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 KRISTY AND DANA DUMONTS' MOTION TO INTERVENE AS INTERVENOR DEFENDANTS-APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

INTRODUCTION

This Court should stay the Dumonts' motion to intervene pending the outcome of their intervention appeal. The Dumonts seek to circumvent the standard appeals process for no reason, and have failed to file a protective notice of appeal to boot. The Dumonts' intervention appeal will be fully briefed by December 12, whereas this merits appeal still lacks a scheduling order. The Court should reject the Dumonts' litigation maneuvering and their attempt to get multiple bites at the intervention apple.

The Dumonts' motion also fails on the merits. Their argument hinges on their interest in a prior settlement agreement but, as the District Court found, St. Vincent is seeking relief under the Constitution, not relief directed at the settlement agreement. The Dumonts also claim practical and stigmatic injuries—but the District Court found that the Dumonts suffered no practical barrier to adoption, and the Dumonts *admit* that their remaining interest is in helping support a government policy; this is at best a mere generalized grievance.

And even if the Dumonts had an interest, Michigan seeks the same result, making it a presumptively adequate representative (especially given that Dumonts argued as *amici*). The Dumonts do not even acknowledge, much less rebut, this presumption. Nor can the Dumonts permissively intervene: They do not assert any claims and have no relevant defenses; they simply reassert *Michigan's* defenses.

FACTUAL BACKGROUND

A. Michigan's adoption system

Michigan has a chronic shortage of foster and adoptive homes. Op., R. 69, Page ID # 2501. There are "approximately 13,000 children in foster care, about 2,000 of whom have a permanency goal of adoption." Decl., R. 34-3, Page ID # 972. Because Michigan cannot meet this need on its own, it holds 137 contracts with 57 child placing agencies to provide foster and adoption services. Op., R. 69, Page ID # 2501. St. Vincent is one of these agencies. As Michigan has recognized, "[h]aving as many possible qualified adoption and foster parent agencies in this state is a substantial benefit to the children of this state." Mich. Comp. Laws § 722.124e(1)(c). But an agency may only oversee foster care placements and facilitate adoptions for foster children if it signs a contract with the Michigan Department of Health and Human Services ("MDHHS"). Op., R. 69, Page ID # 2529.

To become a foster parent in Michigan, a couple must obtain a license. *Id.* at Page ID # 2502. Private agencies recommend families to Michigan for licensing by performing a home study of the prospective parents which includes a "written assessment and a recommendation" from the agency. *Id.* Among the criteria considered are the "strengths and weaknesses" of the parents, their marital status, "past level of family functioning," and the "level of satisfaction" in their relationship. *Id.* The State does not fund these home studies. *Id.* at Page ID # 2518.

B. The referral process

MDHHS provides interactive maps showing all foster care and adoption agencies across Michigan. Applicants can also contact private agencies directly. When this happens, the agency can either: (i) work with the applicants to perform home study assessments or (ii) refer them to another agency that might better meet their needs. Decl., R. 6-1, Page ID # 238.

Private agencies in Michigan have always been able to refer families to other agencies or to MDHHS for a variety of reasons. *Id*. Additionally, some agencies have specialized missions: placing children with Native American families, finding homes for African American children, or serving children with developmental disabilities. Mem., R. 6, Page ID # 181. And faith-based agencies have long referred families elsewhere when they cannot serve a family consistent with their religious beliefs. Decl., R. 6-1, Page ID # 235.

C. St. Vincent Catholic Charities

St. Vincent is one of the oldest and most effective adoption agencies in Michigan. *Id.* at Page ID # 228. St. Vincent has served children and families for over 70 years. *Id*. at Page ID # 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*. St. Vincent provides a range of charitable services, including foster care and adoption. *Id.*

Faith-based agencies like St. Vincent are particularly effective at recruiting families that otherwise might not choose to foster or adopt. *See* Decl., R. 6-2, Page ID ## 262-263. Michigan has even recognized that faith-based "private agencies . . . and the local faith congregations that recruit and support foster families are both vitally important to finding loving homes for vulnerable children." Ex., R. 6-5, Page ID # 283.

St. Vincent happily serves both LGBTQ individuals and children. St. Vincent regularly helps LGBTQ foster children in both its foster program and its group home, and St. Vincent welcomes same-sex couples to attend a parent support group that St. Vincent facilitates. Ex., R. 6-1, Page ID # 231. However, as a Catholic organization, St. Vincent cannot provide a written recommendation to Michigan endorsing a relationship that would conflict with its sincere religious beliefs. Order, R. 52, Page ID # 1854. If unmarried or same-sex couples seek St. Vincent's endorsement, the agency, consistent with State law, provides written information from the State's website and contact information for a list of other local agencies that can work with the family. Decl., R. 6-1, Page ID # 235. And any couple that gets certified by another agency can adopt a child that is currently in a foster home run by St. Vincent. Op., R. 69, Page ID # 2504.

D. Michigan law protects religious agencies

On June 11, 2015, Michigan passed 2015 Public Act Nos. 53, 54, & 55 (the "2015 Laws"). These three laws were passed to protect the status quo

by "[e]nsuring that faith-based child placing agencies can continue to provide adoption and foster care services" consistent with their religious beliefs. Mich. Comp. Laws § 722.124e(1)(g). They also confirm that "a private child placing agency does not receive public funding with respect to a particular child or particular individuals referred by the department unless that agency affirmatively accepts the referral." *Id.* § 722.124e(1)(h).

E. The ACLU solicits the Dumonts

Shortly after the law passed, the ACLU began "more than two years of work" to challenge the law. Ex., R. 37-9, Page ID # 1450. 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., R. 37-3, Page ID # 1426. As a result, Kristy and Dana Dumont began communicating with the ACLU. Ex., R. 37-4, Page ID # 1433. Roughly two months later, the Dumonts reached out to two—and only two—adoption agencies: St. Vincent and Bethany Christian. *Id.* at Page ID ## 1430-1431. Both agencies had been publicly associated with the passage of the 2015 Laws, with agency personnel

testifying at legislative hearings.[1] 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. *See* Ex., R. 37-4, Page ID # 1430-1431. 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." Ex., R. 37-10, Page ID # 1454.

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. *Id.* at Page ID # 1433. The Busk-Suttons privately admitted 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., R. 37-5, Page ID # 1436. The Busk-Suttons further admitted that they "[we]ren't in a huge rush to adopt" and "could probably go to another agency." Ex., R. 37-6, Page ID # 1438.

The Dumonts and Busk-Suttons then sued Michigan. Complaint, *Dumont v. Gordon*, 2:17-cv-13080 (E.D. Mich. Sept. 20, 2017), ECF No. 1. They sought to force Michigan to stop partnering with faith-based child

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[1] *See, e.g.,* Minutes, *House Standing Committee on Families, Children, and Seniors*, Michigan House of Representatives (Feb. 18, 2015), https://perma.cc/5YEQ-TWYD.

placing agencies. *Id.* St. Vincent feared that its ministry would be threatened by this lawsuit and sought to intervene. In response to the lawsuit, Michigan initially defended its decision to partner with St. Vincent, explaining 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 [the 2015 Laws]." Answer at Page ID # 1189, *Dumont*, ECF No. 52.

F. Attorney General Nessel takes office

On January 1, 2019, Attorney General Nessel took office. During her campaign, Nessel took the position that the 2015 Laws' "only purpose is discriminatory animus." Op., R. 69, Page ID # 2499. She also made clear that if elected, she would not defend the Michigan Laws (while calling anyone who *did* support these laws "hate mongers"). *Id.* Nessel then entered into settlement discussions with the ACLU and its clients. Order, R. 52, Page ID # 1856. St. Vincent was not invited to participate in these discussions. *Id.* On March 22, 2019, Michigan and the ACLU filed a stipulated voluntary dismissal with prejudice. *Id.*

The district court—within an hour—entered the dismissal. The court did not approve the terms of the settlement nor enter them as an order. *Id.*[2] And, as the agreement itself notes, it is only valid to the extent not

[2] The *Dumont* court denied a motion to dismiss, but described it as "premature" and based on "contested matters outside the pleadings."

"prohibited by law or court order." *Id.* at Page ID # 1862. After settling the *Dumont* lawsuit, Michigan issued a memorandum that applied to all child placing agencies. Ex., R. 37-7, Page ID # 1441. That memorandum made clear that if St. Vincent did not begin providing home study endorsements for same-sex and unmarried couples, Michigan would exclude it from foster and adoption services.

G. The case below

In April 2019, St. Vincent filed suit challenging Michigan's new policy. Compl., R. 1. The Dumonts then moved to intervene. Mot., R. 18. The District Court denied the motion, concluding that the Dumonts lacked a substantial interest in the case and, in any event, Michigan would adequately represent their position. Order, R. 52, Page ID # 1852.

As the District Court explained, proposed intervenors "rest their claim for intervention . . . on their interest in maintaining the Settlement Agreement." *Id.* at Page ID # 1865. But the court concluded that St. Vincent did not seek to invalidate or interpret the settlement, explaining that the settlement was "beside the point and irrelevant" to St. Vincent's claims. *Id.* Further, the court found that Michigan was "fully capable of protecting" any alleged interest the Dumonts might have, and that "State Defendants and the Dumonts are fundamentally

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Order, R. 52, Page ID # 1856. The "only issue" decided was "whether Plaintiffs have adequately pleaded cognizable" claims. *Id.*

aligned at this time[.]" *Id.* Accordingly, the court found that the "contribution of the Dumonts c[ould] be fully provided through their participation as amicus, which the Court welcome[d]." *Id.*

On September 26, 2019, the District Court issued a preliminary injunction preventing Michigan from taking action against St. Vincent based on its sincere religious beliefs. The court's order maintained the *status quo* by allowing St. Vincent to continue serving children and barring the State from taking action against St. Vincent based on its sincere religious beliefs. *Id.* at Page ID # 2529.

Michigan asked the District Court to stay the injunction pending appeal or, in the alternative, modify the injunction. Mot., R. 72. The court denied that motion, finding that "the State ha[d] offered nothing new." Order, R. 84, Page ID # 2751. A week later, Michigan filed an emergency motion for stay pending appeal.

ARGUMENT

I. This motion should be stayed pending resolution of the intervention appeal.

The Dumonts are attempting two bites at the intervention apple: there is an intervention appeal pending before a panel of this Court (*see* Int. Mot. 1 n.1), and now, this motion. The Court should not indulge this maneuvering. Indeed, if not immediately denied as meritless, the Dumonts' motion should be stayed pending resolution of the intervention appeal for three reasons.

First, failing to stay this motion risks inconsistent panel decisions. As this Court has acknowledged, the "same" legal standard and similar issues are raised when a party moves to intervene in a preliminary injunction appeal *and* appeals the district court denying the party's intervention motion below. They should therefore be considered in tandem. *See Ne. Ohio Coal. for Homeless & Serv. Emps. Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1006-1008 (6th Cir. 2006) (resolving both simultaneously). Bifurcating the two, and allowing the motions panel to go first, could interfere with the intervention panel's work. The Dumonts cite no authority—and provide no good reason—for this end run around the normal appellate process.[3]

Second, there is no harm to anyone—including the Dumonts—in staying this motion until the intervention appeal is resolved. Briefing in their intervention appeal will be completed in just over a month.[4] Briefing Schedule, *Buck v. Gordon*, No. 19-1959 (6th Cir. Sept. 12, 2019), ECF No. 17. By contrast, the merits appeal schedule has not even been set.

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[3] The end run is reinforced by the fact that the argument sections in the Dumonts' intervention brief and this motion are nearly identical.

[4] Letting the Dumonts contest the preliminary injunction at this stage is unwarranted. *See Texas v. United States*, 679 F. App'x 320, 323-324 (5th Cir. 2017). If the Dumonts think they are injured by the preliminary injunction, they have "an effective means of obtaining review": their intervention appeal. *Id.*

Finally, the Dumonts never filed a protective notice of their intent to appeal the preliminary injunction. *See* David G. Knibb, Fed. Ct. App. Manual § 1:7 (6th ed. 2019). The proper practice is for denied intervenors to file a protective notice of appeal against any subsequent orders. *See, e.g.*, *Mausolf v. Babbitt*, 125 F.3d 661 (8th Cir. 1997); *Brennan v. Silvergate Dist. Lodge No. 50, Int'l Ass'n of Machinists*, 503 F.2d 800 (9th Cir. 1974). The Dumonts have not taken the step necessary to protect their ability to appeal from the preliminary injunction order; this Court should not permit them to circumvent the proper appellate procedure via motion.

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

If this Court reaches the merits of the Dumonts' motion, the Court should deny it. To intervene as of right under Rule 24(a)(2), the Dumonts have to show that: (i) their intervention motion was timely, (ii) they have a substantial legal interest in the case, (iii) their ability to protect that interest might be impaired absent intervention, and (iv) the existing parties will not adequately represent their interests. *E.g., Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 779-780 (6th Cir. 2007). All four factors are necessary. *Id*. The Dumonts' motion is timely, but they fail to satisfy the remaining factors.

A. The Dumonts lack a substantial legal interest in this case.

An intervenor of right "must have a direct and substantial interest in the litigation, such that it is a 'real party in interest in the transaction which is the subject of the proceeding.'" *Reliastar Life Ins. Co. v. MKP Invs.*, 565 F. App'x 369, 371-372 (6th Cir. 2014) (quoting *Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 317 (6th Cir. 2005)). This is a dispute between Michigan and St. Vincent over a government policy, which the Dumonts acknowledge. Int. Mot. 12 (noting that "the Dumont's interest [is] in maintaining a policy . . . ."). The Dumonts are private citizens, not parties to this dispute.

i. The Dumonts do not have a direct and substantial interest in seeking to enforce Michigan's own policies.

The Dumonts argue that they have a substantial interest in this litigation because they suffered the stigma of discrimination and have fewer options than other families. Int. Mot. 12 This argument fails for at least two reasons.

First, the Dumonts (at best) allege a generalized grievance. As the Supreme Court explained in *Allen v. Wright*, abstract stigmatic injuries are not cognizable. 468 U.S. 737 (1984). *Wright* rejected two claims practically identical to those here: (i) asking "to have the Government avoid the violation of law alleged in respondents' complaint" and (ii) "a claim of stigmatic injury, or denigration, suffered by all members of a

racial group." The court concluded that "[u]nder neither interpretation is this claim of injury judicially cognizable." *Id.* at 753-754.

This also applies to intervention. As the Seventh Circuit explained in *Sokaogon Chippewa Cmty. v. Babbitt*, seeking to ensure that the government follows the law does not a substantial interest make: "As countless cases have held, however, such a generalized interest is insufficient to support standing, let alone intervention. If it did, the federal courts would be required to allow anyone with an interest—however broad or universal—to intervene in any lawsuit in which the government is a party." 214 F.3d 941, 948 (7th Cir. 2000). Instead, intervenors must "specifically . . . be adversely affected in some way, shape, or form." *Id. See also Providence Baptist Church,* 425 F.3d at 317 (proponent of zoning ordinance could not intervene as its "interest in the negotiated settlement is so generalized it will not support a claim for intervention of right"). The Dumonts have not alleged anything more than a generalized interest in Michigan's policy. As the District Court held, they face no practical barrier to foster care or adoption, Op., R. 69, Page ID # 2504, and they are not otherwise uniquely affected by Michigan's policy. They thus have no more right to intervene than *anyone else* who thinks they could do a better job than Michigan defending its laws.

Neither *Grutter* nor *Jansen* provides the Dumonts with a lifeline. *Jansen* held that the plaintiffs had a substantial interest because they

were parties to a consent decree specifically "challenged in this [later] action." *Jansen v. City of Cincinnati*, 904 F.2d 336, 342 (6th Cir. 1990). But the Dumonts are not parties to a consent decree, merely a private settlement. And St. Vincent is not challenging that agreement, but Michigan's religiously targeted enforcement actions against St. Vincent. *Grutter* focused on the "direct and substantial" interest intervenors had in "gaining admission to the University," which could be impaired absent intervention. *Grutter v. Bollinger*, 188 F.3d 394, 399 (6th Cir. 1999). Yet the Dumonts have not explained how this lawsuit will directly affect them *at all*. They can adopt any child who is available for adoption today, and forcing St. Vincent to close down will not make it any easier for them to do so.

Second, the Dumonts' interests are factually problematic. The Dumonts claim stigmatic harm, but raise no facts to support this claim. The Dumonts argue for the first time that "[t]hey are currently 'actively pursuing fostering and adopting . . . from the Michigan public child welfare system,'" Int. Mot. 6, but they fail to explain *what* steps they have taken or how this gives them an interest in this case. Indeed, they rely exclusively on belated, vague declarations attached to a reconsideration motion. But even these declarations are short on detail (focusing on what happened in 2017), and fail to explain whether the Dumonts' alleged

plans to foster and adopt still exist or how they would be hampered by allowing St. Vincent to continue serving kids.[5]

Further, the Dumonts confuse how the child welfare system works. No agency has a monopoly on foster children; MDHHS works multiple agencies to find a match as quickly as possible. Ex., R. 6-1, Page ID # 234-235. And foster children who are not on MARE are either not legally free for adoption or have already been placed with a foster family (such as with a relative) who wants to adopt them. Ex., R. 42-4, Page ID # 1663.

Instead, the undisputed facts strongly suggest that any interest the Dumonts have here is political, not personal: the Dumonts desire to see Michigan uphold its new policy (an interest that is not uniquely theirs).[6] They do not allege a more direct stake in the outcome of this case, nor

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[5] Tellingly, the Dumonts fail to cite the "testimony" they rely on in footnote three of their motion. This is likely because this testimony is tardy hearsay. The Dumonts sought to file declarations along with an inadmissible intervention reply brief, but the District Court rejected that filing. Order, R. 41, Page ID # 1525. The Dumonts then tried to make an end run around this by attaching the same exhibits to their reconsideration motion. This motion too was promptly denied. Further, while certainly imprecise, the hearsay statement that St. Vincent cannot "work with" same-sex and unmarried couples is not inconsistent with what St. Vincent has said all along, nor with what the District Court found, which is that St. Vincent cannot provide written endorsements, but those couples may work with another agency to adopt children in St. Vincent's care. This Court can certainly rely both on St. Vincent's clarification of its own policies and the District Court's determination.

[6] Int. Mot. 16 ("[T]he Dumonts seek to defend the State's policy[.]").

could they—their ability to foster and adopt is not at issue here. It is undisputed that the Dumonts were recruited by the ACLU for a lawsuit challenging Michigan's practice of working with faith-based agencies. *Supra* 5. And the Dumonts have for *years* known about numerous nearby agencies, yet they have not fostered or adopted.

What the Dumonts seek is the right to act as private attorneys general, enforcing Michigan's new policy against whomever challenges it.[7] That does not give them a direct and substantial interest in this case.

The Dumonts further claim an interest in having the same access to Michigan's child welfare system as everyone else. But this argument is premised on a counterfactual: no couple has access to every private child placing agency (*supra* 3). Their ability to foster or adopt is not impeded. The Dumonts are able to adopt any child currently available for adoption from Michigan's public child welfare system. Order, R. 69, Page ID # 2504.[8]

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[7] *See* Motion to Intervene, *Catholic Charities of W. Mich. v. MDHHS*, 2:19-cv-11661 (E.D. Mich. July 17, 2019) (seeking to intervene to defend same policy).

[8] Further, St. Vincent is not a government actor, s*ee Rendell-Baker v. Kohn*, 457 U.S. 830, 840-841 (1982), and the Dumonts do not argue otherwise. Thus, any claims of stigmatic injury or lack of access cannot even be directed at St. Vincent and would not be appropriately raised in this lawsuit.

ii. The Dumonts' alleged contractual interest cannot justify intervention.

The Dumonts next claim that they have a substantial interest in this case because it could "impair[]" their settlement agreement. Int. Mot. 12. But as the District Court noted, the settlement specifically disclaims application to the extent "prohibited by law or court order." Order, R. 52, Page ID # 1862, 1864. For this reason alone, the Dumonts' contractual interest fails: They obtained the benefit of their bargain with Michigan, and this lawsuit does not affect that.

Further, the cases cited do not support their claims. *Linton* dealt with a consent decree which imposed *direct* economic injury on intervenors by limiting their right to charge higher prices. The Dumonts even concede as much, explaining that in *Linton* the "resolution of [the] litigation would directly impair . . . contractual rights." Int. Mot. 13. And *American Telephone* is even further afield. There, the court found that intervenors had an interest in opposing a consent decree which would have a *direct* impact on the operations of the intervenor by modifying their collective bargaining agreement. *EEOC v. Am. Tel. & Tel. Co.*, 506 F.2d 735, 741 (3d Cir. 1974). In both cases, intervenors would be directly harmed by entry of a consent decree without their involvement—the Dumonts have no such direct connection here, failing to even allege a desire to work with St. Vincent. *See* Int. Mot. 10-11 (arguing only that the Dumonts may seek

to adopt and foster "at the same time" that St. Vincent is helping kids in need).

The Dumonts' claims instead are more like those raised and rejected in *Reliastar*. There, several insurance companies sued over fraudulently obtained insurance policies. *Reliastar*, 565 F. App'x at 370. Two banks sought to intervene, arguing that the insurance policies were the defendants' only assets, without which defendants could not satisfy contingent liabilities to the banks. *Id.* at 371. This Court rejected intervention, explaining that such contingent interests—like those the Dumonts allege here—are not sufficient to merit intervention. *Id.* at 372. The court reaffirmed that intervenors must be a "real party in interest in the transaction" and that downstream effects do not justify intervention. *Id.* at 372-373.

Stripping away the varnish, it becomes clear the Dumonts' real interest is in defending a state policy they support. But the Dumonts have no legal interest—much less a substantial and direct one—in defending Michigan's governmental actions. In *Coalition to Defend Affirmative Action v. Granholm*, organizations integral to a law's enactment sought intervention to defend its constitutionality. 501 F.3d 775 (6th Cir. 2007). But this Court held that, notwithstanding their pre-enactment role in the law change, the organizations lacked a substantial interest in defending the law's constitutionality post-enactment. *Id.* at

781-782. *See also Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323 (6th Cir. 2007) (same).

In short, a private contract cannot give two citizens the right to intervene in a constitutional challenge to a Michigan policy.

B. Denial of intervention will not impair the Dumonts' ability to protect their interests.

The Dumonts' argument that the District Court's preliminary injunction has already impaired their interests misunderstands this factor. The question is not whether this case implicates the Dumonts' interests (that is the previous factor), it is whether the Dumonts' *lack of intervention* might impair those interests. As *amici*, the Dumonts argued against the preliminary injunction, both in person and on paper. A different case caption would not have made those arguments any more persuasive. Nor do the Dumonts explain why *amicus* participation in this appeal is insufficient to protect their purported interests.

The Dumonts' reliance on *Jansen* fares no better. They argue that this case "could leave the defendant 'with obligations to the proposed intervenors . . . that are inconsistent with its obligations to plaintiffs.'" Int. Mot. 16. Not so. The settlement is not binding to the extent inconsistent with the law. This case cannot create conflicting obligations.

C. The existing Defendants adequately protect whatever interest the Dumonts have in this case.

An existing party is presumed to adequately represent a prospective intervenor's interests when they seek the same ultimate objective. *United States v. Michigan*, 424 F.3d 438, 443-444 (6th Cir. 2005). Accordingly, "the applicant for intervention bears the burden of demonstrating inadequate representation." *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987). In this case, Michigan and the Dumonts want the exact same thing. *See* Int. Mot. 16 ("[B]oth the State and the Dumonts seek to defend the State's policy[.]"). Yet the Dumonts have not even tried to overcome this presumption.

Nor do the Dumonts attempt to satisfy the inadequate representation factors. A prospective intervenor "fails to meet his burden of demonstrating inadequate representation when 1) no collusion is shown between the existing party and the opposition; 2) the existing party does not have any interests adverse to the intervener; and 3) the existing party has not failed in the fulfillment of its duty." *Jordan v. Mich. Conference of Teamsters Welfare Fund*, 207 F.3d 854, 863 (6th Cir. 2000). The Dumonts do not even allege collusion; the parties have vigorously litigated the case. Further, there is no daylight between the Dumonts' and Michigan's desired outcomes. They both want the same thing and even entered into a settlement agreement highlighting their shared

interest. Finally, Michigan has not failed to defend its policies, opposing Plaintiff's claims at every stage.

The Dumonts argue that their constitutional theory differs from Michigan's. But differences over legal strategy do not make representation inadequate. *Bradley*, 828 F.2d at 1193 (denying intervention because "[a]lthough the litigation strategy has altered, this objective has not been abandoned by current counsel."). And the Dumonts were "welcome[d]" to submit an amicus brief and oral argument. Order, R. 52, Page ID # 1856. The record belies the claim that their arguments were not considered simply because they were not specifically mentioned and rebutted in the Court's opinion.[9]

III. The District Court did not abuse its discretion in denying permissive intervention.

The Dumonts also claim they are entitled to permissive intervention. They are not. A court may only allow Rule 24(b) intervention if the proponents show they have a claim or defense raising legal or factual questions in common with the case. Fed. R. Civ. P. 24(b)(1)(B).

Here, the Dumonts not only fail to raise a common claim or defense that they share with the main action—they do not raise *any* claims or

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[9] It is no surprise that the District Court did not mention the Dumont's expert report and declaration, which relied on inadmissible double hearsay from an unidentified speaker and failed to provide the court with any relevant evidence or data. They were also directly contradicted by two expert reports proffered by Plaintiffs. Ex., R. 42-1; Ex. R. 42-3.

any separate defenses. Proposed Answer, R. 18-1. None of the existing parties have claims against the Dumonts, nor do the Dumonts assert any claims against the parties. The Dumonts simply mirror the arguments made by Michigan—they seek to assert Michigan's interests. *See* Int. Mot. 16-17. This does not create a *common* interest: "We have previously rejected the suggestion that a proposed intervenor seeking to submit a filing that 'substantially mirror[s] the positions advanced' by one of the parties has necessarily identified a common question of law or fact. . . . Permissive intervention cannot be interpreted so broadly." *Kirsch v. Dean*, 733 F. App'x 268, 279 (6th Cir. 2018) (citations omitted).

Further, "the fact that a proposed intervenor's position is being represented counsels against permissive intervention." *League of Women Votes of Mich. v. Johnson*, 902 F.3d 572, 579 (6th Cir. 2018) (citation and alterations omitted); *Granholm*, 501 F.3d at 784 (same). The District Court also allowed the Dumonts to participate as *amici*. This further undercuts the need for permissive intervention. *Northland Family Planning Clinic*, 487 F.3d at 346. The Dumonts fail to meet the permissive intervention factors.

CONCLUSION

For the foregoing reasons, this Court should deny the motion.

Dated: Nov. 7, 2019

Respectfully submitted,

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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 5,183 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.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Response Brief on the Merits 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: Nov. 7, 2019

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