UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CATHOLIC CHARITIES WEST MICHIGAN,

Plaintiff,

v.

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES; ROBERT GORDON, in his official capacity as the Director of the Michigan Department of Health and Human Services; MICHIGAN CHILDREN'S SERVICES AGENCY; JOOYEUN CHANG, in her official capacity as Executive Director of Michigan Children's Services Agency; DANA NESSEL, in her official capacity as Attorney General of Michigan,

Defendants.

No. 2:19-cv-11661-DPH-DRG

HON. DENISE PAGE HOOD

MAG. J. DAVID R. GRAND

REPLY BRIEF IN SUPPORT OF MOTION TO INTERVENE

ORAL ARGUMENT REQUESTED

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The Dumonts[1] respectfully submit this reply brief in further support of their motion to intervene (ECF No. 20). CCWM seeks to force the State of Michigan to permit state-contracted, taxpayer-funded CPAs, like itself, to discriminate against prospective foster and adoptive families headed by same-sex couples, like the Dumonts. If Plaintiff obtains the relief it seeks, this will inevitably render the *Dumont* Settlement Agreement meaningless because the Settlement Agreement provides, *inter alia*, that the State will require all CPAs to comply with the non-discrimination provisions in their contracts. The Dumonts therefore have a substantial interest in this litigation because, among other reasons, if CCWM is successful, the Dumonts would be subjected to unconstitutional unequal treatment, causing practical and stigmatic injuries by requiring the Dumonts to pursue their desire to adopt a child from foster care in a system in which agencies may, once again, discriminate against them. The State does not adequately represent the Dumonts as it cannot and will not assert the full scope of arguments that defeat CCWM's claims. Therefore, this Court should grant the Dumonts' motion to intervene as a matter of right or, in the alternative, should exercise its discretion to grant permissive intervention. *See, e.g.*, *Grutter* v. *Bollinger*, 188 F.3d 394 (6th Cir. 1999) (granting intervention to minority college applicants in suit brought by white

[1] All abbreviations and capitalized terms are defined in ECF No. 20.

college applicants challenging Michigan's affirmative action program); *Linton* v. *Comm'r of Health and Env't*, 973 F.2d 1311 (6th Cir. 1992) (granting intervention to nursing homes in suit against Tennessee Department of Health regarding Medicaid funding on the basis of nursing homes "contractual" rights); *United States* v. *Detroit*, 712 F.3d 925 (6th Cir. 2013) (granting intervention to labor unions in suit brought by federal environmental compliance action against city department).

I. THE DUMONTS ARE ENTITLED TO INTERVENTION AS OF RIGHT.

Absent intervention, the Dumonts' substantial legal interest would be impaired. The Dumonts have two separate bases for their substantial legal interest: (1) protecting the Settlement Agreement that could be rendered meaningless as a result of this litigation; and (2) the relief sought by CCWM would subject the Dumonts to practical and stigmatic injuries by requiring the Dumonts to pursue their desire to adopt a child from foster care in a system in which agencies may discriminate against them, in violation of their constitutional rights.

Plaintiff asserts that because the Settlement Agreement is not a consent decree, the Dumonts have no legal interest in protecting their rights under it. ECF No. 24 PageID.1297. But Plaintiff cites no authority for that proposition and offers no distinction between a consent decree and a settlement agreement entered into with the State for purposes of asserting an interest sufficient to warrant intervention. Plaintiff cites *Blount-Hill* v. *Board of Education of Ohio*, 195 F. App'x 482 (6th Cir.

2006) for the proposition that the Dumonts are not entitled to intervention because the Dumonts are "not directly targeted by Catholic Charities' complaint." PageID.1299. But the Complaint specifically names the Dumonts, devoting five pages to discussing the *Dumont* case. *See* ECF No.1-2 PageID.45-49.[2] Similarly, Plaintiff relies on *United States* v. *Tennessee*, 260 F.3d 587 (6th Cir. 2001), arguing the Dumonts are not entitled to intervene because they do not "have any interest in reimbursement payments for foster care expenses." But in *Tennessee*, the Sixth Circuit denied intervention because "[movant's] claimed interest d[id] not concern the constitutional and statutory violations alleged in the litigation." *Id*. at 595. Here, the Dumonts' claims go to the heart of the constitutional and statutory issues in this litigation—whether the State must allow CPAs to discriminate against same-sex couples. Moreover, unlike *Tennessee*, where the movant could "protect its economic interests in contract negotiations with the State," *id.*, if the Dumonts are not permitted to intervene they will be unable to protect their constitutional rights.

Similarly, Plaintiff claims that "the Dumonts have alleged nothing more than a 'general ideological interest in the lawsuit'" and that its "requested relief does

[2] CCWM directly connects its alleged injuries and legal claims to the Dumonts. *See* ECF No. 1-2 PageID.45 ("The *Dumont* plaintiffs sought a court order prohibiting the agencies from contracting with faith-based providers, such as Catholic Charities, whose religious beliefs prohibit them from recommending or licensing same-sex couples as foster and adoptive parents.").

not threaten the Dumonts' ability to adopt or foster." ECF No. 24 PageID.1300. But the Dumonts are "actively pursuing fostering and adopting . . . from the Michigan public child welfare system" and "want to have the full range of options available to [them]" and Plaintiff seeks to compel the State to allow CPAs like CCWM to discriminate against same-sex couples including the Dumonts. ECF 20-3, PageID.907; ECF 20-4, PageID.913.[3] Further, in considering the Dumonts' standing to bring suit against the State, this Court recognized that the Dumonts "need not demonstrate that they would have been completely foreclosed—only that they could not compete for the right to adopt on the same footing as everyone else."[4] *Dumont*, ECF No. 49, Page.ID.1092. That same rationale applies here with greater force.[5]

The Dumonts are not adequately represented by the State. Plaintiff

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[3] "In determining whether intervention should be allowed, [the Court] must accept as true the non-conclusory allegations of the motion." *Horrigan* v. *Thompson*, 145 F.3d 1331, 1998 WL 246008, at *2 (6th Cir. 1998) (citation omitted).

[4] The required showing for standing is more demanding than the standard applicable here for demonstrating a "substantial legal interest" warranting intervention. *See Grutter*, 188 F.3d at 398 ("[A]n intervenor need not have the same standing necessary to initiate a lawsuit.").

[5] The court in *Buck* v. *Gordon*, No. 19-cv-00286, ECF No. 52 (W.D. Mich.), missed these critical points, concluding erroneously that the Dumonts have no legal basis for intervention because "Plaintiffs are not asking for any relief directed at the Settlement Agreement." But the *Buck* Plaintiffs seek to force the State to allow discrimination, contravening the Settlement Agreement. The *Buck* court also ignored the Dumonts' separate interest in protecting their constitutional right to have the full range of options available to them in the Michigan child welfare system.

misconstrues the law and obscures critical facts in arguing that the Dumonts "have simply not 'shown how their interests differ [from the State's] in the current litigation'" and the State adequately represents the Dumonts' legal interests. ECF No. 24, PageID.1294. "[P]roposed intervenors are 'not required to show that representation will in fact be inadequate,'" as they need only show that representation *may* be inadequate and may do so by showing "that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments." *Grutter*, 188 F.3d at 400. Plaintiff has effectively conceded this by acknowledging that the Dumonts "plan to introduce Establishment and Equal Protection arguments that the State may not make." ECF No. 24, PageID.1294-95. And while the State wishes to defend against this suit, it has no interest in asserting that the Constitution compels the State to respect the Dumonts' rights. This divergence is more than sufficient to demonstrate that the Dumonts are not adequately represented by the State.[6]

To obscure clear law on this point, Plaintiff points to a purported three-part test from *Jordan* v. *Michigan Conference of Teamsters Welfare Fund*, 207 F.3d

[6] The *Buck* court erroneously concluded that the Dumonts are adequately represented by the State even while seeming to recognize that the interests of the Dumonts and the State may "diverge" and that arguments such as "Establishment Clause theories" may be "uniquely available to the Dumonts." *Buck*, ECF No. 52 PageID.1865. Such potential divergence of interest, and the availability of unique legal claims and defenses, entitles the Dumonts to intervene. *See Grutter*, 188 F.3d at 400.

854 (6th Cir. 2000). But *Jordan* merely identified three factors that show that a proposed intervenor failed to meet the standard; it contains no statement about what must be affirmatively shown to prove inadequate representation beyond noting that "this burden is minimal." *Id.* at 863. Moreover, the *Jordan* court stressed that the movant failed to "identify a single argument that [intervenors] would have made in support of its position that Plaintiffs have failed to advance" and that intervenors' "only argument" was that "[intervenors] would be more vigorous in pursuing its claim for reimbursement than Plaintiffs." *Id.* Here, the Dumonts have argued that this case implicates their constitutional rights, arguments the State will not advance.

II. IN THE ALTERNATIVE, THE DUMONTS SHOULD BE GRANTED PERMISSIVE INTERVENTION.

Permissive intervention is proper when the proposed intervenor's claim or defense "shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Plaintiff does not dispute that the common question of law or fact between its claims and the Dumonts' defense is the State's policy with respect to CPA's discrimination against same-sex couples on the basis of religious criteria. Plaintiff's only argument against permissive intervention is that the "Dumonts' involvement would unduly delay the litigation and prejudice Catholic Charities." ECF No. 24 PageID.1303. But "undue delay or prejudice" is not akin to what additional time or effort may stem from the ordinary addition of a new party to a case. Moreover, the Dumonts have expressed their willingness and ability to abide

by any discovery schedule ordered in this Action and there is nothing to suggest that intervention would cause any undue delay or prejudice. ECF No. 20 PageID.835.

CONCLUSION

For the reasons set forth above and in the Dumonts' opening brief, we respectfully ask the Court to grant the Dumonts' motion to intervene.

Dated: August 7, 2019

Respectfully submitted,

s/ Ann-Elizabeth Ostrager

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

This the 7th day of August, 2019.

s/ Ann-Elizabeth Ostrager