

**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.)

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.)

Civil Action No. 18853

FILED
10:10 am
JUL 20 2023
Dep. B. Nelson
DISTRICT COURT
9TH JUDICIAL DISTRICT
TETON COUNTY WYOMING

ORDER DENYING MOTION TO INTERVENE

This matter came before the Court on June 2, 2023 for a hearing on Representative Rachel Rodriguez-Williams, Representative Chip Neiman, Wyoming Secretary of State Chuck Gray, 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: 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. Jay Jerde appeared on behalf of the State of Wyoming Defendants, Governor Mark Gordon and Attorney General Bridget Hill (the State Defendants). Erin Weismán 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

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and Timothy Garrison appeared on behalf of Representative Rodriguez-Williams, Representative Neiman, Wyoming Secretary of State Chuck Gray, and Right to Life Wyoming (the Applicants).

After reviewing the Applicants' Motion to Intervene (Motion), the Plaintiffs' Amended Opposition, the State Defendants' Response, the Applicants' Reply, the record of this matter, and after considering the arguments of counsel at the hearing, the Court denied the Applicants' Motion from the bench. This Order reduces the Court's ruling to writing.

Background

1. Plaintiffs filed their Amended Complaint for Declaratory Judgment and Injunctive Relief (Amended Complaint) on March 21, 2023. Plaintiffs seek declaratory judgment that Wyoming's Life as a Human Right Act (the Act) and Wyoming Senate File Number 109 (SF 109) violate Wyoming's Constitution. The Applicants promptly moved to intervene in this matter on March 22, 2023. The Applicants seek intervention of right, or alternatively, permissive intervention pursuant to W.R.C.P. 24.
2. The Plaintiffs object to intervention by any of the Applicants. The State Defendants oppose Secretary of State Chuck Gray's intervention on all grounds. The State Defendants also oppose the intervention of the remaining Applicants only to the extent the remaining Applicants seek to introduce witness testimony in this matter.
3. In answering the Complaint and opposing the entry of this Court's Temporary Restraining Order entered on March 22, 2023, the State Defendants present a wholesale denial that the Act violates Wyoming's Constitution. The State Defendants' Answer contains a total of ten admissions that are limited to historical dates, case procedure, and the description of the State Defendants' work in their official capacities. The State Defendants' Answer to the Amended Complaint is nearly

identical to the proposed Answer submitted by the Applicants. Like the Applicants, the State Defendants contest that the Act violates the Wyoming Constitution, contest that abortions are health care, contest that the Wyoming Constitution can reasonably be interpreted as implicitly conferring a right to abortion, and contests that the Act represents an unreasonable restriction on the rights conferred under the Wyoming Constitution.

Legal Authority & Analysis

4. 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.

5. 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. The determination of timeliness is a matter within the trial court's discretion. *Masinter v. Markstein*, 2002 WY 64, ¶ 7, 45 P.3d 237, 240-41 (Wyo. 2002).

6. The issue of timeliness is not contested. The Plaintiffs filed their Amended Complaint on March 17, 2023. The Applicants promptly moved to intervene on March 22, 2023. The Court finds that the element of timeliness is satisfied in this case. Finding that the Applicants have satisfied the element of timeliness, the Court turns to intervention of right.

7. Intervention of Right. Wyoming does not have a state statute that provides the Applicants with an unconditional right to intervene pursuant to W.R.C.P. 24(a)(1). The Court must determine if the Applicants claim an interest in the action that satisfies the requirements of W.R.C.P. 24(a)(2).

8. For intervention of right pursuant to W.R.C.P. 24(a)(2), 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. Horseshoe 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.*

9. Collectively, all of the Applicants assert an interest in this action based on their long history of extensive advocacy work in promoting and supporting pro-life policies, organizations, and legislation. Individually, the Wyoming Secretary of State also asserts an interest based on his statutory obligation to preserve all acts and resolutions of the Legislature pursuant to Wyo. Stat. § 9-1-302, as well as, his position as first in line of succession to the governorship pursuant to Wyo. Stat. § 9-1-211. Representative Rodriguez-Williams and Representative Neiman also assert an interest based on the integral roles they played as the main sponsor and a co-sponsor of the Act. Finally, the Representatives also assert an interest based on preserving the authority of the Legislature to pass laws that promote the policies they were elected by their constituents to pursue.
10. *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.

11. W.R.C.P. 24 is patterned after the Federal Rules of Civil Procedure 24. Accordingly, federal court interpretations of the Federal Rules of Civil Procedure are persuasive authority for the interpretation of the Wyoming Rules of Civil Procedure. *Carroll v. Gibson*, 2021 WY 59, ¶ 9 n.5, 485 P.3d 1004, 1007 (Wyo. 2021) quoting *Gunsch v. State*, 2019 WY 79, ¶ 15, 444 P.3d 1278, 1282 n.5 (Wyo. 2019). The Tenth Circuit requires that “[the] interest in the proceedings be ‘direct, substantial, and legally protectable.’” *Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Department of Interior*, 100 F.3d 837, 840 (10th Cir. 1996) (citing *Vermejo Park Corp. v Kaiser Coal Corp. (In re Kaiser Steel Corp.)*, 998 F.2d 783, 791 (10th Cir. 1993) (quoting *United States v. Perry County Bd. of Educ.*, 567 F.2d 277, 279 (5th Cir. 1978)). 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).

12. The Applicants pointed the Court to the holding in *Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Department of Interior*, 100 F.3d 837, 840 (10th Cir. 1996) as persuasive authority for a finding that the Applicants have a significantly protectable interest to intervene based on their extensive history of advocacy. In *Coalition of Counties*, a court found that a commercial wildlife photographer and amateur biologist had a direct, substantial and legally protectable interest in a lawsuit that challenged the United States Fish and Wildlife Service’s

(FWS) listing of an owl under the Endangered Species Act (ESA). The Court based this finding on the photographer's "persistent record of advocacy" for the owl's protection, his successful efforts as an "interested person" in bringing a lawsuit to have the owl listed under the ESA, and his successful efforts in and enforcing the protections afforded under the ESA through litigation. *Id.*

13. The Court finds *Coalition of Counties* distinguishable from the facts of the present case. The Applicants have a long history of advocacy work advancing their pro-life policies and legislation. However, the biologist in *Coalition of Counties* had a long history of advocacy coupled with designated rights under the ESA and a history of pursuing litigation efforts to enforce ESA protections. *Id.* at 841-42. In contrast to the biologist, the Applicants only have a long history of advocacy efforts and personal interests in pro-life policies and legislation.
14. Advocacy efforts alone do not create a legally protectable interest. This finding is supported by cases that have specifically addressed intervention by state legislators. Even with the liberal construction Rule 24 receives in favor of intervention, courts routinely find that state legislators do not have a legally protectable interest sufficient to intervene in lawsuits challenging the constitutionality of a law. In *Am. Ass'n of People with Disabilities v. Herrera*, the court found that state legislators did not have a legally protectable interest to intervene in a case challenging the constitutionality of amendments made to an electoral statute. 257 F.R.D. 236, 240 (D.N.M 2008). In *Bunquer v. City of Indianapolis*, a court found that three legislators did not have a legally protectable interest to intervene in a lawsuit challenging the constitutionality of statutes that the legislators authored because their interest was no different than the interest of the all the other members of the state legislature. 2013 WL 1332137, * 3 (S.D.Ind. 2013). *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).

15. The Court also finds that the advocacy efforts of Wyoming Right to Life and Secretary of State Chuck Gray do not create a legally protectable interest to qualify for intervention of right. The 7th Circuit has also rejected intervention by a chief lobbyist of an enacted abortion regulation based on a failure to show a direct and substantial interest. *Keith v. Daley*, 764 F.2d 1265, 1269 (7th Cir. 1985). In *Keith v. Daley*, the non-profit lobbyist's interests included promoting pro-life policies, abortion alternatives, and fetal protections. *Keith*, 764 F.2d at 1267. The Court finds that the lobbyist's interests in *Keith v. Daley* are no different from the interests asserted by Right to Life of Wyoming and Secretary of State Chuck Gray as advocates. Although each of the intervenors played a role in promoting pro-life policies and legislation in Wyoming, the Court finds that activity does not amount to a legally protected interest in this litigation.
16. Finally, the Court also finds that Secretary of State Chuck Gray has also failed to assert a legally protected interest based on his duties as Wyoming's Secretary of State. Secretary of State Gray relies on Wyo. Stat. § 9-1-302 and Wyo. Stat. § 9-1-211 to support his claim for intervention in this matter. However, neither of these statutes provide a right for the Secretary of State to intervene in litigation challenging the constitutionality of legislative enactments. Therefore, the Court finds that Secretary of State Chuck Gray does not satisfy the legal requirements for intervention.
17. *Adequacy of Representation*. Even if the Court could find that the Applicants have asserted a direct substantial and legally protectable interest, the Court finds that the interests of the Applicants are adequately represented by the State Defendants. 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).

18. “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). Circumstances that may warrant a finding that representation “may” be inadequate arise when there is collusion between the representative and opposing party, the representative has an interest adverse to the proposed intervenors, or that the representative failed in fulfilling the duty to represent the applicant’s interest. *Sanguine, Ltd. v. U.S. Dept. of Interior*, 736 F.2d 1416, 1419 (10th Cir. 1984).

19. In Wyoming, it is the duty of the Wyoming Attorney General to defend all lawsuits instituted against the state of Wyoming and brought against state officers in their official capacity. Wyo. Stat. § 9-1-603(a). In the present case, the State Defendants are represented by the Wyoming Attorney General. The Applicants’ objective and the objective of the State is the same, defending the constitutionality of the Act. “ . . . [R]epresentation is adequate ‘when the objective of the

applicant for intervention is identical to that of one of the parties.” *Coalition of Counties*, 100 F.3d at 845 (citations omitted).

20. The Applicants suggest that the State Defendants defense of the Act is insufficient. However, the Applicants fail to assert sufficient facts for establishing that the State Defendants “may not” be adequately representing the Applicants’ interests. There is no alleged collusion between the State Defendants and the Plaintiffs. There is no adversity between the State Defendants and the Applicants, in fact, the Applicants asserted at the hearing that they have a very cordial relationship with the attorney for the State Defendants. Further, there is no allegation or facts to suggest that the State Defendants have abandoned the defense of the Act.
21. Instead, the State Defendants have set forth a steadfast defense of the Act during the entirety of this litigation. The State Defendants’ Answer to the Amended Complaint represents a wholesale denial of all of the Plaintiffs’ claims in this matter. Further, the Court notes that the State Defendants’ Answer is nearly identical to the proposed Answer filed by the Applicants.
22. The Applicants’ main contention of inadequate representation rests on the State’s position that witness testimony and factual evidence is not necessary to defend the constitutionality of the Act. The State Defendants assert that the Plaintiffs have only asserted a facial challenge to the Act which does not require witness testimony. The Applicants take a different position with respect to witness testimony and contend that they would augment the record by introducing evidence in favor of the Act. The decisions made regarding what factual evidence to present during litigation amount to a tactical litigation decision. *See Stuart v. Huff*, 706 F.3d 345 (4th Cir. 2013) (finding that “disagreement over how to approach the conduct of the litigation is not enough to rebut the presumption of adequacy of representation”). While the Applicants and the State Defendants may not agree on what factual evidence is necessary to defend the Act, a disagreement on how to

approach this litigation does not rebut the presumption that the State Defendants are providing an adequate defense of the Act.

23. 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).

24. The Court finds that the State Defendants are adequately representing the interests of the Applicants. *City of Stilwell, Okla. 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 applicant’s interest were adequately represented and intervention would unduly delay and prejudice the adjudication of rights). The Office of the Wyoming Attorney General is currently asserting a vigorous defense of the Act. Further, all of the legal arguments and factual information that the Applicants seek to introduce as intervenors can be submitted by timely filed *amicus* brief.

25. Finally, the Court finds that the intervention of the Applicants will unduly delay and prejudice the adjudication of the rights in this matter. The State Defendants and Applicants seek the same objective in this litigation. The Court finds that their defense is nearly identical as demonstrated by the State Defendants’ Answer and the Applicants’ proposed Answer. The Court finds that the addition of the Applicants into this litigation risks duplicating the presentation of the defense in

this matter and risks the presentation of cumulative argument. A duplication of the defense and argument risks unduly delaying this matter and prejudicing the adjudication of rights and the Court finds that the Applicants' motion for permissive intervention should be denied.

IT IS THEREFORE ORDERED that the Court respectfully **DENIES** Representative Rachel Rodriguez-Williams, Representative Chip Neiman, Wyoming Secretary of State Chuck Gray, and Right of Life of Wyoming's Motion to Intervene.

Dated this 20th day of July, 2023.

1810
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 20 day of July 2023.
J. Robinson / M. Brannett via fax J. Gierde via fax
P. Modlin / M. Carney c/o Robinson fax
J. Colasunton via fax E. Weisman via plu
J. Harman via fax J. Garrison & D. Hare c/o Harman fax
By: Deputy B. Nelson