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

KRISTY DUMONT; DANA DUMONT; ERIN BUSK-SUTTON; REBECCA BUSK-SUTTON; and JENNIFER LUDOLPH, *Plaintiffs*, v. NICK LYON, in his official capacity as the Director of the Michigan Department of Health and Human Services; and HERMAN MCCALL, in his official capacity as the Executive Director of the Michigan Children's Services Agency, *Defendants*, and ST. VINCENT CATHOLIC CHARITIES; MELISSA BUCK; CHAD BUCK; and SHAMBER FLORE, *Proposed Defendant-Intervenors*	No. 2:17-CV-13080-PDB-EAS HON. PAUL D. BORMAN MAG. ELIZABETH A. STAFFORD

REPLY IN SUPPORT OF
PROPOSED INTERVENORS' MOTION TO INTERVENE

INTRODUCTION

Plaintiffs concede that the Motion to Intervene should be granted, because St. Vincent's interest in partnering with the State to provide foster and adoption services to vulnerable families is at the heart of this lawsuit. Dkt. 21 at 2-3. Plaintiffs agree that this interest is substantial, and cannot be adequately represented by the State.

But Plaintiffs want to be choosy about their opponents. Having filed a Complaint that would shut down St. Vincent's adoption and foster programs, Plaintiffs seek to exclude the people who benefit from those programs, as having only "attenuated" or "hypothetical" interests in this lawsuit. But the concrete and practical risks to the Buck Family and Shamber Flore (the "Individual Movants") could not be more real. If Plaintiffs win, St. Vincent will be forced to immediately close its public foster and adoption programs.[1] The Bucks will lose critical services and the chance to adopt a biological sibling of their children through those programs. And Shamber will lose the ability to volunteer with these programs that once transformed her own life. Plaintiffs may regret seeking such harmful relief, but the proper remedy for that error is voluntary dismissal—not opposing intervention by the families who face harm.

Having conceded St. Vincent's entitlement for intervention, Plaintiffs seek to

[1] Under Michigan law, St. Vincent can only offer foster and public adoption services if it partners with the State. But it cannot partner with the State if it is forced to violate its religious beliefs as a condition of doing so. Ex. 1 ¶ 8; Dkt. 18 at 11.

parlay that concession into the right to block other qualified parties from intervening. But adequacy of representation is judged based on *existing* parties to a suit, which is why the Sixth Circuit has frequently allowed multiple similarly situated individuals to intervene. Ultimately, Plaintiffs simply do not want to grapple with the real-world consequences their lawsuit, if successful, would inflict on countless families and children just like Individual Movants. But that is not a legal basis for this Court to exclude parties who meet the requirements for intervention as of right.

ARGUMENT

I. Individual Movants possess a substantial legal interest in the case that may be impaired by this lawsuit.

Plaintiffs claim that harm the Individual Movants face is "not implicated" because the Complaint does not formally request closure of St. Vincent or harm to the Individual Movants. Dkt. 21 at 1, 3. But the right to intervene depends not on such formalism, but on whether "disposing of the action *may as a practical matter* impair or impede the movant's ability to protect its interest." Fed. R. Civ. P. 24(a)(2) (emphasis added). The Sixth Circuit has frequently allowed intervention based on the practical consequences that *may* flow from a lawsuit, even if those consequences were not requested or even implied in the complaint.

For example, in *Grutter v. Bollinger*, plaintiffs sued to challenge the race-conscious policy of the University of Michigan Law School, arguing the policy

violated the Equal Protection Clause. 188 F.3d 394, 397 (6th Cir. 1999). In their legal challenge of the policy, the plaintiffs in *Grutter* did not request that the University stop admitting minority students, nor even request that the University admit *fewer* minority students. Yet a number of minority students (some who merely "intend[ed] to apply" in the future to the University) moved to intervene simply based on the potential practical impact the litigation would have on their chance of being admitted. *Id.* at 397, 400. The lower court ruled against intervention, holding that these students lacked a substantial interest. The Sixth Circuit reversed, holding that a ruling for the plaintiffs would have "diminish[ed] the[] likelihood of" the movants receiving services in the future. *Id.* at 400. This satisfied "the minimal requirements of the impairment element." *Id.*

In contrast to the intervenors in *Grutter*, the Individual Movants here have an even stronger interest. A ruling in favor of Plaintiffs will not merely "diminish th[e] likelihood," but will undoubtedly prevent the Individual Movants from receiving *any* services through St. Vincent's public adoption and foster programs. Disposition of this lawsuit thus certainly "may as a practical matter impair or impede" the Individual Movants' interests, even if those consequences were not something Plaintiffs requested—or even anticipated.

Plaintiffs also argue that Individual Movants lack a substantial legal interest

in the litigation because they are "not parties to any contract with the State and perform no services on behalf of the State." Dkt. 21 at 7. But this approach flies in the face of Sixth Circuit and Supreme Court rulings "reject[ing] the notion that Rule 24(a)(2) requires a specific legal or equitable interest." *Grutter*, 188 F.3d at 399 (quoting *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997)). That is why the Sixth Circuit has frequently concluded intervention was required for parties with no legal or contractual relationship.[2]

Similarly, the Supreme Court held that a union member was entitled to intervene by right in a suit brought by the Secretary of Labor to invalidate an election of union officers, even though federal law prohibited the union member from initiating his own suit. *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 537 (1972). As other courts have explained, "although an asserted interest must be 'legally protectable,' it need not be legally *enforceable*. . . . [A]n interest is sufficient . . . even if the intervenor does not have an enforceable legal entitlement or would not have standing to pursue her own claim." *Texas v. United States*, 805 F.3d 653, 659 (5th Cir. 2015).

[2] *See, e.g., Grutter*, 188 F.3d at 398 (intervention for would-be student with no contractual or legal relationship with University or government); *Miller*, 103 F.3d at 1247 (intervention for the Michigan Chamber of Commerce in a dispute over campaign finance laws where the chamber had no contractual or legal relationship with the state or the labor unions that brought the lawsuit).

In an attempt to avoid this clear precedent, Plaintiffs rely on two cases in which intervention was denied because the motion was untimely, and because the would-be intervenors asserted merely "economic interests" which could have been satisfied through other alternatives. *See United States v. Tennessee*, 260 F.3d 587 (6th Cir. 2001); *Blount-Hill v. Bd. of Educ.*, 195 F. App'x 482 (6th Cir. 2006). Here, Plaintiffs do not dispute timeliness. And far more is at stake for Individual Movants than economic interests that could be satisfied elsewhere.[3] Individual Movants thus easily meet the liberal requirement to show a substantial interest.

II. Individual Movants are not adequately represented by existing parties.

Plaintiffs next attempt to exclude the Individual Movants by arguing that St. Vincent adequately represents their interests in this case. But adequate representation is measured based on representation by "existing parties," not between other potential intervenors. Fed. R. Civ. P. 24(a)(2); *see Jansen v. City of Cincinnati*, 904 F.2d 336, 337 (6th Cir. 1990) ("The proposed intervenors' right to

[3] Notably, the practical impact of this suit is far more direct for Individual Movants than for Plaintiffs. Plaintiffs will be able to adopt a child in Michigan regardless of whether they prevail here. In fact, they can currently adopt with agencies located even closer to them. Dkt. 18 Ex. 1 ¶ 8. But if Plaintiffs' suit succeeds, the Bucks will likely lose the opportunity to work with trusted social workers and adopt a biological sibling of their children. *See* Ex. 1 ¶¶ 6-7; Dkt. 18 at 12-13. Nor could these services be replaced by private adoption, because that service is fundamentally different and expensive. *See* Ex. 1 ¶¶ 2-4.

intervene . . . depends also on whether their interest is adequately protected by the *existing parties*." (emphasis added)); *Miller*, 103 F.3d at 1247 (same).

Plaintiffs cite no precedent for the proposition that a party opposing intervention may block a qualified movant by conceding that another movant should intervene. This would allow any plaintiff to strategically handpick his preferred intervening adversary by choosing which movant to concede intervention. More importantly, such a standard is inconsistent with Sixth Circuit precedent. For instance, in *Grutter* the Sixth Circuit allowed "41 students and three pro-affirmative action coalitions" to intervene, even though many were identically situated. 188 F.3d at 394, 397. The Sixth Circuit did not demand individualized interests for each intervenor, nor consider whether any of the movants could adequately represent the others, because such an inquiry is legally irrelevant. *Id.*; *see also Linton v. Comm'r of Health & Env't*, 973 F.2d 1311, 1313 (6th Cir. 1992) (allowing six similar nursing homes to intervene); *Jansen*, 904 F.2d at 337 (a "class of black applicants" intervened).[4]

Here, the Government has already conceded that the State does not adequately

[4] The same is true in other circuits. *See, e.g.*, *Conservation Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 40 (1st Cir. 1992) (seven fishing groups); *New York Pub. Interest Research Grp., Inc. v. Regents of Univ. of State of N. Y.*, 516 F.2d 350, 351 (2d Cir. 1975) (three pharmacists); *Texas v. United States*, 805 F.3d 653, 655 (5th Cir. 2015) (three immigrants); *Curry v. Regents of Univ. of Minnesota*, 167 F.3d 420, 421 (8th Cir. 1999) (five university students); *Sanguine, Ltd. v. U.S. Dep't of Interior*, 736 F.2d 1416, 1417 (10th Cir. 1984) (nine tribes).

represent interests related to St. Vincent's provision of public adoption and foster services. Dkt. 21. at 2-3. Plaintiffs fail to reconcile this concession with their argument that the State adequately represents the interests of Individual Movants. That alone should be enough to show inadequate representation.

But even if the Individual Movants are required to separately show that their interests may be inadequately represented by the State, they have met the "minimal" burden of proof required to do so. *Grutter*, 188 F.3d at 400.[5] As in *Grutter*, the State is "unlikely to present evidence" of factors that "may be important and relevant" to determining legal issues at stake. *Id.* at 401. Such evidence includes how Individual Movants rely on services from St. Vincent that state agencies do not provide.[6] Dkt. 18-4 at 3. Thus, the State does not adequately represent Individual Movants.

CONCLUSION

The Court should grant the Motion in its entirety for all Proposed Intervenors.

Dated: Jan. 9, 2018

Respectfully submitted,
/s/ Stephanie H. Barclay
Counsel for Proposed Defendant-Intervenors

[5] Plaintiffs erroneously state that the Individual Movants must "overcome the presumption of adequate representation by the state." Dkt. 21 at 13. But the Sixth Circuit "has declined to endorse a higher standard for inadequacy when a governmental entity [is] involved." *Grutter*, 188 F.3d at 400.

[6] Plaintiffs also argue allowing Individual Movants to intervene would needlessly complicate the proceedings, raise costs, and delay adjudication. Dkt. 21 at 15. But this is inconsistent with Plaintiffs' argument elsewhere that Individual Movants are not raising arguments different from St. Vincent and their evidence can still come in if relevant. Dkt. 21 at 12. Thus, permissive intervention is also appropriate.

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CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2018, I electronically filed the above document with the Clerk of Court via CM/ECF, which will provide electronic copies to counsel of record.

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