No. 19-2185

In the United States Court of Appeals for the Sixth Circuit

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

Plaintiffs-Appellees,

v.

ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services; JOO YEUN 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 M. AZAR, II, 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 U.S. District Court for the Western District of Michigan, Southern Division
No. 1:19-CV-00286

RESPONSE TO PROPOSED INTERVENORS' MOTION FOR LEAVE TO FILE BRIEF IN SUPPORT OF DEFENDANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL

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This Court should deny the Dumonts' third attempt in this Court to interject themselves into this litigation. As they admit (Dumont Mot. 1), the Dumonts already have a separate pending appeal that will determine their intervention rights in this case. And they have separately moved to intervene on appeal. Now they ask this motions panel, before it even rules on their motion to intervene on appeal—to say nothing of their pending intervention appeal—to let them oppose the preliminary injunction immediately and grant them the unusual right to file a brief in support of an emergency stay request.

Letting the Dumonts contest the preliminary injunction without their intervention appeal being resolved is unwarranted. *See Texas v. United States*, 679 F. App'x 320, 323-324 (5th Cir. 2017) ("Dr. Tudor has not cited any authority, and we have found none . . . , in which this court has allowed a nonparty to appeal without intervening and without having actually participated in the proceedings below."). If the Dumonts think they are injured by the preliminary injunction, they "clearly" have "an effective means of obtaining review, . . . intervention." *Id.* And the Federal Rules of Appellate Procedure provide a means to expedite the resolution of their intervention appeal. *See* Fed. R. App. P. 27(f). Yet the Dumonts have never filed a motion to expedite their appeal—which would require them to identify "good cause" for doing so. Instead, they filed *another* unjustified paper before this panel. Their maneuvering should be rejected.

Moreover, the Dumonts' desired guest appearance offers nothing new. Indeed, they deem Michigan's opposition to the District Court's injunction "sufficient." Dumont Mot. 2. And when the Dumonts propose arguments "the State has not addressed," their primary example (that Defendant Nessel's election did not change Michigan's policy) is an argument the State made throughout four pages of its stay request.[1] Their attempts to reweigh the factual evidence before the District Court are equally unenlightening.[2] The Dumonts' final legal contention—that

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[1] *Compare id.* ("The Dumonts' brief will assist the Court by identifying additional clearly erroneous factual findings . . . . For instance, the district court found that MDHHS's enforcement of its non-discrimination provision against faith-based agencies was a 'sudden change' in policy attributable to the arrival of Attorney General Dana Nessel and her alleged anti-religious animus.") *with* State Mot. to Stay at 18-19 ("MDHHS confirmed that Nessel's statements had no effect on MDHHS's Policy. . . .") *and* 23-24 ("No such change occurred" in Michigan's litigation position).

[2] The Dumonts think there is a "clear factual error[]" in the District Court not mentioning "that the investigation into [St. Vincent] itself was completed and [was] pending final approval" before Nessel took office. Dumont Mot. 2-3 (internal quotation marks and citations omitted). But—as the District Court noted—Michigan's Director of Child Welfare Licensing admitted "the Department has not been able to finalize its investigation of St. Vincent" "*[b]ecause of the present lawsuit*." Aff., R. 34-3, Page ID #978 (emphasis added); *see also* Op., R. 69, Page ID # 2514 (District Court acknowledging same). Nor are the Dumonts' proffered "expert and lay testimony" "critical" (Dumont Mot. 4) to understanding how excluding St. Vincent from foster-care undermines Michigan's stated goal in maximizing the number of certified homes for foster and adopted children. *See* Op., R. 69, Page ID # 2520 ("The record here reflects that

the District Court was obligated to consider and specifically address their *amici* arguments (*see* Dumont Mot. 3-4)—is as baseless as the Establishment Clause and Equal Protection arguments they would interject. There is no evidence that the Dumonts' arguments went unconsidered, only that they were unpersuasive.

There was no reason to address the Dumonts' constitutional arguments. Time and again, the Supreme Court has held that "the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-45 (1987). By contrast, the Supreme Court "has *never* held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs." *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988) (emphasis added). The same is true regarding the Equal Protection Clause. By not offering anything of value to the court, the Dumonts cannot expect their arguments to feature prominently in the final opinion.

Indeed, if the Dumonts' constitutional arguments prevail, they would not only effectively invalidate Michigan's law protecting foster-care agencies' religious liberty, *see* Mich. Comp. Laws § 722.124e(2)-(3) &

St. Vincent affirmatively refers same-sex and unmarried couples seeking that assistance to other agencies available to provide it.").

(7)(a), § 710.23g, § 400.5a, they would cast doubt on substantially similar laws in at least nine other states.[3] Asking this Court to break constitutional ground, via a motions panel, on a stay request—where St. Vincent would need leave to file a response brief to address these tangential arguments—does nothing to clarify the issues nor aid the Court in its consideration of this appeal.

CONCLUSION

For the foregoing reasons, this Court should deny the Dumonts' motion for leave to file a brief in support of Michigan's motion to stay the preliminary injunction pending appeal.

Dated: November 7, 2019

Respectfully submitted,

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[3] *See* Ala. Code § 26-10D-4 (1)-(2), § 26-10D-3(1), § 26-10D-5(a); Kan. Stat. § 60-5322(b)-(c); Miss. Code § 11-62-5(2), § 11-62-7(2); N.D. Cent. Code § 50-12-03, § 50-12-07.1; S.B. 1140 § 1(A-B), 56th Leg. Reg. Sess. (Okla. 2018); S.C. Exec. Order No. 2018-12 (2018); S.D. Codified Laws § 26-6-38, § 26-6-39, § 26-6-40; Tex. Hum. Res. Code. § 45.002(1), § 45.004; Va. Code § 63.2-1709.3(A)-(B).

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CERTIFICATE OF COMPLIANCE

This response complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 932 words. This response also complies with Fed. R. App. P. 27(d)(1)(E) (and thus, the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6)) because this response has been prepared in a proportionally spaced typeface (Century Schoolbook 14-point type) using Microsoft Word 2016.

/s/ Lori H. Windham
Lori H. Windham

CERTIFICATE OF SERVICE

I hereby certify that the foregoing response was filed this 7th day of November, 2019 through the Court's Electronic Filing System. Parties will be served, and may obtain copies electronically, through the operation of the Electronic Filing System.

Dated: November 7, 2019

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