

**IN THE DISTRICT COURT OF TETON COUNTY, WYOMING
NINTH JUDICIAL DISTRICT**

DANIELLE JOHNSON; KATHLEEN)
DOW; GIOVANNINA ANTHONY, M.D.;)
RENE R. HINKLE, M.D.; CHELSEA'S)
FUND; and CIRCLE OF HOPE)
HEALTHCARE d/b/a Wellspring Health)
Access;)

Plaintiffs,)

v.)

Civil Action No. 18732

STATE OF WYOMING; MARK)
GORDON, Governor of Wyoming;)
BRIDGET HILL, Attorney General for the)
State of Wyoming; MATTHEW CARR,)
Sheriff Teton County, Wyoming; and)
MICHELLE WEBER, Chief of Police,)
Town of Jackson, Wyoming,)
Defendants.)

FILED
TETON COUNTY WYOMING
2022 NOV 30 PM 3:13
Clerk of District Court

ORDER ON MOTION TO INTERVENE

This matter came before the Court on November 21, 2022 for a hearing on Representative Rachel Rodriguez, Representative Chip Neiman, and Right to Life of Wyoming's Motion to Intervene. John Robinson, Marci Bramlet, Peter Modlin, and Megan Cooney appeared on behalf of the Plaintiffs. Jay Jerde appeared on behalf of the State of Wyoming Defendants, Governor Mark Gordon and Attorney General Bridget Hill. Erin Weisman appeared on behalf of Teton County Sheriff Matthew Carr. Lea Colasuonno appeared on behalf of the Town of Jackson's Chief of Police Michelle Weber. Frederick Harrison and Denise Harle appeared on behalf of Representative Rodriguez, Representative Neiman, and Right to Life Wyoming (Applicants). After reviewing the Applicants' Motion to Intervene, the Plaintiffs' Opposition, the State Defendants' Response, the Applicants' Reply, and the record of this matter and after considering

the arguments of counsel at the hearing, the Court finds that the Applicants' Motion to Intervene should be denied for the reasons set forth in this Order.

Background

1. Plaintiffs originally filed this action on July 25, 2022. This lawsuit challenges the constitutionality of Wyoming House Bill 92 (HB 92), as codified at Wyo. Stat. § 36-6-102. HB 92 became effective on July 27, 2022.
2. Shortly after becoming effective, this Court entered an Order Granting Motion for Temporary Restraining Order on July 27, 2022 that temporarily stayed the enforcement or application of HB 92. On August 10, 2022 this Court entered an Order Granting Preliminary Injunction staying the enforcement of HB 92 while this matter is pending. The Applicants promptly filed a Motion to Intervene on August 16, 2022.
3. The State Defendants filed a Response to the Motion to Intervene on August 31, 2022. Plaintiffs filed an Opposition to Individual Legislators' and Right to Life of Wyoming's (RTLW) Motion to Intervene on September 2, 2022. The Applicants filed a Reply to their Motion on October 7, 2022. The Court held a telephonic scheduling conference to set a hearing on the Applicants' Motion. After consultation with counsel for all parties, the Court set a hearing on Applicants' Motion. A hearing was held on November 21, 2022.
4. Each Applicant seeks intervention of right. They contend that their motion is timely, that they have a significant protectable interest in this matter, that their interest will be impaired without intervention, and that the State Defendants do not adequately represent their interests. Alternatively, the Applicants seek permissive intervention and contend that they share a common question of fact or law with this action. The Plaintiffs oppose the Applicants' Motion. The Plaintiffs contend that the Applicants have not demonstrated a significant protectable interest in

this matter and that the Applicants are adequately represented by the State Defendants. Although the State Defendants do not oppose the Applicants' Motion they dispute the Applicants' position that an evidentiary hearing is appropriate in this matter.

Legal Authority

5. There are two ways to intervene in an existing action, intervention of right and permissive intervention. Both types of intervention are controlled by W.R.C.P. Rule 24 which states:

(a) *Intervention of Right*.—On timely motion, the court must permit anyone to intervene who:

- (1) is given an unconditional right to intervene by statute; or
- (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) *Permissive Intervention*. —

(1) In General. — On timely motion, the court may permit anyone to intervene who:

- (A) is given a conditional right to intervene by statute; or
- (B) has a claim or defense that shares with the main action a common question of law or fact.

6. Timeliness. Regardless of the type of intervention, a motion to intervene must be timely filed.

“Irrespective of whether the applicant requests intervention of right or permissive intervention, the motion must be timely.” *Kerbs v. Kerbs*, 2020 WY 92, ¶ 13, 467 P.3d 1015, 1019 (Wyo. 2020) (citations omitted). Timeliness is evaluated from the standpoint of reasonableness. *Hirshberg v. Coon*, 2012 WY 5, ¶ 13, 268 P.3d 258, 262 (Wyo. 2012). The Court is charged with looking at the “totality of the circumstances” and not just the mere passage of time. *Hirschberg*, 2012 WY at ¶¶ 14-15, 268 P.3d at 262.

7. Intervention of Right. For intervention of right, the Applicants must meet four conditions.

Concerned Citizens of Spring Creek Ranch v. Tips Up, LLC, 2008 WY 64, ¶ 11, 185 P.3d 34, 38

(Wyo. 2008) (citations omitted). The Wyoming Supreme Court has stated the conditions of the four-part test include:

- 1) The applicant must claim an interest related to the property or transaction which is the subject of the action;
- 2) The applicant must be so situated, that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest;
- 3) There must be a showing that the applicant's interest will not be adequately represented by the existing parties; and
- 4) The application for intervention must be timely.

Concerned Citizens, 2008 WY at ¶14, 185 P.3d at 39 (citing *James S. Jackson Co., Inc. v. Horsehoe Creek Ltd.*, 650 P.2d 281, 286 (Wyo. 1982)).

Conditions one through three are questions of law. *Concerned Citizens*, ¶ 11, 185 P.3d at 38. The appellate court provides no deference on issues of law. *State Farm Mut. Auto. Ins. Co. v. Colley*, 871 P.2d 191, 194 (Wyo. 1994). If the trial court erroneously denies intervention as of right, the appellate court will reverse the trial court's decision. *State Farm Mut. Auto. Ins. Co.*, 871 P.2d at 194). The fourth condition is left to the discretion of the trial court and is reviewed for an abuse of discretion. *Concerned Citizens*, ¶ 11, 185 P.3d at 38. "Intervention of right is construed broadly in favor of intervention." *Id.*

8. *Protectable Interest*. Although intervention of right is liberally construed, the Applicants bear the burden to establish a significant protectable interest in the present action. *Platte County School Dist. No. 1 v. Basin Elec. Power Co-op.*, 638 P.2d 1276, 1279 (Wyo. 1982) (citations omitted). The first two conditions of the four-part test depend on whether the applicants have established a significant protectable interest. *Concerned Citizens*, ¶ 17, 185 P.3d at 40. A significant protectable interest is an interest that is not merely contingent to the present action. *Platte County*, 638 P.2d at

1279. A merely contingent interest is “similar to the interest of any member of the public at large.”
Id.

9. *Adequacy of Representation*. Under the third condition, the applicant bears the burden to establish that their significant protectable interest is not adequately represented by the present parties. *Concerned Citizens*, ¶ 20, 185 P.3d at 40. The Wyoming Supreme Court has referenced the following three-part test to assess the condition of adequacy of representation. *Id.* (citations omitted). The three-factor test includes:

- (1) Whether the interest of a present party is such that the party will undoubtedly raise the same arguments as the intervenor;
- (2) Whether the present party is capable and willing to make such arguments; and
- (3) Whether the intervenor would offer any necessary elements to the proceeding that the existing parties would neglect.

Id. (citations omitted).

10. “An intervenor’s burden is only minimal in that he or she must only show that his or her interest **may not** be adequately represented.” *Id.* (emphasis added). “Where the intervenor and an existing party have the same objective, a presumption of adequacy of representation arises. A simple difference between a party and an intervenor’s motivation in the litigation is not enough to show inadequacy of representation.” *Id.* (citation omitted).

11. Permissive Intervention. “Permissive intervention may be allowed in the district court’s discretion.” *Concerned Citizens*, ¶ 23, 185 P.3d at 41. The appellate court reviews a trial court’s denial of permissive intervention for an abuse of discretion. *Concerned Citizens*, ¶ 12, 185 P.3d at 38. Pursuant to W.R.C.P. Rule 24(b)(1), a Court may, on a timely motion, allow a party to intervene if the party “is given a conditional right to intervene by statute or has a claim or defense

that shares with the main action a common question of law or fact.” In deciding whether to grant permissive intervention, a court must also assess whether “intervention will . . . unduly delay or prejudice the adjudication of rights of the original parties.” *Masinter v. Markstein*, 2002 WY 64, ¶ 6, 45 P.3d 237, 240 (Wyo. 2002).

Legal Analysis

12. **Timeliness.** The Court addresses the condition of timeliness first. This condition must be satisfied for intervention of right and permissive intervention. Looking at the totality of circumstances, the Applicants’ Motion was brought promptly and without delay. Plaintiffs filed this action on July 25, 2022. The Applicants filed their Motion on August 16, 2022. There is no evidence, nor any argument raised by the existing parties, that the Applicants’ Motion is untimely. The Court finds that the Applicants have satisfied the condition of timeliness.
13. **Significant Protectable Interest.** The second and third conditions require the Court to find that the Applicants share an interest in the litigation and that their interest may be impaired or impeded if they are not allowed to intervene. The satisfaction of these two conditions demonstrates a significant protectable interest. *Concerned Citizens*, ¶ 17, 185 P.3d at 40. The Applicants must establish that they have a significant protectable interest and not merely an interest that is “similar to any member of the public at large.” *Platte County*, 638 P.2d at 1279.
14. The individual Legislators’ interests in this litigation are summarized into three points. First, the Legislators have an interest in enacting legislation that regulates the medical profession; that promotes the health, welfare, and safety of its citizens; and that promotes human life. Second, the individual Legislators seeking intervention were involved in sponsoring the bill, Representative Rodriguez was the main sponsor of HB 92 and Representative Neiman was a co-sponsor of HB 92. Thus, they have an interest in seeing the legislation that they worked to pass actually enacted.

Third, due to the individual Legislators' personal vocations related to supporting human life, they are personally interested in seeing the legislation take effect.

15. RTLW's interests in this litigation are also summarized into three points. First, RTLW has an interest in achieving changes in the law to ensure that the sanctity of human life is protected. Second, RTLW was an instrumental advocate for HB 92 and is interested in seeing HB 92 take effect. Third, RTLW is interested in this litigation because RTLW wants to ensure its advocacy efforts that promote health and safety are not wasted. All of RTLW's interests relate to its role as an advocate.

16. The Court is charged with determining whether the important interests identified by the Applicants rise to the level of a "significantly protectable interest." To do so, the Court must look to case law that interprets W.R.C.P. Rule 24. There are no Wyoming cases that are directly on point with the facts in this case. The Court may therefore turn to cases outside of our jurisdiction to provide guidance and to use as persuasive authority. Additionally, Wyoming's Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure. *Carroll v. Gibson*, 2021 WY 59, 9 n. 5, 485 P.3d 1004, 1007 (Wyo. 2021) (citation omitted). Thus, the Court may utilize federal court interpretations of the Federal Rules of Civil Procedure to guide the Court in interpreting W.R.C.P. Rule 24 which is closely matched to its federal counterpart. *Id.*

17. The Tenth Circuit has acknowledged that ". . . courts have enjoyed little success in attempting to define precisely the type of interest necessary for intervention" *American Ass'n of People with Disabilities v. Herrera*, 257 F.R.D. 236, 246 (D.N.M. 2008) (citing *Sanguine, Lts. v. U.S. Dep't of the Interior*, 736 F.2d 1416, 1420 (10th Cir. 1984)). "Determining the sufficiency of an applicant's interest is a highly fact-specific determination." *American Ass'n of People with Disabilities*, 257 F.R.D at 246 (citation omitted). However, the Tenth Circuit consistently requires

that the interest be “direct, substantial, and legally protectable.” *Id.* The Court will look for the Applicant to demonstrate how the interest is endangered by this case. *Id.*

18. All of the cases relied upon by the Applicants involve distinct environmental interests or economic interests. Courts have broadly recognized environmental interests as legally protected interests for purposes of intervention. *See Coal. of Ariz./N.M. Cnty. For Stable Econ. Growth v. Dep’t of Interior*, 100 F.3d 837, 841 (10th Cir. 1996) (wildlife photographer who played a role in listing the spotted owl as an endangered species had legally protectable interest in lawsuit between a coalition of counties and the Department of the Interior that was challenging the listing); *Wash. State Bldg. & Constr. Trades Council, AFL-CIO v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982) (finding, without analysis, that the district court erred in denial of motion to intervene filed by a public interest group that sponsored a ballot initiative which closed Washington State’s borders to out of state low-level radioactive waste); *San Juan County, Utah v. U.S.*, 503 F.3d 1163, 1206 (10th Cir. 2007) (holding that an environmental conservation group was not entitled to intervention because it was unable to establish inadequate representation) *abrogated by Western Energy Alliance v. Zinke*, 877 F.3d 1157 (10th Cir. 2017) .
19. The Applicants cited only two cases that did not involve environmental interests. However, both of those cases hinged on the threat of economic damage. In *Barnes v. Security Life of Denver Insurance Company*, the court found that the proposed intervenor had a financial interest in the administration of the insurance policies in question and would bear the responsibility for paying any potential liability assessed in the lawsuit. 945 F.3d 1112, 1124-25 (10th Cir. 2019). In *Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action*, the court found that the potential loss in the market value of homes owned by a group of homeowners constituted a sufficient interest

to intervene in a lawsuit challenging the constitutionality of a ordinance that placed a moratorium on the operation of abortion clinics. 558 F.2d 861, 870 (8th Cir. 1977).

20. In contrast, there are a number of cases that have denied an individual legislator's motion to intervene, finding that their support for a piece of legislation does not rise to the level of a significant protectable interest. In *Am. Ass'n of People With Disabilities v. Herrera*, several state legislators sought to intervene in a case concerning the constitutionality of amendments made to an electoral statute. 257 F.R.D. 236, 240 (D.N.M 2008). The district court found that the legislators who supported the amendments did not have an interest in the lawsuit that rose to the level of a legally protected interest. 257 F.R.D. at 251.
21. In analyzing the condition of a substantial protectable interest, courts look to cases that have required Article III standing in conjunction with motions to intervene. *Id.* at 249. Although Article III standing is not required under W.R.C.P. Rule 24, standing cases offer guidance. *Id.* In *Bunquer v. City of Indianapolis*, three state senators sought to intervene in a case concerning the constitutionality of two statutes regarding police arrest powers. 2013 WL 1332137, * 3 (S.D.Ind. 2013). The statutes were co-authored by the state senators seeking intervention. *Bunquer*, 2013 WL at * 3. The court found that the state senators' interest in the constitutionality of a piece of legislation they drafted was no different than the interest that all members of the state legislature had in the constitutionality of statutes. *Id.*; *See Also One Wisconsin Institute, Inc. v. Nichol*, 310 F.R.D. 394 (W.D. Wis. 2015) (holding four state legislators failed to identify a legally protected interest entitling them to intervene as of right in a lawsuit challenging voting laws).
22. The Court finds that interests raised by the Legislator Applicants, though important, are nonetheless indirect and contingent interests for purposes of intervention. The Court cannot find any caselaw or statutes providing legislators with a legal right to intervene on the basis of being

sponsors or co-sponsors of a particular bill. The Legislators' interest in a bill, by nature of their profession, is slightly different than that of the public at large. However, the heart of the interest asserted is in ensuring that legislation passed by the Legislature is actually enacted. Undoubtedly, this is a generalized interest held by the entire State Legislature and likely by any Wyoming citizen interested in ensuring that the Wyoming State Legislature is able to exercise its authority to pass and enact laws.

23. The Court acknowledges that the Legislators unquestionably have a personal stake in this litigation due to their personal beliefs and vocations. However, the health, safety, and welfare of Wyoming citizens are certainly important interests held by every Wyoming citizen. The Court finds that interests founded on the Legislators' personal convictions are not different from any Wyoming citizen's interest in seeing legislation enacted that promotes the health, welfare, and safety of Wyoming's citizens.
24. Finally, regardless of the outcome of this litigation, the individual Legislators are free to continue their work. They can continue to enact legislation that regulates the medical profession; promotes the health, welfare and safety of its citizens; and promotes human life. A challenge to a particular piece of legislation on the basis of its constitutionality is not an infringement on the Legislators' ability to enact laws. Specifically, the outcome of this case will not abrogate the individual Legislators' authority to continue to work on drafting, passing and enacting laws that restrict abortion services within the State.
25. The Court also finds that RTLW's interests are indirect and contingent. Regardless of the outcome of this litigation, RTLW can continue to engage in its advocacy for changes in the law that promote the health and safety of Wyoming citizens as well as the sanctity of life. Further, the Court finds that RTLW's interest in seeing HB 92 enacted is similar to that of any other member of the public.

The outcome of this litigation will not impact how the Applicants continue to legislate and advocate. This case will only address whether HB 92, as written and enacted, is constitutional under Wyoming's Constitution.

26. Inadequate Representation. Even if the Applicants could establish a significant protectable interest, the Court finds that that Applicants failed to overcome the presumption that their interests are inadequately represented by the State Defendants. The Court finds that the Applicants and the State Defendants have the same objective in this case. An essential function of the Office of the Wyoming Attorney General is to defend the constitutionality of Wyoming's statutes. The Applicants' interest is to ensure that HB 92 is found constitutional.
27. When an intervenor has the same objective as an existing party, there is a presumption that the intervenor's interests are adequately represented. *Concerned Citizens*, ¶ 12, 185 P.2d at 38. To overcome this presumption, the Applicants contend that the State Defendants will not raise the same arguments, are unwilling to make some arguments, and will neglect necessary elements to the proceedings. The Applicants present two main arguments in support of this position. First, the Applicants contend that the State Defendants neglected to present rebuttal evidence to Plaintiffs' affidavits presented in support of their Motion for Temporary Restraining Order and Motion for Preliminary Injunction. Second, the Applicants disagree with the State Defendants' position that this case should be certified to the Wyoming Supreme Court without an evidentiary hearing. The Applicants conclude that the State Defendants decision not to present rebuttal evidence and their decision to seek certification establishes that the State Defendants will neglect the factual record in this case and fail to produce relevant evidence.
28. At the hearing, the State Defendants disagreed with the Applicants that the factual record will be neglected should this Court hold an evidentiary hearing. The State Defendants also acknowledged

that they have a disagreement with the Applicants with respect to whether this case should be certified without an evidentiary hearing. However, counsel for the State Defendants affirmatively asserted that they would fully participate in an evidentiary hearing if one is held.

29. “A simple difference between a party and an intervenor’s motivation in the litigation is not enough to show inadequacy of representation.” *Id.*, ¶ 12, 185 P.2d at 38. Although the Applicants and State Defendants appear to have a difference in opinion over their litigation tactics in this case, their objectives are the same. Their positions are not adverse to one another. Further, this Court is concurrently issuing a Certification Order in this matter. If the Wyoming Supreme Court issues a notice of agreement to answer the certified questions, no further factual record will be necessary. For these reasons, the Court concludes that the Applicants have failed to overcome the presumption of adequate representation by the State Defendants.

30. Permissive Intervention. The Applicants contend that even if they have not met the requirements for intervention of right they meet the requirements for permissive intervention. The Applicants assert that they have defenses that are directly responsive to the claims asserted by Plaintiffs in this matter. The defenses include: “relevant evidence” on (1) the benefits of HB 92; (2) the constitutionality of HB 92; and (3) the harm that results from viewing abortions as health care. The Plaintiffs contend that this information will add nothing to the litigation and will only serve to complicate and delay the litigation with irrelevant information.

31. The Court finds the Plaintiffs’ arguments persuasive. First, this Court has found that the State Defendants are adequately representing the interests of the Applicants. *City of Stilwell, Okl. v. Ozarks Rural Elec. Co-op. Corp.*, 79 F.3d 1038, 1043 (10th Cir. 1996) (upholding district court’s decision to deny permissive intervention on finding that applicants’ interests were adequately represented and intervention would unduly delay and prejudice the adjudication of rights). Second,

this Court has concurrently issued a Certification Order. This case involves questions of law to which Wyoming has no controlling precedent which would be determinative of the cause of action. Permitting the Applicants to intervene would unduly delay the adjudication of the rights of the parties.

Conclusion

32. The Court is sympathetic to the Applicants' desire to intervene in this matter. As advocates and lawmakers, the Court recognizes that the issues before the Court strike at the very heart of RTLW's advocacy efforts as well as the individual Legislators' personal convictions and legislative efforts. However, the Applicants' interests do not rise to the level of a significant protectable interest under the law.

IT IS THEREFORE ORDERED that the Individual Legislators' and Right to Life of Wyoming's Motion to Intervene is respectfully **DENIED**.

DATED this 30th day of November, 2022.

1110-
Melissa M. Owens
District Court Judge

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served by mail/fax upon the following persons at their last known address this 30 day of Nov 2022.

J. Robinson / M. Bramlet - Fax
P. Madlin / M. Cooney % Robinson Stetling Welch Fax
J. Jerde - Fax
E. Colasubino - Fax
E. Weisman - Pickup, Hand
F. Harrison - Fax
D. Harle - c/o F. Harrison Fax

By: Dep J. Smith Johnson v. State of Wyoming
Civil Action No. 18732

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