IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

MELISSA BUCK; CHAD BUCK; and 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; HERMAN MCCALL, in his official capacity as the Executive Director of the Michigan Children's Services Agency; DANA NESSEL, in her official capacity as Michigan Attorney General; ALEX AZAR, in his official capacity as Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *Defendants.*	No. 1:19-cv-00286 HON. ROBERT J. JONKER

PLAINTIFFS' RESPONSE TO KRISTY AND DANA DUMONT'S MOTION TO INTERVENE

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CONCISE STATEMENT OF ISSUES PRESENTED

1. The Proposed Intervenors have failed to satisfy the requirements for either intervention as of right or permissive intervention. Proposed Intervenors present no evidence to support the claim that they have a substantial legal interest in this case, nor have they explained how their personal interests are at all implicated by St. Vincent's contract with the State of Michigan.

PRELIMINARY STATEMENT

St. Vincent is providing adoptions and finding families for Lansing's most vulnerable children today, and it wants to continue doing so. This lawsuit is about St. Vincent and its relationship with the State Defendants, who in turn claim that federal regulations govern certain aspects of that relationship.

Proposed Intervenors are not party to either of those relationships. And, crucially, they do not even claim they wish to adopt through St. Vincent. Instead, they seek a right to police the contractual relationships between the State and child welfare agencies they show no interest in working with. Their intervention would not protect any legal interest; no interest of theirs is impaired, and the State could adequately represent any interests they might have. Permitting intervention will only complicate the case and create unnecessary delays.

Adoptive families like the Bucks, volunteers like Shamber Flore, and St. Vincent itself need urgent relief from the government's unlawful actions. The Plaintiffs would not object to Proposed Intervenors acting as *amicus curiae* in the case, provided that doing so does not delay consideration of Plaintiffs' urgent preliminary injunction motion.

BACKGROUND

St. Vincent is one of the oldest and most effective adoption agencies in Michigan. ECF No. 6-1 at PageID.228. St. Vincent has served children and families for over 70 years, helping those in crisis find hope and safety. *Id.* at PageID.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.* As it has for many years, St. Vincent provides these services pursuant to contracts with the State Defendants. It is illegal to provide adoption or foster care services to children in Michigan's child welfare system without a MDHHS contract. *Id.* at PageID.237. Therefore, if the State refuses to work with St. Vincent, the agency would be forced to shut down its foster and adoption ministries. *Id.* at PageID.237.

In order to ensure that "[p]rivate child placing agencies, including faith-based child placing agencies, have the right to free exercise of religion under both the state and federal constitutions," Michigan enacted a law in 2015 to protect religious child welfare providers. MCL 722.124(e). As the State explained: "Under well-settled principles

of constitutional law, this right includes the freedom to abstain from conduct that conflicts with an agency's sincerely held religious beliefs." *Id*. As the State explained further, "[e]nsuring that faith-based child placing agencies can continue to provide adoption and foster care services will benefit the children and families who receive publicly funded services." *Id*. at 722.124(g).

Shortly after the law passed, the ACLU of Michigan began "more than two years of work" to file a lawsuit to challenge the law. Ex. 9. 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. 3. As a result, Proposed Intervenors Kristy and Dana Dumont began communicating with the ACLU. Ex. 4 at 6. Roughly two months later, the Dumonts reached out to two—and only two—adoption agencies: St. Vincent and Bethany Christian. *Id*. at 3. 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 and St. Vincent. *See id.*; Ex. 10 at 3-4. 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 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." *Id.* at 4.

The Dumonts also put the ACLU in touch with another couple, the Busk-Suttons, who were parties to *Dumont v. Gordon* but have not sought to intervene here. Ex. 4 at 6. In June 2016, they inquired about one child on MARE and reached out to two different offices of Bethany. *Id.* at 4. Privately, Busk-Suttons said 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. 5. The Busk-Suttons further admitted that they "weren't in a huge rush to adopt" and "could probably go to another agency." Ex. 6.

The Dumonts and Busk-Suttons then sued the State of Michigan, not in the Dumonts' home forum of the Western District, but in the Eastern District of Michigan, on September 20, 2017. Complaint, *Dumont v. Gordon*, 17-cv-13080 (E.D. Mich. Sept. 20, 2017), ECF No. 1. The lawsuit sought to force the State to change its policy of partnering with private, faith-based child placing agencies like St. Vincent. *Id.* The Dumont plaintiffs did not assert any claims directly against St. Vincent or any other adoption agency. *See id.* As plaintiffs suing state agencies in federal court, the Plaintiffs sought only prospective injunctive and declaratory relief based primarily on their status as taxpayers in Michigan. *Id.*

The Bucks, Ms. Flore, and St. Vincent feared that their ministry would be threatened by the ACLU's lawsuit. They sought to protect their rights by intervening. In response to the lawsuit, 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 PA 53," the state law passed to protect religious child welfare agencies. Def. Answer at PageID.1189, *Dumont v. Gordon*, 17-cv-13080, (E.D. Mich. Dec. 15, 2017), ECF No. 52.

On January 1, 2019, Defendant Nessel took office. On January 23, the State and the ACLU sought a stay of the case so that they could engage in settlement discussions. Neither St. Vincent nor the other intervenors were invited to participate in these discussions. Then, on March 22, 2019, the State and ACLU filed a stipulated voluntary dismissal with prejudice, explaining that they had entered into a settlement agreement and that dismissal of the case was appropriate as "Intervenor Defendants [the Plaintiffs in this action] . . . are not party to the Settlement Agreement." Ex. 1 at 22.

The District Court then—within the hour—entered the stipulated dismissal "pursuant to the terms of the settlement agreement" and retained jurisdiction over the enforcement of the private settlement agreement. *Id.* at PageID.1445. And as the agreement itself notes, it is only valid to the extent it is not "prohibited by law or court order." *Id.*

After settling that lawsuit with the Dumonts, the State of Michigan issued a memorandum that applied to all child placing agencies in the State. Ex. 7. The State did not claim that the settlement was the exclusive reason for its sudden enforcement of this policy; it claimed that its policy had actually been required by state contracts all along, and that

this policy was necessary to comply with federal regulations from 2016. *See* Department of the Attorney General's *Summary Statement of Dumont v. Gordon Settlement Agreement*, available at https://www.michigan.gov/documents/ag/03.22.19_FINAL_Dumont_settlement_summary_650097_7.pdf and reproduced as Ex. 8 ("In compliance with this federal requirement, MDHHS contracts mandate that . . . all agencies must comply with MDHHS's non-discrimination statement when providing state-contracted services."); ECF No. 34 at PageID.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.").[1]

The State's allegedly "long-standing" policy violates Plaintiffs' First Amendment rights, as explained in their Preliminary Injunction Motion. *See* ECF No. 5. Plaintiffs need urgent relief to ensure that St. Vincent can keep its agency open and the Bucks, Shamber Flore, and others like

[1] The Plaintiffs dispute that this policy was in place prior to 2019, but cite Michigan's statements here in order to note a rare area of agreement: neither the Plaintiffs nor the State believe that the settlement agreement was the sole source of or reason for the State's current policy.

them are not harmed by the State's and the federal government's unlawful policies, regulations, and actions.

ARGUMENT

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

The Dumonts are not entitled to intervention as of right. To intervene as of right, a proposed intervenor must demonstrate "(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). "Each of these elements is mandatory, and therefore failure to satisfy any one of the elements will defeat intervention under the Rule." *Blount-Hill v. Zelman*, 636 F.3d 278, 283 (6th Cir. 2011) (citing *United States v. Michigan*, 424 F.3d 438, 443 (6th Cir. 2005)). While Proposed Intervenors' motion is timely, they have failed to satisfy the remaining three factors: they have not demonstrated a substantial legal interest; they have not shown that such interest will be impaired; and they have failed to rebut the

presumption that the State can adequately represent any interest they have.

A. The Dumonts have not alleged a substantial legal interest in this litigation.

This case is about the Plaintiffs' longstanding relationship with the State and the State's policy that threatens to end that relationship—to the detriment of St. Vincent, the Bucks, Ms. Flore, and other children and families who depend on St. Vincent for support. The Proposed Intervenors are not a party to that relationship. The Plaintiffs are challenging an unconstitutional policy which impairs *their* contract with the State and *their* constitutional rights. The Dumonts—who no longer make any claim that they want to work with St. Vincent—have no legal interest in whether or how that relationship continues, nor have they presented any evidence of such an interest. *Grutter*, 188 F.3d at 398 ("The proposed intervenors *must show* that they have a substantial interest in the subject matter of this litigation.").

First, the Dumonts claim an interest as a "party to a court-endorsed settlement agreement that is directly challenged in a separate litigation." ECF No. 19 at PageID.463. The settlement agreement is not court-endorsed—more on that later—and neither is that agreement "directly

challenged" here. Proposed Intervenors are correct to note that their settlement agreement created only "contractual rights" enforceable by them against the State. *Id*. The settlement says nothing about, nor could it be enforced against, Plaintiffs here. Indeed, Plaintiffs cannot violate the settlement agreement as they are not a party to it, nor were they ever invited to be. Instead, Plaintiffs challenge the State's discriminatory policy, one which even the State insists exists separately from that agreement, and which is now being enforced to prevent the State from continuing to work with St. Vincent. *See* ECF No. 34 at PageID.925 (State's claims); ECF No. 6 at PageID.188-189, 221-222 (describing Plaintiffs' harms from this policy).

In Proposed Intervenors' lengthy arguments about the settlement, two words are conspicuously absent: "consent decree." The Proposed Intervenors and State Defendants *could* have sought to have their settlement entered on the docket as a binding order of the court. That would have given the private agreement the force of a court order and—crucially—required a fairness hearing and subjected its terms to legal review on appeal. *See Pedreira v. Sunrise Children's Servs., Inc.*, 802 F.3d 865, 872 (6th Cir. 2015) (remanding consent decree for fairness hearing).

Instead, they elected to enter into a private, two-party settlement, which by its very nature cannot adjudicate the rights of third parties. *See Bamerilease Capital Corp. v. Nearburg*, 958 F.2d 150, 152 (6th Cir. 1992) ("Settlement agreements are a type of contract and are therefore governed by contract law."); *E.E.O.C. v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 460 (6th Cir. 1999) ("[I]t is axiomatic that courts cannot bind a non-party to a contract, because that party never agreed to the terms set forth therein."); *Original Brooklyn Water Bagel Co. v. Bersin Bagel Grp.*, LLC, 817 F.3d 719, 727 (11th Cir. 2016) ("It defies both logic and common sense to suggest as a general matter that a defendant settling one case may bind all future plaintiffs to an agreement they had no part in negotiating *and* from which they derived no benefit.") (emphasis in original).

The hallmarks of a consent decree are (1) "retain[ed] jurisdiction to enforce the decree" and (2) a court order which "incorporate[d] the parties' terms." *Pedreira*, 802 F.3d at 871. The Eastern District did not incorporate the settlement agreement's terms into its dismissal order. Instead, the court dismissed the case "pursuant to the terms of the settlement agreement," specifically citing *RE/MAX Int'l, Inc. v. Realty*

One, Inc., 271 F.3d 633 (6th Cir. 2001). Order on Stip. of Dismissal at PageID.1469, *Dumont v. Gordon*, 17-cv-13080 (E.D. Mich. Mar. 22, 2019), ECF No. 83. And as *RE/MAX* states: "[t]he phrase 'pursuant to the terms of the [s]ettlement' ***fails to incorporate*** the terms of the [s]ettlement agreement into the order." *RE/MAX Int'l, Inc.* at 642 (emphasis added). Thus, the Eastern District's order makes clear that the settlement agreement was not incorporated in the court's order, and Sixth Circuit law makes it clear that the Dumonts and the State *only* have a private settlement. The Dumonts cannot enforce that settlement against Plaintiffs here.

The caselaw they cite only further undermines their claim. In *Jansen*, the protected interest was clear: the "subject matter of the litigation requires *an interpretation of the consent decree* negotiated by the proposed intervenors and the City." *Jansen v. City of Cincinnati*, 904 F.2d 336, 342 (6th Cir. 1990) (emphasis added). The *Buck* litigation, however, does not require interpretation of any consent decree. The settlement does not bind the Plaintiffs, nor can it limit their rights. What is more, the settlement explicitly states that it is valid "[u]nless prohibited by law or court order." Ex. 1 at 9. This further confirms that the settlement does

not have the force of a court order, nor does it purport to limit the ability of other Article III courts to enter orders related to other parties' rights related to their own contracts concerning foster care and adoption. The settlement agreement does not need to be applied by this Court, as it is a mere private contract between the State and a non-party to this litigation. Even the State claims that the policy challenged here did not originate with the settlement agreement. *See* ECF No. 34 at PageID.925.

City of St. Louis is similarly unpersuasive, as it addresses arguments unique to the federal government as a repeat litigator whose interests in future claims and "other bankruptcy trusts established across the country" are a far cry from the Dumonts' purported interest. *City of St. Louis v. Velsicol Chemical Corp.*, 708 F. Supp. 2d 632, 667 (E.D. Mich. 2010).

Second, having no right to enforce their settlement against the Plaintiffs, the Dumonts fail to answer the key question: What harm will the Dumonts suffer as a result of this litigation? They claim that if St. Vincent is allowed to continue serving children in Michigan, this will "expose the Dumonts to unconstitutional 'unequal treatment' and thus further practical and stigmatic injury." ECF No. 19 at PageID.465. But

they nowhere claim that they want to adopt from St. Vincent, or tell the Court anything about their own plans to foster or adopt, whether those plans still exist, and whether or how they would be hampered by allowing St. Vincent to continue its religious exercise. They have not even attached a declaration, so there is no evidence before the Court regarding their interests. This fact alone should be sufficient to defeat their motion.

This also distinguishes their situation from *Grutter*, in which the Sixth Circuit held that intervention was appropriate for "individuals who have *applied or intend to apply* to the University" (emphasis added), because they had a substantial legal interest in the "educational opportunity" of attending college. *Grutter*, 188 F.3d at 397. Proposed Intervenors have not pointed to any such interest here.

Nor do Proposed Intervenors cite any case suggesting that mere stigmatic injuries are a sufficient legal interest for purposes of intervention.[2] In the related (although not identical) analysis of cognizable legal interests for standing, the Supreme Court has held that

[2] Given that Proposed Intervenors did not reach out to adoption agencies before speaking with the ACLU about a legal challenge, only reached out to faith-based adoption agencies, and did not attempt to adopt or foster during the pendency of their litigation, any claim of stigmatic harm is questionable.

"abstract stigmatic interest" is not enough. *Allen v. Wright*, 468 U.S. 737, 755–56 (1984), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014) ("If the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating . . . ."). Similarly, the Dumonts are claiming a stigmatic interest in the application of state policy to child welfare agencies, regardless of whether they actually have any plans to work with that agency. Such an interest would be boundless.

At bottom, Proposed Intervenors seek to use a private agreement obtained through separate litigation to act as private attorneys general, roving the State to intervene in any case where a religious child welfare agency is exercising the rights granted to it under the U.S. Constitution and state law. This Court should not sanction such conduct.

Third, the Proposed Intervenors allege that "the relief the *Buck* Plaintiffs seek would, if granted, infringe on the Dumonts' existing contractual rights." ECF No. 19 at PageID.463. But as explained above, Plaintiffs challenge the State's official policy of excluding faith-based agencies like St. Vincent. Put another way: the private settlement

agreement cannot bind St. Vincent in its contractual relationship with the State, nor diminish its constitutional rights under the First Amendment. It is the State's implementation of a policy (or, as in this case, its unlawful reinterpretation and enforcement of existing anti-discrimination provisions) that impacts St. Vincent. *See* Ex. 7.

This difference is key—as even the cases cited by the Proposed Intervenors recognize. In *Blount-Hill*, the Sixth Circuit 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 its private settlement with the State does not give it 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 concerned only "contractual rights in agreements with the State to provide community-based services" tangential to the constitutional challenges at issue).

B. The Dumonts' legal interests are not impaired.

For the same reason that the Proposed Intervenors have failed to identify a significant legal interest, they have failed to show how such an interest would be impaired. Proposed Intervenors' generalized interest in this case can be adequately addressed by filing an amicus brief, which Plaintiffs do not oppose.

C. The existing Defendants can adequately defend the Dumonts' legal interests.

The Proposed Intervenors' only argument here is that they plan to raise Establishment and Equal Protection arguments that the State may not raise. But that can be done in an *amicus* brief. The State is also likely to raise identical arguments, as the State and Proposed Intervenors have acted in lockstep since the *Buck* litigation began.

Proposed Intervenors claim that they don't think the State Defendants will adequately represent their interests. But they simultaneously argue that the settlement agreement they obtained from the State is a crucial bulwark protecting those same interests. Proposed Intervenors point to no evidence suggesting that the State's representation of their supposed interests would be inadequate and thus fail to overcome the presumption of adequate representation. *See Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) ("[T]he applicant for intervention bears the burden of demonstrating inadequate representation. This requires overcoming the presumption of adequacy of representation[.]") (citations and internal quotation marks omitted).

II. The Dumonts should not be granted permissive intervention.

Proposed Intervenors should not be granted permissive intervention. Permissive intervention requires Proposed Intervenors to "establish that the motion is timely" and to allege "at least one common question of law or fact." *United States v. Michigan*, 424 F.3d 438, 445 (6th Cir. 2005) (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.* at 445.

Allowing Proposed Intervenors to join the case will only lead to additional, unnecessary motions practice (as their actions have already demonstrated). They are also attempting to create undue delay and prejudice to Plaintiffs by seeking to have their intervention motion heard prior to Plaintiffs' urgent preliminary injunction motion and seeking to have this Court transfer the case outside Plaintiffs' and State Defendants' home forum (which is also the home forum of Proposed Intervenors).

Neither have Proposed Intervenors 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. ECF No. 19 at PageID.17-18; *South Carolina v. North Carolina*, 558 U.S. 256, 288 (2010) ("Courts often treat *amicus* participation as an alternative to intervention."); *Brewer v. Republic Steel Corp.*, 513 F.2d 1222, 1225 (6th Cir. 1975) (similar); *Bush v. Viterna*, 740 F.2d 350, 359 (5th Cir. 1984) ("In acting on a request for permissive intervention, it is proper for the court to consider the fact that the Association has been granted *amicus curiae* status.").

In short, Proposed Intervenors have no legally protected interest in St. Vincent's contract with the State, nor have they explained how their personal interests are *at all implicated* by St. Vincent's contract with the State of Michigan. There is thus no shared or common question of law arising in this case between the relief Plaintiffs request and the interests Proposed Intervenors seek to assert.

CONCLUSION

Plaintiffs face the imminent threat that their religious ministry could be shut down by the State *at any time* based on the State's unconstitutional policy. What is more, their adoption contract is set to expire in ***four months***—September 30, 2019. This uncertainty is already

having a serious impact on St. Vincent's foster families, employees, and the agency as a whole. Injunctive relief is urgently needed to ensure continuity of care for the children and families St. Vincent serves. This Court should not permit third parties with no direct interest in St. Vincent's continued operation to delay or impair Plaintiffs' ability to vindicate their rights.

Dated: June 4, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This memorandum complies with the word limit of L. Civ. R. 7.3(b)(i) because, excluding the parts exempted by L. Civ. R. 7.3(b)(i), it contains 4,125 words. The word count was generated using Microsoft Word 2019.

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I hereby certify that on June 4, 2019, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which sends an electronic notification to all counsel who have entered an appearance on the Docket.

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