No. 19-1959

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

v.

ROBERT GORDON, in his official capacity as the Director of the Michigan Department of Health and Human Services; JOOYEUN CHANG, in her official capacity as the Executive Director of the Michigan Children's Services Agency; DANA NESSEL, in her official capacity as Attorney General of Michigan; ALEX AZAR, in his official capacity as the Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Defendants,

and

KRISTY DUMONT; DANA DUMONT,
Amici Curiae-Appellants.

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

REPLY BRIEF OF KRISTY DUMONT AND DANA DUMONT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

In opposing Kristy and Dana Dumont's motion to intervene, Plaintiffs misconstrue both the Dumonts' arguments in support of intervention and this Court's precedents, relying on the District Court's legal and factual errors to keep the Dumonts from their rightful place: as parties to this litigation. Absent the ability to participate as parties to this litigation, the Dumonts' ability to protect their interest in being able to foster and adopt from the Michigan foster care system without facing discrimination is impaired, and their contractual rights, achieved through the settlement of litigation with the State, are undermined.

At bottom, this action seeks to force the State of Michigan to allow taxpayer-funded, state-contracted child placing agencies to refuse to accept same-sex couples as prospective foster and adoptive families for the children in their care, regardless of a family's qualifications and the needs of the children. Response at 1. It was precisely such discrimination that the Dumonts challenged in *Dumont* v. *Gordon*, 2:17-cv-13080-PDB-EAS (E.D. Mich. 2019), leading to a Settlement Agreement, R. 31-5, Page ID ## 713–44, in which the State committed to enforce the non-discrimination provisions in its contracts with child placing agencies.[1] This

[1] Plaintiffs once again mischaracterize the *Dumont* case as a "lawsuit challenging Michigan's practice of working with faith-based agencies." Response at 30; *see also* Response to Motion to Intervene, R. 37, Page ID # 1371 (The Dumonts "sought to force the State to change its policy of partnering with private, faith-based child placing agencies like St. Vincent."). The Dumonts brought no such

settlement ensured that same-sex couples like the Dumonts would have the ability to foster or adopt children in the Michigan foster care system on the same terms as heterosexual couples; they would no longer face the stigma of discrimination or be denied the full set of agency options from which heterosexual couples can choose. Before the *Dumont* settlement, the Dumonts were turned away from two agencies because of their sexual orientation. Picking up the phone to contact other agencies would require them to consider and question whether that agency would also turn them away for no reason other than their sexual orientation. The *Dumont* settlement secured what all heterosexual couples already had—the right to be welcomed by all available agencies and evaluated as potential foster and adoptive parents based on their ability to provide a safe, loving home for children in the Michigan child welfare system.

It was the settlement of *Dumont* that prompted this litigation in which Plaintiffs seek to effectively undo the relief obtained through the settlement by asking the courts to declare that the State must allow taxpayer-funded, state-contracted child placing agencies with religious objections to same-sex couples to discriminate against such families. Should Plaintiffs prevail, the Dumonts will once

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lawsuit. Their case challenged discrimination against same-sex couples by state-contracted child placing agencies. *See, e.g.*, *Dumont* Complaint, *Dumont* R. 1, Page ID # 3 ("This action concerns only the State's provision of taxpayer-funded government services based on religious and discriminatory criteria.").

again face discrimination in the form of the denial of the full set of agency options that are available to heterosexual couples as well as the stigmatic harm suffered as a result of being denied service because of their sexual orientation. They will also lose the benefit of their bargain in settling the *Dumont* litigation, in which they agreed to dismiss their claims with prejudice in exchange for the State's commitment to enforce the non-discrimination provisions in its contracts with child placing agencies.

The Federal Rules of Civil Procedure and Sixth Circuit case law make clear that the Dumonts should be granted intervention as of right or, in the alternative, permissive intervention. The District Court erred by failing to address the Dumonts' interest in pursuing fostering and adoption free from discrimination and by misunderstanding the effect this case has on the Dumonts' rights in the Settlement Agreement. Additionally, the District Court erred in finding that the State adequately represents those interests, despite the fact that the State has not invoked important defenses available to the Dumonts, including that allowing taxpayer-funded, state-contracted agencies to use religious criteria to exclude same-sex couples would violate the Establishment Clause and the Equal Protection Clause of the Constitution. Moreover, the State has interests and incentives in policymaking flexibility and avoiding litigation that do not align with the Dumonts'.

ARGUMENT

I. The Dumonts Have a Right to Intervene.

A. The District Court Erred in Concluding That the Dumonts Lack a Substantial Legal Interest in This Case.

The Dumonts have two distinct substantial legal interests at stake here, each of which independently satisfies this Court's "expansive notion of the interest sufficient to invoke intervention of right," *Mich. State AFL-CIO* v. *Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997): (1) the relief sought by Plaintiffs would subject the Dumonts to practical and stigmatic injuries by requiring them to pursue fostering and adopting a child in a system in which taxpayer-funded, state-contracted child placing agencies ("CPAs") may discriminate against them, impairing their constitutional rights; and (2) the preliminary injunction renders the Settlement Agreement, which the Dumonts obtained in exchange for the dismissal of their constitutional claims in an earlier action, meaningless. The District Court erred in overlooking these interests and the controlling authority showing them to be sufficient for a grant of intervention as of right.

1. *The Dumonts have a substantial legal interest in being able to foster and adopt from the State Foster Care System without being subjected to further discrimination.*

Plaintiffs' argument that the Dumonts lack a substantial legal interest in this litigation rests on the false premise that the relief sought by Plaintiffs poses "no practical barrier to foster care or adoption" for the Dumonts. Response at 1; *see*

also id. at 33 ("The Dumonts can foster in the same way as any other couple . . . ."). They attack a straw man by arguing that "the Dumonts would not lose access to Michigan's child welfare system regardless of the outcome of this litigation." *Id.* at 23.

Forcing the State to allow agencies with religious objections to same-sex couples to turn away such families deprives the Dumonts of *equal* treatment as they seek to foster and adopt a child through Michigan's public child welfare system. Unequal access to a government program is an injury that gives the Dumonts a substantial interest in this litigation. *See Dumont* v. *Lyon*, 341 F. Supp. 3d 706, 722 (E.D. Mich. 2018) (finding Dumonts' alleged Article III standing from "the unequal treatment they received as a result of being turned away based upon their status as a same-sex couple, a barrier that makes 'it more difficult for [same-sex couples to adopt] than it is for [heterosexual couples]'") (quoting *Ne. Fla. Chapter of Associated Gen. Contractors of Am.* v. *City of Jacksonville*, 508 U.S. 656, 666 (1993) (alterations in original)). The Dumonts do not argue that if Plaintiffs prevail and CPAs are permitted to discriminate based on religious objections to same-sex couples that *all* agencies would refuse to accept them. Rather, they have said that if the State is forced to allow agencies to use religious criteria to exclude same-sex couples, they will once again be subjected to the risk of the stigmatizing experience of being denied service because of their sexual orientation, and they will be denied

the full array of options from which heterosexual couples can choose to find the agency best suited for their circumstances. *See* Expert Report of David M. Brodzinsky, Ph.D., R. 62-1, Page ID # 2233 ("If State-contracted agencies exclude same-sex couples, even if there are other agencies in their vicinity, there is also no guarantee that any of those agencies will be appropriate for the family's circumstances.") Indeed, the *Dumont* court found that the stigmatic and practical injuries cited by the Dumonts were sufficient to meet the higher threshold for Article III standing. *Dumont*, 341 F. Supp. 3d at 720–22; *see Grutter* v. *Bollinger*, 188 F.3d 394, 398 (6th Cir. 1999) ("an intervenor need not have the same standing necessary to initiate a lawsuit").

In their effort to get around this clear unequal treatment that the Dumonts would face should Plaintiffs prevail in this case, Plaintiffs argue that there would be no discrimination because any child in STVCC's care could be placed with the Dumonts if they are licensed by another agency. Even if that were true, that would not erase the harms discussed above. In any case, while STVCC says families approved by any agency can *adopt* a child in its care through the Michigan Adoption Resource Exchange ("MARE"), that leaves out all of the children who are not legally free for adoption who need foster placements. Response at 23. The overwhelming majority of children in the foster care system are not free for adoption and are thus

not listed on MARE.[2] Thus, even putting aside the harms of stigmatizing discrimination and reduced agency options to choose from, MARE is not the "separate but equal" solution STVCC presents it to be.

Plaintiffs further attempt to refute the discriminatory harms identified by the Dumonts by claiming that "*[n]o couple* has access to every private child placing agency," Response at 24 (emphasis in original), because *inter alia* some agencies have "specialized missions," *id.* at 10. This relies on sleight of hand. As an MDHHS employee explained, "all [agencies] have the same contractual and licensing requirements and all must comply with [the] terms of the contract and license," and "[a]lthough an agency may focus on providing foster care case management or adoption services to *children* with certain needs, like those with disabilities," agencies do not "exclude prospective foster and adoptive *parents* based

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[2] 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. 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.").

STVCC does not deny that it wants free license to exclude the Dumonts and other families like them from providing a home for most of the MDHHS-supervised children in the agency's care. STVCC's own testimony shows that families headed by same-sex couples are systematically excluded from serving as foster homes for children assigned to STVCC because they are excluded from "that agency's pool of homes waiting to serve a child in need" to which the agency looks to when "MDHHS gives agencies just one hour" to match a referral of a child's foster care case with a potential family. *See* Declaration of Snoeyink, R. 6-1, Page ID # 234.

on race, religion, sexual orientation or marital status." Declaration of Bladen, R. 34-4, Page ID ## 998–99 (emphasis added). The other reasons Plaintiffs list—"some [agencies] are located too far away, some do not provide the specific services a couple might need, [and] some might have a long waiting list," Response at 24—are not examples of agencies excluding classes of prospective foster or adoptive families and do not conflict with the nondiscrimination clause that has been part of CPA adoption and foster care case management contracts since 2015 and 2016, respectively. *See* Declaration of Goad, R. 34-2, Page ID # 969.

Plaintiffs next attempt to challenge the Dumonts' interest in this case by attacking the sincerity of their desire to foster or adopt a child in foster care. They suggest the Dumonts could not be sincere because they contacted the ACLU and still have not fostered or adopted. Plaintiffs' portrayal of the Dumonts as acting to further an ACLU agenda as opposed to their sincere desire to care for a child in need is baseless. They attempt to repurpose years' old, out-of-context statements from the *Dumont* case and use them, without any factual basis, to cast doubt on the sincerity of the Dumonts' current desire to foster and adopt a child from Michigan's public welfare system. *See* Response at 13–15. These irrelevant details are contradicted by the Dumonts' allegations, which must be accepted as true, *Horrigan* v. *Thompson*, 1998 WL 246008, at *2 (6th Cir. 1998), that they are "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." Declaration of K. Dumont, R. 39-2, Page ID # 1518; Declaration of D. Dumont, R. 39-3, Page ID # 1522. That they have not yet completed this process—particularly given the obstacle of discrimination that they have faced—does not support the inference Plaintiffs suggest.

Plaintiffs also assert that the Dumonts lack an interest in this case because, they say, the Dumonts have no desire to foster or adopt a child through STVCC. Because the relief Plaintiffs seek would allow any agency to use religious criteria to exclude same-sex couples, the Dumonts have an interest in this case as a same-sex couple who seeks to foster and adopt.[3] At least two other agencies have also discriminated against same-sex couples. *See Catholic Charities* Complaint, R. 1-2, *Catholic Charities of West Michigan* v. *MDHHS*, 2:19-cv-11661 (E.D. Mich. 2019); Motion to Intervene, R. 19, Page ID # 457 ("Kristy and Dana Dumont contacted two state-contracted CPAs, STVCC and Bethany Christian Services, to inquire about adopting a child from foster care and were turned away because the

[3] Although Plaintiffs seek to tar the Dumonts' motion to intervene in another case involving similar claims brought by another CPA, *see* Response at 30–31, they are seeking to intervene in that case for this same reason. The Dumonts' motion to intervene in *Catholic Charities of West Michigan* v. *MDHHS*, 2:19-cv-11661 (E.D. Mich. 2019) is still pending.

agencies stated that they 'do[] not work with same-sex couples.'").[4] In any case, the Dumonts did try to work with STVCC but were turned away twice and the Dumonts said that the reason they have not contacted STVCC for a third time is that, "in light of St. Vincent's public statements and its statements in the *Dumont* Case, [they] thought it would likely turn [them] away again" and they "did not want to again experience the sadness and frustration [they] felt each previous time [they] were rejected." Declaration of K. Dumont, R. 39-2, Page ID # 1518; Declaration of D. Dumont, R. 39-3, Page ID # 1522. The court "must accept as true the non-conclusory allegations" of a motion to intervene. *Horrigan*, 1998 WL 246008 at *2. Plaintiffs' efforts to dispute the Dumonts' desire to foster and adopt children should be given no weight.

The Dumonts' interest in avoiding further discrimination is not a mere "generalized grievance" because, unlike "numerous other members of the general public," Response at 28, the Dumonts personally suffered, and continue to suffer, discrimination from the precise conduct in which Plaintiffs seek to engage. Unlike the prospective intervenors in *Granholm*, the Dumonts' interest in this case is not grounded in their role in "advocat[ing] for the passage of a law." *Coal. to Defend*

[4] While Bethany agreed to comply with the State's requirements after the Settlement Agreement was announced, if Plaintiffs were to prevail and the courts hold that the State has to allow agencies to discriminate, it is unknown whether Bethany would resume its past practice.

Affirmative Action v. *Granholm*, 501 F.3d 775, 782 (6th Cir. 2007).[5] Rather, the Dumonts are directly "affected by the [policy]" and therefore "have an ongoing legal interest in its enforcement after it" was adopted. *Id.* Like the prospective students in *Grutter* who sought admission to the University of Michigan and wanted to "maintain[] the use of race as a factor in the University's admissions program," 188

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[5] Plaintiffs attack the Dumonts' litigation activities as an "attempt to bypass the legislative process and change Michigan law protecting religious accommodation by private agreement." Response at 39 n.14. But it is *Plaintiffs*, not the Dumonts, who want to change Michigan's law through litigation. State law passed in 2015 provides that "a child placing agency shall not be required to provide any services if those services conflict with, or provide any services under circumstances that conflict with, the child placing agency's sincerely held religious beliefs," but the legislature defined "services" to *exclude* "foster care case management and adoption services provided under a contract with the department." Mich. Comp. L. §§ 722.124e(2), (7)(b). CPAs' foster care case management and adoption contracts with MDHHS cover "services include[ing] the home study, recruitment and placement of foster children." Declaration of Hoover, R. 34-5, Page ID # 1007. In other words, while the statute permits agencies to decline to provide services that conflict with their religious beliefs when providing private placement adoptions—*i.e.*, adoptions of infants who were voluntarily placed by birth parents without State involvement— it does not allow such conduct when agencies are providing public child welfare services to children in the State's custody.

The only provision in the statute applicable to agencies providing services under contract with the State says that a CPA may decide for religious reasons not to accept a "referral" of "a particular child or particular individuals" *from "the Department"* for foster care case management or adoption services. Mich. Comp. L. §§ 722.124f(a); 722.124e(1)(h) (emphasis added). When a couple calls an agency to inquire about fostering or adopting, that call is not a "referral" within the plain language of the statute, and the agency may not choose whether to "accept" or "reject" it. Once an agency chooses to accept Department referrals of children or other young people in need of the services of a CPA, it may not decline to provide them any services based on religious objections, including recruitment of families to care for them.

F.3d at 398, the Dumonts seek to foster and adopt a child from the public child welfare system and maintain the State's policy of requiring compliance with the nondiscrimination clause in CPA contracts. Therefore, the Dumonts have a substantial legal interest in this case and have the right to intervene.

2. *The Dumonts have a substantial legal interest in preserving the benefit of their bargain in settling the* Dumont *Litigation.*

Plaintiffs' argument that the Dumonts cannot have an interest in protecting the Settlement Agreement because its language "specifically disclaims application to the extent 'prohibited by law or court order'" is completely backwards. Response at 33. The Settlement Agreement's enforceability hinges on the outcome of this case because this case seeks a court order to prevent the State from enforcing its nondiscrimination policy. Participating in this case is the only way the Dumonts can preserve the rights they obtained through their settlement of the *Dumont* litigation and ensure no court order is entered to vitiate those rights.[6] Plaintiffs' argument that the contract establishing the rights the Dumonts obtained after hard-fought litigation deprives them of the ability to protect those rights from

[6] That the Dumonts' Settlement Agreement memorializing this policy is not a consent decree—something the Dumonts never claimed—does not diminish this interest. *See Grutter*, 188 F.3d at 398 ("*Jansen* [does not] . . . stand[] for the proposition that an interest must be protected by means of a consent decree or by any other particular means in order for the proposed intervenors to be able to establish that they have a substantial legal interest.").

legal challenge makes no sense whatsoever. The fact that Plaintiffs' success in this lawsuit would eliminate the Dumonts' ability to enforce their settlement agreement is precisely what demonstrates that the Dumonts have a substantial legal interest justifying intervention.

This case bears no resemblance to cases in which putative intervenors' "primary interest in the litigation is to preserve a party's financial viability in order to protect the intervenor's own economic interests." *Reliastar Life Ins. Co.* v. *MKP Inv.*, 565 Fed. Appx. 369, 372 (6th Cir. 2014) (punctuation omitted); *see also Blount-Hill* v. *Bd. of Educ. of Ohio*, 195 Fed. Appx. 482, 486 (6th Cir. 2006) (holding putative intervenor had no substantial interest because its "primary interest is economic"). In *Reliastar*, this Court held that a putative intervenor had no substantial interest where it sought only "to protect its contingent interests in" the insurance policies at issue in the litigation. 565 Fed. Appx. at 372. To the contrary, the Dumonts assert a *direct* contractual interest in this case: The State's commitment to enforce its nondiscrimination policy, a benefit that the Dumonts bargained for in exchange for dismissing their lawsuit, which this litigation now jeopardizes. *Blount-Hill* is similarly irrelevant. There, this Court found a prospective intervenor did not have a substantial interest because its "claimed interest d[id] not concern the constitutional and statutory violations alleged in the litigation." 195 Fed. Appx. at 486. Here, the Dumonts' interests go to the heart of the constitutional claims at

issue: Plaintiffs claim that the Constitution entitles them to discriminate against people like the Dumonts and the Dumonts disagree.

The District Court's finding that "Plaintiffs are not asking for any relief directed at the Settlement Agreement itself" does not bear on the question of Dumonts' right to intervene. Opinion, R. 52, Page ID # 1865. The Dumonts' litigation with the State and Plaintiffs is central to the Complaint in this action (filed days after the *Dumont* settlement), and there is no doubt that the effect (not to mention intent) of the injunctive relief Plaintiffs seek (and preliminarily obtained) is to eviscerate the core provisions in the Settlement Agreement the Dumonts bargained for in agreeing to dismiss their constitutional challenges.

B. Denial of Intervention Has Already Impaired the Dumonts' Ability to Protect Their Interests.

The District Court's denial of intervention has already impaired the Dumonts' ability to protect their interests. In entering a preliminary injunction, which compels the State to allow discrimination against same-sex couples like the Dumonts, the District Court did not address at all evidence and legal arguments the Dumonts submitted as *amici*. As discussed below, the Dumonts offered two defenses not presented by the State—that allowing agencies to use religious criteria to exclude same-sex couples would violate the Establishment and the Equal Protection Clauses of the Constitution. The Dumonts submitted evidence showing that when agencies exclude same-sex couples when providing public child welfare

services, it limits the pool of prospective parent applicants and harms children and families. *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, ¶ 17 ("I recall an LGBTQ prospective family who reached out to [an agency] . . . . [It] refused to work with them. The family was so discouraged that they decided not to call another agency.").

Plaintiffs argue that the District Court properly ignored this evidence because it contains hearsay (an objection never raised before the court below) and was refuted by Plaintiffs' two expert reports. However the District Court did not conduct an evidentiary hearing, and nothing in the District Court's opinion suggests that it engaged in any evidentiary analysis of the Dumonts' submissions.[7] Moreover, while Plaintiffs claim that Dr. Brodzinsky's expert testimony was refuted by two

[7] Whether or not the Dumonts' submissions contained hearsay is irrelevant on a preliminary injunction. *See, e.g.*, *Kos Pharma., Inc.* v. *Andrx Corp.*, 369 F.3d 700, 718 (3d Cir. 2004) (affirming district court's reliance on hearsay and noting "many of our sister Circuits have recognized that affidavits and other hearsay materials are often received in preliminary injunction proceedings") (alterations omitted) (collecting cases); *see also* 11A Charles A. Wright, Arthur R. Miller, et al., Federal Practice & Procedure § 2949 (3d ed.) (noting that "affidavits usually are accepted on a preliminary injunction motion without regard to the strict standards of Rule 56(c)(4), and . . . hearsay evidence also may be considered").

expert reports, those reports said nothing to challenge his discussion of the deterrent effect of discrimination on prospective families. Rather, a report simply noted the unremarkable point that not *all* same-sex couples are ultimately deterred by discrimination. Expert Report of Karen Strachan, R. 42-3, Page ID # 1654 ("Every month, I usually have at least one same-sex couple in my training class, if not more. . . . I have never had any of these couples express to me that St. Vincent's religious beliefs have discouraged or prevented them from fostering or adopting, or created any sort of obstacle to them providing a home for children."). Although Plaintiffs contend that the Dumonts' arguments were not "unconsidered," the arguments are nowhere addressed in the District Court's opinion. *Compare* Opinion Granting Preliminary Injunction, R. 69, Page ID # 2519 ("[T]here is nothing in this record that supports a finding that the power of CPAs to decline referrals [*i.e.*, to turn away prospective parents] limits the pool of applicants."), *with* Expert Report of David M. Brodzinsky, Ph.D., R. 62-1, Page ID # 2229 (offering such evidence) *and* Declaration of Sander, R. 62-2, Page ID # 2273, ¶ 17 (same).

C. The Dumonts' Interests Are Not Adequately Represented by the State.

Finally, the Dumonts have satisfied their "minimal" burden of demonstrating that their interests are not adequately represented by the State because the State has not advanced the arguments that the relief sought by Plaintiffs violates the Establishment and Equal Protection Clauses. "[P]roposed intervenors are not

required to show that the representation will in fact be inadequate," *Grutter*, 188 F.3d at 400, just that it *may* be. And "it may be enough to show that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments."[8] *Miller*, 103 F.3d at 1247 (emphasis added); *see also Jordan* v. *Mich. Conf. of Teamsters Welfare Fund*, 207 F.3d 854, 863 (6th Cir. 2000) (no inadequate representation where intervenor "does not identify a single argument that [it] would have made in support of its position that Plaintiffs have failed to advance"). "[I]nterests need not be wholly 'adverse' before there is a basis for concluding that existing representation of a 'different' interest may be inadequate." *Jansen* v. *City of Cincinnati*, 904 F.2d 336, 343 (6th Cir. 1990).

Here, as in *Grutter*, the State has institutional interests in policymaking flexibility and incentives to avoid litigation that may conflict with the Dumonts' interests in asserting their constitutional rights. This could lead to inconsistent justifications for the State's policy now and adverse interests between the State and the Dumonts. *See also Miller*, 103 F.3d at 1247 (finding inadequate representation where intervenor "would harbor an approach and reasoning for upholding the statutes that will differ markedly from those of the state, which is cast by the statutes

[8] This is hardly a disagreement regarding "the finer points of constitutional theory." Response at 45. The State has not offered two critical defenses of its policy—that is required by the Establishment Clause and the Equal Protection Clause—and, in fact, expressly rejected this position in *Dumont*.

in the role of regulator"). Plaintiffs' claim that there is "no daylight between the Dumonts' and Michigan's desired outcomes," Response at 43, ignores critical differences between their justifications for that result. While the State wishes to maintain its current nondiscrimination policy, it has not assumed the Dumonts' position that the Constitution *requires* this policy. Indeed, not only has the State not raised the Dumonts' constitutional rights here, it opposed these very same arguments in *Dumont*, and the State could change its litigation posture again at any time. Thus, as Plaintiffs' own authority instructs, because the State has at least some "interest[s] adverse to the proposed intervenor," *Bradley* v. *Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987), it may not adequately represent the Dumonts' interests.

Plaintiffs try to distinguish *Grutter* on the basis that no presumption of adequate representation applied in that case 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." Response at 46. Here, too, the Dumonts have a very different interest than the State. The Dumonts have an interest in being able to foster and adopt free from discrimination that stigmatizes them and denies them access to agencies available to others, while the State has an interest in policymaking flexibility and avoiding litigation, all in the interest in serving the children in its care. The fact that the Dumonts share the State's

goal of upholding the challenged policy—which was also true of the intervenors in *Grutter*—does not mean that the Dumonts and the State have the same interest.[9]

Puzzlingly, Plaintiffs claim that the Dumonts have somehow waived the right to appeal the District Court's adequacy of representation finding merely because the Dumonts "neither acknowledge [a presumption of adequate representation] nor cite the relevant standard for rebutting it." Response at 42. This is wrong for at least two reasons. *First*, the Dumonts' opening brief makes clear that no presumption of adequate representation applies here because the State has interests structurally and materially opposed to the Dumonts. *See* Appellants' Brief at 24–26. *Second*, none of Plaintiffs' cases stands for the proposition that failure to anticipate the opposing party's argument in an opening brief and only responding on reply constitutes a waiver of an entire argument in support of a motion to intervene.[10]

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[9] Plaintiffs also attempt to distinguish *Grutter* on the basis that in that case, "the existing party was unlikely to present certain crucial *evidence*." Response at 47 (emphasis in original). But, as discussed above (at n.7), the Dumonts proffered important evidence that the State Defendants have not.

[10] Plaintiffs' cited cases are inapposite. In *United States* v. *Huntington Nat'l Bank*, a defendant was found to forfeit an interest in property subject to criminal forfeiture proceedings because it failed to raise one of two grounds for relief entirely. 574 F.3d 329, 331–32 (6th Cir. 2009). In *United States* v. *White*, a defendant waived an argument where he "present[ed] a new reason [for the district court's error] . . . for the first time on appeal." 920 F.3d 1109, 1114 (6th Cir. 2019). And in *Hisrich* v. *Volvo Cars of N. Am., Inc.*, this Court merely found that a trial court erred in denying a plaintiff's failure-to-warn jury instruction where there was no evidence at trial that the plaintiff in fact "neither read nor heeded the instructions." 226 F.3d 445, 451 (6th Cir. 2000). None of these cases says that an appellant who does not

II. To Contest Permissive Intervention, Plaintiffs Distort the Record.

Plaintiffs' arguments against permissive intervention turn on the incorrect premise that permissive intervention requires the pleading of counter- or crossclaims in a proposed answer and improperly describe the Dumonts as "impassioned bystander[s]." Response at 50. Plaintiffs point to no authority holding that prospective intervenors *must* allege counterclaims or "face potential liability," rather than potential injury, in order to intervene and Federal Rule of Civil Procedure 24 does not provide otherwise. *Id.*; *see*, *e.g.*, *League of Women Voters of Mich.* v. *Johnson*, 902 F.3d 572, 577 (6th Cir. 2018) (permissive intervention requires only "timely motion," "a claim or defense that shares with the main action a common question of law or fact" and consideration of "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights"). Requiring an intervening defendant to assert counterclaims or face liability would completely distort the rationale for permissive intervention. *See* 7C Charles A. Wright, Arthur R. Miller, et al., Federal Practice & Procedure § 1911 (3d ed.) (Rule 24(b) "does not specify any particular interest that will suffice for permissive intervention and, as the Supreme Court has said, 'it plainly dispenses with any requirement that the

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anticipate all of the nuances of the appellee's arguments is stripped of the right to respond in a reply brief, especially where, as here, the opening papers make clear that the respondent's argument lacks merit.

intervenor shall have a direct personal or pecuniary interest in the subject of the litigation.'") (quoting *SEC* v. *U.S. Realty & Improvement Co.*, 310 U.S. 434, 459 (1940)). Indeed, when Plaintiffs moved to intervene in *Dumont* (successfully), they did not assert counterclaims, nor did they face potential liability, as the *Dumont* Plaintiffs sought no relief against them.

Plaintiffs further argue that the Dumonts "do not even allege a claim or defense common to this action—they only assert Michigan's claims or defenses for it," Response at 49, but plainly neither is correct. In seeking intervention before the District Court, the Dumonts identified two unique affirmative defenses that go to the heart of the constitutional issues in this litigation—the nondiscrimination policy Plaintiffs attack as unconstitutional is the same policy the Dumonts argue is *mandated* by the Constitution. *See* Brief, R. 19, Page ID # 469 ("[B]oth Plaintiffs and the Dumonts raise claims or defenses related to whether the First, Fifth and Fourteenth Amendments to the U.S. Constitution require the State to permit state-contracted CPAs to violate the contracts' non-discrimination requirement that includes sexual orientation."); s*ee also* R. 18-1 at Page ID # 448 ("The relief requested by Plaintiffs is barred by the Establishment Clause of the First Amendment of the United States Constitution" and "The relief requested by Plaintiffs is barred by the Equal Protection Clause of the Fourteenth Amendment, and by the Fifth

Amendment of the United States Constitution").[11] Consistent with Rule 24(b), the Dumonts' Establishment and Equal Protection Clause defenses share a common question of law or fact with Plaintiffs' claims and protect the Dumonts' rights, not Michigan's. Moreover, neither the State Defendants nor Federal Defendants raised these defenses.

Finally, Plaintiffs wholly ignore *Liberte Capital Grp., LLC* v. *Capwill*, which is cited in the Dumonts' opening brief and shows that the District Court's lack of analysis is an abuse of discretion.[12] 126 Fed. Appx. 214, 220 (6th Cir. 2005).

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[11] Plaintiffs' reading of the Dumonts proposed answer is so off-base as to border on bad faith. They say that the Dumonts do not "raise a defense relevant to this action" when, in fact, the Dumonts claim that the Establishment Clause bars the Free Exercise claims asserted by Plaintiff. Response at 50. They say that the Dumonts' "proposed answer merely parrots that of the State Defendants" when, in fact, the State Defendants have not asserted that the relief sought by Plaintiffs is barred by the Establishment or Equal Protection Clauses. *Id.*

[12] Plaintiffs also baselessly claim that "the Dumonts' intervention *would* delay this case" because Dumonts have filed a "flurry of filings." Response at 52 (emphasis in original). Ignoring the *ad hominem* attack, the Dumonts have filed papers not to "crowd[] the docket," *id.*, but to protect their right to be free from state-sanctioned discrimination in their efforts to foster and adopt a child from Michigan child welfare system. Plaintiffs have not nor could they identify any instance where the Dumonts failed to meet any deadlines or otherwise sought extensions to the prejudice of the parties.

CONCLUSION

For the foregoing reasons and those set out in the Dumonts' opening brief, the order of the District Court should be reversed and the Dumonts should be granted intervention as of right or, in the alternative, permissive intervention.

Dated: December 12, 2019

Respectfully submitted,

s/ Garrard R. Beeney

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CERTIFICATE OF SERVICE

I hereby certify that on December 12, 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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