct one—in defending Michigan's governmental actions. *Granholm*, 501 F.3d 775; *Cox*, 487 F.3d at 323. Although the Dumonts' support for the State's policy came through a backroom deal rather than legislative process, the

same holds true.[14] A law's proponents have no enduring interest in defending the law after its enactment. That remains the State's prerogative. *Diamond v. Charles*, 476 U.S. 54, 67 (1986) ("Only the State may invoke regulatory measures to protect that interest, and only the State may invoke the power of the courts when those regulatory measures are subject to challenge.").

In short, a private contract cannot give two citizens the right to intervene in a constitutional challenge to a Michigan policy that the State is already defending.

B. The denial of intervention will not impair the Dumonts' ability to protect their interests

The Dumonts do not have an interest in the case, but even assuming they did, they fail to explain how this interest might be impaired. The

[14] Indeed, the ACLU's "sue-and-settle" strategy confirms the real goal of the Dumonts' desired intervention: safeguard their collective attempt to bypass the legislative process and change Michigan law protecting religious accommodation by private agreement. Our framers, however, "fully recognized that nothing would so jeopardize the legitimacy of a system of government that relies upon the ebbs and flows of politics to 'clean out the rascals' than the possibility that those same rascals might perpetuate their policies simply by locking them into binding contracts." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 45 (1977) (Brennan, J., dissenting). Avoiding "legislation by litigation" is more reason to deny the Dumonts' intervention request.

Dumonts misunderstand this factor when they claim that the district court's preliminary injunction has already impaired their interests. Appellants' Br. at 21. The question is not whether *this case* might impair the Dumonts' interests (the last factor made that inquiry), it is whether the Dumonts' *lack of intervention* might impair those interests. *See, e.g., Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1247 (6th Cir. 1997) ("To satisfy this element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is possible *if intervention is denied*.") (emphasis added); *Blount-Hill v. Zelman,* 636 F.3d 278, 283 (6th Cir. 2011) (describing this factor as "the applicant's ability to protect its interest will be impaired without intervention"). The Dumonts have not shown (nor could they) that their intervention in this case would better protect their interest than their amici participation. As amici, the Dumonts briefed the preliminary injunction and were even granted oral argument time at the hearing. The Dumonts seem to argue that the district court ignored their arguments because they were amici and not parties. Appellants' Br. at 26 n.4. However, there is no evidence

that the Dumonts' arguments were unconsidered, only that they were unpersuasive.[15]

The Dumonts' reliance on *Jansen* fares no better. They argue that, as in *Jansen*, this case "could leave the defendant with obligations to the proposed intervenors that are inconsistent with its obligations to plaintiffs." Appellants' Br. at 28. Not so. As discussed above, Michigan's obligations to the Dumonts are explicitly conditional. If St. Vincent prevails, Michigan's obligations to the Dumonts and St. Vincent will be not only consistent, but contemplated.

C. The existing Defendants adequately protect whatever interest the Dumonts have in this case

An existing party is presumed to adequately represent a prospective intervenor's interests when both seek the same ultimate objective. *United States v. Michigan*, 424 F.3d 438, 443-444 (6th Cir. 2005) ("[A]pplicants for intervention must overcome the presumption of adequate representation that arises when they share the same ultimate objective as a party to the suit."). Accordingly, "the applicant for

[15] As further evidence of their lack of persuasiveness, this Court explicitly considered—and rejected—the Dumonts' arguments in its stay decision. Order, *Buck*, No. 19-2185 (6th Cir. Nov. 19, 2019), ECF No. 29-2.

intervention bears the burden of demonstrating inadequate representation." *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) (citation omitted); *Reliastar*, 565 F. App'x at 373. In this case, Michigan and the Dumonts want the exact same thing. *See* Appellants' Br. at 26 (admitting that the State and the Dumonts "both seek to defend the State's policy[.]"). Yet the Dumonts have not even tried to overcome this presumption of adequacy.

The Dumonts neither acknowledge this presumption nor cite the relevant standard for rebutting it. *See* Appellants' Br. at 23-26; Br., R. 19, Page ID # 467. Failure to contest this issue constitutes forfeiture of the argument. *See United States v. Huntington Nat'l Bank*, 574 F.3d 329, 332 (6th Cir. 2009) ("To preserve the argument, then, the litigant not only must identify the issue but also must provide some minimal level of argumentation in support of it."); *United States v. White*, 920 F.3d 1109, 1114 (6th Cir. 2019) ("[A]n Appellants' failure to raise an argument in his appellate brief forfeits that issue on appeal."). For this reason alone, the Dumonts' appeal fails.

Even if the Dumonts had not forfeited the argument, they still could not overcome the presumption of adequacy. To overcome this

presumption, the Dumonts must show either: (i) collusion between the existing party and the opposition, (ii) the existing party has adverse interests, or (iii) the existing party has failed to fulfill its duty. *Jordan v. Mich. Conference of Teamsters Welfare Fund*, 207 F.3d 854, 863 (6th Cir. 2000); *Bradley*, 828 F.2d at 1192.

The Dumonts do not allege collusion; the parties have vigorously litigated the case. Further, there is no daylight between the Dumonts' and Michigan's desired outcomes. They both want the same thing and even entered into a settlement agreement highlighting their shared interest. Finally, Michigan has not failed to defend its policies, opposing Plaintiffs' claims at every stage. By failing even to attempt to rebut this presumption, the Dumonts' appeal should be denied. *See Hisrich v. Volvo Cars of N. Am., Inc.*, 226 F.3d 445, 451 (6th Cir. 2000) ("Defendants ignore that they must rebut the presumption and that plaintiff is not required to present evidence establishing what is presumed unless such rebuttal evidence is presented.").

The Dumonts instead claim the district court "acknowledg[ed] that there *may* be some difference in the State Defendants' and the Dumonts'

legal positions[.]" Appellants' Br. at 23. But this is not what the district court said. In full, it held that:

> It is possible to imagine a basis for permissive intervention if the interests of the State Defendants and the proposed intervenors diverge . . . . But that is not where the case presently is. At 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 unremarkable observation that the State and Dumonts' interests *might* diverge in the future is of no help to the Dumonts now. *See, e.g., Blount-Hill*, 195 Fed. Appx. at 490 (Clay, J. concurring) ("However, this possible future divergence of interests does not bear on White Hat's or Defendant's interests in the instant case."). Indeed, the district court stated that the Dumonts could seek leave to intervene in the future if this came to pass. Order, R. 52, Page ID # 1865. And the Dumonts were "welcome[d]" to submit an amicus brief and oral argument. *Id*. The record thus belies the claim that their arguments were not considered simply because they were not specifically mentioned and rebutted in the Court's opinion.[16]

[16] It is no surprise that the district court did not mention the Dumont's expert report and declaration, which relied on inadmissible double hearsay from an unidentified speaker and failed to provide the court with any relevant evidence or data. They were also directly contradicted by two expert reports proffered by Plaintiffs. Ex., R. 42-1; Ex., R. 42-3.

Rather than show anything this Court's jurisprudence requires, the proposed intervenors merely argue that their and the State's constitutional arguments could emphasize different things. *See* Appellants' Br. at 24. However, differences over the finer points of constitutional theory do not constitute inadequate representation. *E.g., Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 701 F.3d 466, 491 (6th Cir. 2012) (overruled on other grounds) ("Any mere disagreement over litigation strategy . . . does not, in and of itself, establish inadequacy of representation.") (internal quotation marks omitted); *Geier v. Sundquist*, No. 95-5844, 94 F.3d 644, at *2 (6th Cir. Aug. 14, 1996) (unpub. table decision) ("Whether Tennessee should rely more heavily on the *Fordice* decision is simply a question of litigation strategy. Such disagreements are inadequate to form the basis of a right to intervene."). The Dumonts and the State may disagree about exactly what arguments should make the cut in a word-limited appellate brief, but this disagreement over what to focus on does not give the Dumonts a right to insert themselves into this case as a party.

This Court's opinion in *Bradley v. Milliken* is instructive. 828 F.2d 1186. There, the existing representative party and the prospective

intervenors disagreed over who should monitor a remedial decree (the former favored a superintendent, the latter an independent commission). *Id.* at 1193. Yet even this disagreement over the ultimate relief—far more substantial than the Dumonts' doctrinal disagreement—was insufficient to overcome the presumption of adequacy. This Court held that the existing party and proposed intervenors "share[d] the same ultimate objective . . . . Although the litigation strategy has altered, this objective has not been abandoned by current counsel." *Id.*

The Dumonts' reliance on *Grutter* and *Ne. Ohio Coal. for the Homeless & Serv. Emps. Int'l Union v. Blackwell* is inapt. *Grutter*—unlike *Bradley*—did not apply the presumption of adequacy because the intervenor applicants' interest (in obtaining admission to the University and obtaining an education) differed from the University's interest in its admissions policies.[17] *See* 188 F.3d 394. Moreover, *Grutter* did not find inadequate representation only because the prospective intervenors

[17] Here, the Dumonts admit to sharing the same ultimate objective as the State and—unlike in a competitive application process for a limited number of slots at a public university, in which the university might have an interest in not admitting *all* proposed intervenors—there is no daylight between the Dumonts' alleged interests in becoming foster or adoptive parents and the State's interest in protecting its policies; achieving one cannot detrimentally affect the other.

favored different legal arguments. Instead, it found that, because of "internal and external institutional pressures," the existing party was unlikely to present certain crucial *evidence*—something the Dumonts do not and cannot allege here. *Id.* at 400. Indeed, as this Court recently noted, here, "the facts are largely uncontested." Order at 2, *Buck*, No. 19-2185 (6th Cir. Nov. 19, 2019), ECF No. 29-2. Finally, *Grutter* also focused on the fact that "the University is at less risk of harm than the applicants" were it to lose the case, such that it "may not defend the case as vigorously" as intervenors. 188 F.3d at 400. But here, the Dumonts are even less likely than Michigan to suffer any harm were the State to lose. *Supra* 25-28.

Blackwell helps the Dumonts even less. There, this Court held that the existing party and proposed intervenor did not share the same ultimate objective, largely because the existing party had refused to appeal the district court's temporary restraining order. 467 F.3d 999, 1008 (6th Cir. 2006) ("[T]he State and the Secretary do not have the same ultimate objective."). The exact opposite happened here—Michigan is currently appealing the district court's preliminary injunction. Moreover, this Court noted that the Secretary of State's goal (administering an

election smoothly) diverged sharply from the State of Ohio's goal (defending its law). *Id.* Here, both the Dumonts and the State have the exact same goal. *See* Appellants' Br. 26 (acknowledging that "both" the State and the Dumonts "seek to defend the State's policy.").

In short, the Dumonts have failed to assert a direct and substantial legal interest in this case, alleging only a desire to defend Michigan's laws and a desire to support a private agreement that is not the contract at issue in this litigation. Nor have the Dumonts shown that failure to intervene will impair these interests—they have participated as amicus and have made their views crystal clear to the district court through briefing and oral argument. Finally, the Dumonts do not rebut the presumption that whatever alleged interest they might have is adequately represented in this litigation by the State—which is vigorously defending its own policy.

II. The district court correctly denied the Dumonts' permissive intervention

The district court also properly denied permissive intervention. This Court reviews that decision for abuse of discretion, reversing only if left with the firm and definite conviction that the district court committed a

clear error. *E.g., United States v. City of Detroit*, 712 F.3d 925, 930 (6th Cir. 2013). The Dumonts have fallen far short of this high standard.

Permissive intervention requires Proposed Intervenors to "establish that the motion . . . is timely" and to allege "at least one common question of law or fact." *Michigan*, 424 F.3d at 445 (citation omitted). "Once these two requirements are established, the district court must then balance undue delay and prejudice to the original parties, if any, and any other relevant factors to determine whether, in the court's discretion, intervention should be allowed." *Id.*; Fed. R. Civ. P. 24(b)(1)(B).

The Dumonts' arguments fail to show abuse of discretion. First, the Dumonts do not even allege a claim or defense common to this action—they only assert Michigan's claims or defenses for it. Second, they wrongly claim that the district court was required to consider logically secondary factors when it denied permissive intervention for failure to meet the initial hurdle of sharing a common claim or defense—this Court has confirmed that no further analysis was necessary. Third, the Dumonts' intervention—as shown by their flurry of filings in this Court—would delay the case. And finally, the Dumonts fail to explain how their involvement as amici does not adequately address serve their interests.

The Dumonts' proposed answer raises no counterclaims. Proposed Answer, R. 18-1. Nor do the Dumonts raise a defense relevant to this action. None of the existing parties (neither St. Vincent, nor the State Defendants, nor the Federal Defendants) have any claims against the Dumonts. Simply, the Dumonts do not face potential liability (direct or indirect) from this case. As the Dumonts themselves argue, they "cannot be held liable because they are private actors." *Id.* at Page ID # 449. Exactly. It is thus no surprise that their proposed answer merely parrots that of the State Defendants, raising only defenses that would shield the State from liability. This Court has rejected such maneuvers on numerous occasions:

> We have previously rejected the suggestion that a proposed intervenor seeking to submit a filing that 'substantially mirror[s] the positions advanced' by one of the parties has necessarily identified a common question of law or fact. '[I]f that were true' . . . 'any party wishing to intervene to support one side of a lawsuit could simply reiterate the [positions] of that side and thus meet the "common question" requirement. Permissive intervention cannot be interpreted so broadly.'

Kirsch v. Dean, 733 F. App'x 268, 279 (6th Cir. 2018). Allowing the Dumonts to intervene with neither their own claim nor defense violates Rule 24(b)'s plain text and would permit any impassioned bystander

entry into this case. *Cf.* Caleb Nelson, *Intervention*, 106 Va. L. Rev. ___, 1-2 (forthcoming April 2020), https://perma.cc/N88U-RHAH, (noting that Rule 24(b) intervention is limited to actual legal claims and defenses).

The Dumonts' reliance on *Miller* here is also inapposite. *See* Appellants' Br. at 27-28. In *Miller*, the district court denied permissive intervention without *any* explanation—but that is not the case here. *See* Order, R. 52, Page ID # 1865. Further, this entire discussion was *dicta* as the court granted intervention under Fed. R. Civ. P. 24(a). What is more, the court's remedy for failure to explain the basis for permissive intervention denial was to remand the motion to the district court for further clarification. *Miller*, 103 F.3d at 1248. The Court also limited *Miller* to its facts, and later cases have so recognized. *See id*. at 1247 (granting intervention "in view of the facts unique to this particular case[.]"); *Granholm*, 501 F.3d 775; *Cox*, 487 F.3d 323.

The Dumonts next argue that the district court abused its discretion by failing to explicitly consider whether intervention would create undue delay or prejudice. Appellants' Br. at 28. Yet, this Court has—at least twice—squarely rejected that argument. Once a district court finds that proposed intervenors lack an interest in the case, it "[i]s under no

obligation to consider" undue delay or prejudice. *Dean,* 733 F. App'x at 280. *See also Reliastar*, 565 F. App'x at 374 (same).

Not to mention, the Dumonts' intervention *would* delay this case. They have given every indication that, if allowed into the case, they would ask the district court to reconsider its preliminary injunction, which would require new briefing and another hearing. This Court has held that the risk of delay is "particularly apparent" where the proposed intervenor "may attempt to have the court reconsider its prior rulings." *Bradley,* 828 F.2d at 1194.

Further, the Dumonts' flurry of filings—an intervention motion below, a motion to reconsider, an amicus brief in support of the state below, this brief, a motion to intervene on appeal, and a motion to file a brief in support of an emergency motion in Michigan's Sixth Circuit appeal—reflect a penchant for crowding the docket. Their involvement would "inhibit, not promote, a prompt resolution." *Granholm*, 501 F.3d at 784.

Neither have the Dumonts explained how intervention would better protect their alleged interest in this case than filing an amicus brief, especially given that the only way in which they claim the State will not adequately represent their interest is in not making the same legal

arguments that they want to make.[18] Br., R. 19, Page ID ## 467-468; *South Carolina v. North Carolina*, 558 U.S. 256, 288 (2010) ("Courts often treat amicus participation as an alternative to intervention."). And, as discussed above, Michigan adequately represents the Dumonts' interests and the Dumonts lack a substantial interest in this case. These also counsel against permissive intervention. *E.g., League of Women Voters of Mich. v. Johnson*, 902 F.3d 572, 579 (6th Cir. 2018); *Granholm*, 501 F.3d at 784.

Because the Dumonts failed to raise a prerequisite claim or defense, because the State Defendants adequately represent them, because they continue to participate as amici, and because they would delay this case, the district court correctly denied permissive intervention.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's order denying intervention.

[18] This is the only claim the Dumonts make because, though foreclosed by the facts and the law, it is the only even remotely plausible claim they could make—the State is more than capable of defending its laws without help from two private citizens.

Dated: November 21, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,015 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 hereby certify that the foregoing Response Brief on the Merits was filed this 21st day of November, 2019 through the Court's Electronic Filing System. Parties will be served, and may obtain copies electronically, through the operation of the Electronic Filing System.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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