No. 19-2185

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MELISSA BUCK; CHAD BUCK; SHAMBER FLORE; ST. VINCENT CATHOLIC CHARITIES,
Plaintiffs-Appellees,

v.

ROBERT GORDON, in his official capacity as the Director of the Michigan Department of Health and Human Services; 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;
Defendants-Appellants,

and

ALEX AZAR, in his official capacity as the Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Defendants.

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

MOTION OF KRISTY DUMONT AND DANA DUMONT TO INTERVENE AS INTERVENOR DEFENDANTS-APPELLANTS

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Kristy and Dana Dumont respectfully move for intervention to participate in the appeal of the District Court's grant of a preliminary injunction in favor of the Plaintiffs St. Vincent Catholic Charities ("STVCC"), Melissa Buck, Chad Buck, and Shamber Flore.[1]

INTRODUCTION

In this case, Plaintiffs are challenging the State of Michigan's commitment and contractual obligation to ensure that state-contracted, taxpayer-funded child placing services are provided on a non-discriminatory basis to prospective foster and adoptive families headed by same-sex couples. This case follows from *Dumont* v. *Gordon*, 2:17-cv13080-PDB-EAS (E.D. Mich.) ("*Dumont*"), which was initiated by the Dumonts after they were turned away by

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[1] Kristy and Dana Dumont timely moved to intervene in the action below pursuant to Federal Rule of Civil Procedure 24. R. 18, Page ID ## 421–424. The District court denied the Dumonts' motion, R. 52, Page ID ## 1852–1866, and the Dumonts timely appealed to this Court. *See Melissa Buck, et al.* v. *Robert Gordon, et al.*, No. 19-1959 (6th Cir. 2019) (the "Intervention Appeal"). Thereafter, while briefing in the Intervention Appeal was ongoing, the district court granted Plaintiffs' Motion for Preliminary Injunction. R. 70, Page ID ## 2530–2531. To protect their interests and to raise important arguments about the constitutionality of the relief requested by Plaintiffs, the Dumonts now seek to intervene in this appeal filed by 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, and Dana Nessel, in her official capacity as Attorney General of Michigan (collectively, the "State Defendants") while the Intervention Appeal with respect to the underlying action is being briefed separately before this Court.

two state-contracted, taxpayer-funded child placing agencies because of the agencies' religious objections to accepting same-sex couples.

In the *Dumont* suit, 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 case, seeking an injunction prohibiting the State from enforcing the non-discrimination requirements, which in effect attacked the settlement the Dumonts had achieved. Notwithstanding that, the District Court denied the Dumonts' motion to intervene, and subsequently issued a preliminary injunction eviscerating all that the Dumonts had achieved in their settlement agreement with the State. On October 7, 2019, the State Defendants timely filed this appeal of the District Court's Opinion and Order granting preliminary injunctive relief. Notice of Appeal, R. 71, Page ID ## 2532–33.

FACTUAL BACKGROUND

A. The *Dumont* Action

In July 2016, Kristy Dumont called STVCC, a state-contracted, taxpayer-funded child placing agency ("CPA") in Michigan and said that she and her wife, Dana Dumont, were interested in adopting a child from Michigan's public child welfare 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 a second CPA on the basis of a religious objection, the Dumonts, along with Erin and Rebecca Busk-Sutton (collectively, the "*Dumont* Plaintiffs"), filed a complaint against Michigan state officials (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 families 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 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 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 case, intervened in *Dumont*. *Id.* at Page ID # 458. The *Dumont* State Defendants and the STVCC Parties moved to dismiss the *Dumont* complaint. *Id*. The STVCC Parties' motion asserted (as does their complaint here) 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.

Following denial of the motions to dismiss and a period of discovery, the *Dumont* Plaintiffs and the *Dumont* State Defendants began settlement discussions. Brief in Support of Motion, R. 19, Page ID # 459. 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.* at Page ID # 723. 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 727. 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*.

B. The *Buck* Action

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 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 interest in protecting the rights obtained under the Settlement Agreement and in being able to pursue fostering and adopting from the Michigan public child welfare system without State-sanctioned discrimination 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' constitutional arguments in this case. *Id.*

On July 31, 2019, the District Court denied the Dumonts' motion to intervene. Order, R. 52, Page ID ## 1864–66. 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 ## 1934–36. The next business day, the District Court denied the motion for reconsideration. Order Denying Reconsideration, R. 58, Page ID # 1962. The Dumonts timely filed a notice of appeal from the District Court's order denying the

Motion, R. 65, Page ID ## 2488–99, and filed their brief in the Intervention Appeal, *Melissa Buck, et al.* v. *Robert Gordon, et al.*, No. 19-1959 (6th Cir. 2019), on October 16, 2019. Pursuant to the briefing schedule, that appeal will not be fully briefed until December 12, 2019.

On September 26, 2019, the District Court entered a preliminary injunction (the "Preliminary Injunction") that prohibits the State from complying with its obligations to the Dumonts under the Settlement Agreement. Order Granting Preliminary Injunction, R. 70, Page ID ## 2530–31.[2] 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*) or critical evidence offered by the Dumonts about the harm to children should a preliminary injunction be entered, and wholly ignored the impact of the Injunction on the Settlement Agreement. *See generally* Opinion Granting Preliminary Injunction, R. 69, Page ID ## 2498–529. On October 7, 2019, the State filed a Notice of Appeal of the District Court's Opinion and Order granting preliminary injunctive relief. Notice of Appeal, R. 71, Page ID ## 2532–33.

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[2] The District Court also dismissed Melissa Buck, Chad Buck, and Shamber Flore for want of standing. *Id.* at Page ID # 2530. The District Court denied the remainder of the State Defendants and the Federal Defendants' motions to dismiss. *Id.*

ARGUMENT

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

The Dumonts are entitled to intervene in this appeal as a matter of right under Federal Rule of Civil Procedure 24(a), which applies to this requested intervention in an appeal. *See Ne. Ohio Coal. For Homeless and Serv. Emp. Int'l Union, Local 1199* v. *Blackwell*, 467 F.3d 999, 1006–07 (6th Cir. 2006) (applying Rule 24(a) to intervention at the appellate stage). The Dumonts satisfy all four required prongs for intervention as of right: "(1) that the motion to intervene was timely; (2) that they have a substantial legal interest in the subject matter of the case; (3) that their ability to protect that interest may be impaired in the absence of intervention; and (4) that the parties already before the court may not adequately represent their interest." *Grutter* v. *Bollinger*, 188 F.3d 394, 397–98 (6th Cir. 1999).

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." *Mich. State AFL-CIO* v. *Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997); *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, including "the point to which the suit has progressed"). The Dumonts have filed their motion just 13 days after the appeal was docketed and before any briefing, and if their motion is granted, will abide by the same briefing schedule this Court sets for the State Defendants' briefs. Their motion

to intervene below was likewise timely, filed before any party responded either to the complaint or to the motion for a preliminary injunction. The parties conceded that the Dumonts' motion below was timely and the District Court took no issue with timeliness.

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

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. This Appeal, and the Preliminary Injunction in this case, implicate two of the Dumonts' substantial legal interests warranting intervention. *First*, the Dumonts have a substantial legal interest in pursuing fostering and adopting a child from the Michigan public child welfare system without being exposed to 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.

At the same time that the Dumonts are actively pursuing fostering and adopting a child from the Michigan public child welfare system, the Preliminary

Injunction compels the State to allow STVCC to turn away same-sex couples like the Dumonts because they have a religious objection to accepting such families. This subjects the Dumonts to the stigma of discrimination and leaves them with fewer agency options than are available to other families.[3] This practice 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

[3] 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 agency (and 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). The vast majority of children in foster care are not legally free for adoption and thus fall outside of the MARE program. *See* Declaration of Neitman, R. 34-3, Page ID #972 ("There are approximately 13,000 children in foster care, about 2,000 of whom have a permanency goal of adoption.").

upon their status as a same-sex couple). This interest of the Dumonts alone warrants a grant of intervention as of right to challenge the Preliminary Injunction.

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).

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. Here, the Preliminary Injunction impairs the Dumonts' contractual right 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 case 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 case 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 granted relief which 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 case *is* about the State's implementation of the Settlement Agreement. For this additional reason, the Dumonts have a substantial legal interest in intervening in this case.

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

Intervention as of right in this Appeal 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 pursuing fostering and adopting without exposure to state-sanctioned discrimination and protecting their contractual rights under the Settlement Agreement have already been impaired without intervention before the District Court 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. Excluding the Dumonts from this appeal will only further impair their interests.

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 the State having obligations that are inconsistent with its obligations to the Dumonts in the Settlement Agreement. The Dumonts, already denied the opportunity to defend their rights as a party in the District Court proceedings regarding the Preliminary Injunction, must be provided the opportunity to participate in the appeal of the Preliminary Injunction now and defend against any final order which impairs their rights. They cannot wait for resolution of the Intervention Appeal, by which time it will likely be too late to participate in this Appeal which will decide important legal issues implicating the Dumonts' constitutional rights and legal interests.

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

No other party adequately represents the Dumonts' interests. The Dumonts' challenge to the Preliminary Injunction seeks to defend their constitutional rights using legal arguments that the State is unable or unwilling to make and offering evidence that the State is unable or unwilling to offer. Although both the State and the Dumonts seek to defend the State's policy requiring non-discrimination, the Dumonts 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. In *Dumont*, the State opposed the Dumonts' efforts to prove their claims under the Establishment Clause and Equal Protection Clause.

In addition, in their proposed opposition to Plaintiffs' Motion for a Preliminary Injunction (and subsequent amicus brief in opposition to the motion) filed at the District Court, the Dumonts submitted critical evidence that the State did not, including expert and lay testimony about the impact of discrimination against prospective foster and adoptive families on children's opportunities for family placements. This evidence shows that even if LGBTQ-friendly agencies exist, state-sanctioned discrimination is harmful to children and families in the child welfare system. *See* Expert Report of David M. Brodzinsky, Ph.D., R. 62-1, Page ID # 2230 ("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."); Declaration of Sander, R. 62-2, Page ID # 2273 ("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."). Moreover, only the Dumonts directed the District Court's attention to past MDHHS investigations showing that agency refusals to place

children with same-sex couples have already delayed two adoptions and kept one child separate from his siblings. Letter, R. 67, Page ID # 2494. Because the Dumonts were denied participation as parties, the court disregarded that evidence and relied extensively on Plaintiffs' factual assertions that were directly refuted by that evidence to conclude that the State's reasons for enforcing its non-discrimination requirement were a "pretext for religious targeting." Opinion Granting Preliminary Injunction, R. 69, Page ID ## 2518–19 (finding the state's policy "actually undermines the State's goal[] of . . . maximizing available placements for children. This further supports a finding of pretext for religious targeting."); *id.* at Page ID # 2519 ("[T]he State's proposed action here actually undermines [the State's goal of making available as many properly certified homes for the placement of foster and adoptive children as possible]. ***There is nothing in this record*** that supports a finding that the power of CPAs to decline referrals limits the pool of applicants.") (emphasis added).

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.; *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]."). 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.[4] 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 Blackwell*, 467 F.3d at 1008 (holding Secretary of State could not adequately represent Attorney General in case challenging absentee ballot voter identification laws because "Secretary's primary

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[4] 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*.

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").

II. Alternatively, This Court Should Grant Permissive Intervention Under Rule 24(b).

In the alternative, the Dumonts should be granted permissive intervention under Rule 24(b) of the Federal Rules of Civil Procedure, which provides that "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)). Here, the Dumonts' claims go to the heart of the constitutional issues in this litigation— the "common question[s] of law and fact" include 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. Additionally, granting the Dumonts' motion to intervene in this appeal would not result in undue delay or prejudice to the existing parties. While the original parties twice sought and received extensions of deadlines before the District Court below, the Dumonts timely met all deadlines and will continue to do so before this Court. The Dumonts

will be prepared to abide by the same briefing schedule this Court sets for the State Defendants' briefs.

CONCLUSION

For the foregoing reasons, the Court should grant the Proposed Intervenor Defendants-Appellants' Motion to Intervene.

Dated: October 28, 2019

Respectfully submitted,

s/ Garrard R. Beeney

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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 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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