UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MELISSA BUCK; CHAD BUCK; SHAMBER FLORE; ST. VINCENT CATHOLIC CHARITIES, Plaintiffs, 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.	No. 1:19-cv-00286-RJJ-PJG HON. ROBERT J. JONKER **BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION** **EXPEDITED CONSIDERATION REQUESTED**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

CONCISE STATEMENT OF REASONS
SUPPORTING PROPOSED INTERVENOR DEFENDANTS' POSITION

In its July 31, 2019 order (the "Order") denying the motion to intervene filed by Kristy and Dana Dumont, this Court held that the standard for intervention of right was not satisfied because the Dumonts "rest their claim for intervention as of right on their interest in maintaining the Settlement Agreement" in *Dumont* v. *Gordon*, 2:17-cv-13080-PDB-EAS (E.D. Mich.) and that this was "an insufficient basis to support intervention" because "Plaintiffs are not asking for any relief directed at the Settlement Agreement itself" and "the State is fully capable of protecting" the Dumonts' interests. That Plaintiffs "do not seek to interpret [the] terms" of the Settlement Agreement or may find it to be "beside the point" does not overcome the fact that, should Plaintiffs obtain the relief sought, the State will be unable to abide by the terms of the Settlement Agreement, rendering it a nullity and depriving the Dumonts of the benefit for which they dismissed their claims in the initial action. Moreover, the Order failed to consider that the Dumonts have a substantial legal interest in intervention independent of the settlement agreement: (i) their interest in fostering or adopting children from the Michigan child welfare system, which Plaintiffs would limit and (ii) their Constitutional interest in not bearing the stigma of state-funded programs assuming the Dumonts are not fit parents solely because of their sexual orientation. Finally, although the Order recognized that the interests of existing parties and those of the Dumonts may "diverge" and that certain "defenses and counterclaims" are "uniquely available" to the Dumonts, it nonetheless held that "the State is fully capable of protecting any interest the Dumonts have." Binding Sixth Circuit precedent provides, however, that under such circumstances, proposed intervenors are not adequately represented. Accordingly, the Dumonts respectfully request that the Court reconsider the Order and permit the Dumonts to intervene as of right.

The Dumonts respectfully submit this memorandum of law in support of their motion pursuant to Local Rule 7.4 for the Western District of Michigan for reconsideration of the Court's July 31, 2019 order (the "Order") denying their motion to intervene, ECF No. 52.[1] Absent the ability to participate as a party in this action (the "Action"), the Dumonts' constitutional and contractual rights will be in jeopardy. The Dumonts would again be subject to the practical and stigmatic injuries of having to pursue their desire to adopt a child from foster care in a system in which agencies may unconstitutionally discriminate against them. No existing party, including the State, will assert or defend the Dumonts' constitutional rights in the Action. Moreover, if Plaintiffs were to prevail in this Action, this would effectively prevent the Dumonts from enforcing the Settlement Agreement achieved in *Dumont* v. *Gordon*, 2:17-cv-13080-PDB-EAS (E.D. Mich.), and may lead to further piecemeal litigation—contrary to the interest of judicial efficiency—by which the Dumonts would attempt to protect their interest in the Settlement Agreement and seek to vindicate their constitutional rights after—rather than co-extensively with—this Action. The Dumonts have a substantial legal interest in the litigation and it matters not that Plaintiffs here do not "directly" seek to invalidate the Agreement because invalidation is precisely the outcome of the relief the Plaintiffs seek and, in any case, the Dumonts' constitutional rights are independent of the Settlement Agreement. While the Dumonts bargained hard for the gains they achieved in return for dismissing their earlier claims, should this Court afford Plaintiffs the relief they seek, there would be substantial uncertainty with respect to the State's ability to abide by the contractual promises it made to the Dumonts. Moreover, as noted above, it would be an inefficient use of judicial resources to bar the Dumonts

[1] The Dumonts expressly reserve and do not waive all arguments presented to the Court in support of their motion for intervention, ECF No. 18.

from intervening in the Action as, if Plaintiffs prevail, the Dumonts would thereafter have to seek to vindicate their rights in another litigation.

LEGAL STANDARD

"On motion and just terms, the court may relieve a party or its legal representative from a[n] . . . order . . . for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect . . . (6) any other reason that justifies relief." Fed. R. Civ. P. 60(b). In seeking reconsideration, a movant must demonstrate "a palpable defect by which the court and the parties have been misled" and that "a different disposition of the case . . . result[s] from a correction thereof." W.D. Mich. LCivR 7.4(a).

ARGUMENT

I. THE DUMONTS ARE ENTITLED TO INTERVENTION AS OF RIGHT.

As this Court recognized (Order at 13–14), to intervene as of right, the Dumonts must establish that their motion is timely; they have a substantial legal interest in the subject matter of the case; their ability to protect that interest may be impaired absent intervention and the existing parties may not adequately represent their interests. While earlier briefing may have failed to bring all relevant considerations to the Court's attention with necessary clarity, the Dumonts satisfy all of the intervention requirements and ask this Court to reconsider its ruling and grant the Dumonts intervention as of right so they may efficiently vindicate their contractual and constitutional rights.

A. The Dumonts Have a Substantial Legal Interest in this Action

In earlier briefing, the Dumonts raised three substantial legal interests in this Action, two of which related to their interest in maintaining the benefits of the Settlement Agreement entered into in the *Dumont* litigation. ECF No. 19, PageID.462. The Order denying the motion to intervene did not address a separate interest asserted—the Dumonts' interest in

adopting or fostering a child from the Michigan child welfare system without being subjected to unconstitutional discrimination. This interest exists independent of the Settlement Agreement.

With respect to the Settlement Agreement, the Court concluded that this did not amount to a substantial legal interest 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." ECF No. 52, PageID.1865. However, even if the Settlement Agreement is not "directly" challenged in this litigation, this suit seeks to dismantle the relief the Dumonts achieved in the *Dumont* Settlement Agreement. ECF No. 37, PageID.1376. Indeed, but for the Settlement Agreement, Plaintiffs never would have filed this Action.

The Dumonts Have a Substantial Legal Interest in Intervention Independent of the Settlement Agreement. Because the Court addressed only the Dumonts' interests related to maintaining the Settlement Agreement, it appears that the Dumonts may not have made sufficiently clear their other independent reasons for intervention: the Dumonts' interest in adopting or fostering a child from the Michigan child welfare system free from unconstitutional discrimination—an interest that is are entirely independent of the Settlement Agreement and which is directly threatened by the relief Plaintiffs seek and neither theoretical nor speculative. The Dumonts twice in the past attempted to foster and adopt a child from St. Vincent Catholic Charities ("STVCC") and were turned away because of their sexual orientation and are again "actively pursuing fostering and adopting . . . from the Michigan public child welfare system" and "want to have the full range of options available to [them]." (Exhibit A at 3, previously filed

as ECF No. 39-2 PageID.1518; Exhibit B at 3, previously filed as ECF No. 39-3 PageID.1522.[2] If Plaintiffs obtain the relief they request, STVCC will once again be permitted to discriminate against same-sex couples and the Dumonts will be required to pursue their goal of fostering and adopting children out of foster care in a system in which they will have fewer agency options available to them than other families, and will be subjected to the stigma of discrimination.

Clear Sixth Circuit precedent establishes that the Dumonts have a substantial legal interest in the subject matter of this litigation based on their interest in fostering or adopting children from the Michigan child welfare system without facing unconstitutional hurdles. *See Grutter* v. *Bollinger*, 188 F.3d 394, 398 (6th Cir. 1999) (holding prospective minority University of Michigan applicant's "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, 338–39 (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); *see also Coalition to Defend Affirmative Action* v. *Granholm*, 240 F.R.D. 368, 375 (E.D. Mich. 2006) (holding white law school applicant had substantial legal interest to intervene in action challenging bar against racial preferences).

Should Plaintiffs Prevail, the State's Ability to Adhere to the Terms of the Settlement Agreement Would be Subject to Doubt. Plaintiffs make no representation, nor could they, that "the Settlement Agreement is beside the point and irrelevant to the constitutional and

[2] The Eastern District of Michigan has found the Dumonts' interest to be sufficient to satisfy the Article III standing requirement, which is more demanding than the standard applicable here for demonstrating a "substantial legal interest" warranting intervention. *See Grutter* v. *Bollinger*, 188 F.3d 394, 398 (6th Cir. 1999) ("[A]n intervenor need not have the same standing necessary to initiate a lawsuit."); *Dumont* v. *Lyon*, 341 F.Supp.3d 706, 719–26 (E.D. Mich. 2018)

statutory claims asserted." ECF No. 52, PageID.1865. Plaintiffs admit that the Settlement Agreement is a "source of or reason for the State's current policy." ECF No. 37, PageID.1373. Indeed, the Settlement Agreement is the reason Plaintiffs filed this Action. Plaintiffs' Complaint specifically named Kristy and Dana Dumont and directly and repeatedly connected STVCC's alleged injury to the *Dumont* litigation and the Settlement Agreement.[3] It is of no moment whether this action is to be construed as trying to "directly" overturn the Settlement Agreement in which the State committed to enforce the non-discrimination requirement in child placing agency ("CPA") contracts or seeking an injunction to compel the State to allow CPAs to discriminate against same-sex couples, which would necessarily cause the State to abandon the promises made to the Dumonts. These are two sides of the same coin. The State has committed to the Dumonts that the State will enforce the non-discrimination requirement in CPA contracts and, if Plaintiffs are granted an injunction to compel the State to allow them to turn away same-sex couples like the Dumonts, the State will not be able to fulfill its obligations to the Dumonts under the Settlement Agreement.

Far from being "beside the point and irrelevant to the constitutional and statutory claims asserted," it is clear that the policy challenged by Plaintiffs is the State's implementation

[3] *See* ECF No. 1, PageID.29 ("[T]he ACLU filed a lawsuit against MDHHS on behalf of two LGBT couples . . . claim[ing] that the state's decision to continue contracting with [Bethany Christian Services and STVCC] violated the Establishment and Equal Protection Clauses."); PageID.33 ("In a statement accompanying the settlement, Defendant Nessel announced that after reviewing the ACLU's claims . . [she] directed MDHHS to change its internal policy regarding permitting private agencies to refer couples to other agencies."); PageID.35 ("Per the Attorney General's statement and the terms of the settlement, any private agency which refuses to comply . . . will have its contracts 'terminate[d]'") (quoting Settlement Agreement); PageID.36 ("The State has already begun taking steps to enforce this policy, including requiring that child welfare agencies complete training on this new policy."); PageID.37 ("Based upon the newly announced policy that would prohibit St. Vincent from providing adoption services consistent with its religious beliefs, St. Vincent believes that adverse action from the State Defendants is certainly impending.").

of the *Dumont* Settlement Agreement, and the Dumonts therefore have a substantial legal interest in intervening in this case.[4]

As a further consideration, it would be an inefficient use of judicial resources to force the Dumonts to later attempt to vindicate their rights in another separate action in the event Plaintiffs prevail.

B. The Dumonts Are Not Adequately Represented by the State

Sixth Circuit precedent makes clear that "proposed intervenors are 'not required to show that representation will in fact be inadequate.'" *Grutter*, 188 F.3d at 400. To the contrary, they need only show that representation *may* be inadequate and may do so by showing "that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments." *Id.* In the Order, the 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." ECF No. 52, PageID.1865. 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 the standard for inadequate representation, showing the motion for intervention should have been granted.

Numerous courts in this Circuit have recognized that intervention as a matter of right is warranted when the interests of intervenors and existing parties may diverge and where

[4] Plaintiffs have also submitted at least 31 exhibits relating to the Dumonts and the *Dumont* litigation. These exhibits directly connect the State's policy to enforcement of the Settlement Agreement. The announcement of the State's policy, for example, explains that the State is "required" to implement the policy as a result of "a settlement agreement with the [*Dumont*] plaintiffs in a lawsuit pertaining to non-discrimination in the delivery of foster care and adoption services." ECF No. 37-7, PageID.1441. *See also* ECF No. 37-8, PageID.1444–1447 (summary of *Dumont* v. *Gordon* Settlement Agreement).

an existing party will not advance all of the claims or defenses of a proposed intervenor. *See*, *e.g.*, *Grutter*, 188 F.3d at 401 (holding inadequate representation where intervenors presented "concerns about whether [State University] will present particular defenses"); *Bd. of Educ. of the Highland Local Sch. Dist.* v. *U.S. Dep't of Educ*., 2016 WL 4269080, at *3 (S.D. Ohio Aug. 15, 2016) (holding inadequate representation where defendants "will not advance the related claims [intervenor] wishes to pursue nor all of the remedies she seeks"); *Gulfport Energy Corp.* v. *Vill. of Barnesville*, 2015 WL 4068797, at *6 (S.D. Ohio July 2, 2015) (holding inadequate representation where "there is no indication that the [defendant] . . . will pursue all of [intervenor]'s claims and arguments"); *Oakland Cnty.* v. *Fed. Nat. Mortg. Ass'n*, 276 F.R.D. 491, 499 (E.D. Mich. 2011) (holding inadequate representation where "there are certain . . . defenses unique to [intervenor]" and "these defenses cannot be invoked by [defendants]"); *Great Am. Assur. Co.* v. *Travelers Prop. Cas. Co.*, 2007 WL 184732, at *3 (S.D. Ohio Jan. 19, 2007) ("'[A]dequate representation' requires that the parties to the suit will fully advocate for and protect the intervenor's interest . . . The Sixth Circuit has held that the intervenor need not show that representation will in fact be inadequate, but only need show the potential for inadequate representation."). The same result is required here.[5]

[5] While the Dumonts appreciate the Court's invitation to appear as amici, that status will not allow the Dumonts to vindicate their interest in the litigation. The ability to raise and make arguments, participate in discovery, call and examine witnesses and appeal in the event of an adverse ruling is the only course by which the Dumonts can in this Action protect their rights. The Dumonts are mindful of the demands on judicial resources and will not duplicate the efforts of other parties and will strive to efficiently participate.

CONCLUSION

For the reasons set forth above, the Court should reconsider its July 31 Order and permit the Dumonts to intervene in this Action.

Dated: August 9, 2019

Respectfully submitted,

s/ Leila R. Siddiky

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CERTIFICATE OF COMPLIANCE

This memorandum complies with the word limit of LR 7.2(B)(i) because, excluding the parts exempted by LR 7.2(B)(i), it contains 2,210 words. The word count was generated using Microsoft Word 2016.

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