IN THE SUPREME COURT, THE STATE OF WYOMING

RACHEL RODRIGUEZ-WILLIAMS, House District Representative; CHIP NEIMAN, House District Representative; and RIGHT TO LIFE OF WYOMING, INC., Appellants (Proposed Intervenors), v. 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, Appellees (Plaintiffs), and STATE OF WYOMING; MARK GORDON, Governor of Wyoming; BRIDGET HILL, Attorney General for the State of Wyoming; MATTHEW CARR, Sheriff Teton County; and MICHELE WEBER, Chief of Police, Town of Jackson, Wyoming, Appellees (Defendants).	**S-23-0196**

BRIEF OF APPELLEES/PLAINTIFFS

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INTRODUCTION

Intervention as of right requires a "direct, substantial, and legally protectable" interest. Proposed Intervenors seek to intervene based on their anti-abortion advocacy and on their sponsorship of legislation banning abortion, but ask this Court to ignore the legal authority finding these interests insufficient for intervention. Appellants principally rely on a Tenth Circuit case finding intervention warranted where the intervenor had ***statutory rights*** at stake and a United States Supreme Court case where the intervenor had a ***statutory right*** to intervene. Proposed Intervenors do not claim any such statutory rights exist here—because they do not—and therefore have failed to establish any legally protectable interest to support intervention.

Appellants also have not met their burden of demonstrating how the disposition of this case can possibly impact their asserted interests. Regardless of the outcome of Plaintiffs' claims, Proposed Intervenors will be able to continue the very same activities they performed in the decades before *Dobbs* eliminated the right to an abortion under the United States Constitution: engaging in pro-life advocacy, debating policy related to "choosing life," and voting on legislation.

Nor have Appellants demonstrated that the Attorney cannot adequately represent their interests—a separate and independent requirement for intervention as of right. Because Proposed Intervenors and the Attorney General have the same objective—to defend the constitutionality of the state's abortion statutes—adequacy of representation is presumed. That proposed intervenors disagree with the Attorney General's strategy

concerning presentation of evidence is not a basis for establishing inadequacy of representation. The District Court properly denied intervention as of right.

The lower court did not abuse its discretion in denying permissive intervention. Because the Proposed Intervenors' interests are adequately represented, as a matter of law permissive intervention is not available. Moreover, allowing intervention would cause delay and confusion, as well as risk injecting politics into this legal proceeding. Appellants did not seek a stay of the litigation pending this appeal, with the result that litigation has already progressed to an advanced stage. Discovery has closed, experts have been disclosed, and cross-motions for summary judgment have been filed and will be heard on December 14, 2023. Allowing Proposed Intervenors a meaningful opportunity to participate in the litigation therefore would necessitate re-litigating the entire case. The District Court acted well within its discretion to deny permissive intervention.

STATEMENT OF JURISDICTION

The trial court denied Appellants' motion to intervene on July 20, 2023. An order denying a motion to intervene as of right is an appealable order. *James S. Jackson Co. v. Horseshoe Creek Ltd*., 650 P.2d 281, 285 (Wyo. 1982); *see also* Wyo. R. App. P. 1.05. Appellants filed a notice of appeal on August 4, 2023.

BACKGROUND

During the 2022 legislative session, the Legislature adopted House Bill 92, amending the State's abortion law. H.R. 92, 66th Leg., Budget Sess. (Wyo. 2022). The amendment, which was contingent on the United States Supreme Court overruling *Roe v. Wade*, criminalized abortion at any point during a woman's pregnancy with limited exceptions ("Trigger Ban"). *See id.* § 1(a).

On July 21, 2022, Attorney General Bridget Hill advised Governor Mark Gordon that if the Trigger Ban was "challenged in the courts," then "the Office of the Wyoming Attorney General stands ready to defend it." Off. of Att'y Gen., Report #1465 – 2022 House Enrolled Act 57 (HB0092) (Jul. 21, 2022).

Plaintiffs filed a lawsuit challenging the Trigger Ban, and the trial court granted a preliminary injunction. *See* Order Granting Mot. for Prelim. Injunction, *Johnson et al. v. Wyoming, et al.*, Civil Action No. 18732 (Dist. Ct. Teton Cnty. Aug. 10, 2022) ("Trigger Ban Action") (attached as Ex. A). The Legislature responded by repealing the Trigger Ban and adopting a new abortion ban ("Criminal Abortion Ban") and abortion medication ban ("Criminal Medication Ban"), which are challenged in the present action. *See* H.R. 152, 67th Leg., Gen. Sess., Ch. 184 (Wyo. 2023); S. 109, 67th Leg., Gen. Sess., Ch. 190 (Wyo. 2023).

The District Court granted temporary restraining orders against each of the new abortion statutes. Supp. R. at 2255–2262 [Order Granting Motion for Temporary Restraining Order—Wyo. Stat. § 35-6-139 (Sept. 19, 2023)]; R. at 719–50.

Representatives Rachel Rodriquez-Williams and Chip Neiman, along with Right to Life Wyoming ("RTLW"), previously filed a motion to intervene in the Trigger Ban Action, which the Court denied. *See* Order Denying Mot. to Intervene, *Johnson et al. v. Wyoming, et al.*, Civil Action No. 18732 (Dist. Ct. Teton Cnty., Nov. 30, 2022) ("Intervention Order I") (attached as Ex. B). The same parties, along with Secretary of State Chuck Gray, filed a motion to intervene in the present action, which the Court also denied. *See* R. at 1336–47 [("Intervention Order II")]. Proposed Intervenors filed the instant appeal on August 4, 2023.[1] Supp. R. at 1513–18.

Right To Life of Wyoming is an anti-abortion advocacy organization that claims its purpose is 1) "educating citizens on policy issues related to abortion;" 2) "lobbying government officials;" and 3) "encouraging civic involvement" concerning abortion. App. Br. at 6. RTLW asserts a right to intervene to ensure its "advocacy interests on behalf of women and unborn children are not wasted." R. at 678.

Representatives Rodriguez-Williams and Neiman are members of the Wyoming House of Representatives who co-sponsored the Trigger Ban and Criminal Abortion Ban ("Individual Legislators"). Both are self-described "personal supporter[s] of pro-life pregnancy centers . . . ." R. at 676. Representative Rodriguez-Williams was also the Executive Director of Serenity Pregnancy Center, which claims to "empower[] mothers and fathers in crisis pregnancies to value and choose life in all circumstances." *Id.* at 675.

[1] Appellants' brief was not filed on behalf of Secretary Gray, and Secretary Gray therefore has abandoned his attempt to intervene.

The Individual Legislators seek to intervene to "ensur[e] that their constituents' pro-life policy preferences . . . are given effect" and to "defend the law" that they consider a personal "crucial policy achievement." App. Br. at 10, 20.

ARGUMENT

A. The Trial Court Properly Denied Appellants' Intervention as of Right under Wyo. R. Civ. P. 24

A non-party may intervene as a matter of right only if the movant "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." Wyo. R. Civ. P. 24(a)(2); *see Concerned Citizens of Spring Creek Ranch v. Tips Up, LLC*, 2008 WY 64, ¶ 13, 185 P.3d 34, 39 (Wyo. 2008). "An applicant who fails to meet any one of these conditions is not permitted to intervene as of right under [Rule] 24(a)(2)." *State Farm Mut. Auto. Ins. Co. v. Colley*, 871 P.2d 191, 194 (Wyo. 1994).

As the trial court found, Proposed Intervenors cannot meet the requirements of Rule 24(a)(2) for three separate and independent reasons. First, they do not identify any significant, protectable legal interest. Second, they are unable to demonstrate how their stated interests would be impaired by the outcome of this litigation. Third, even if they could identify a significant, protectable legal interest (and they cannot), the State is currently and adequately representing any such interests.

1. Appellants Have Failed to Identify Significant Protectable Interests

Appellants bear the burden "to demonstrate that they ha[ve] a significant interest in

the present litigation." *Platte County School Dist. No. 1 v. Basin Elec. Power Co-op.*, 638 P.2d 1276, 1279 (Wyo. 1982). In rejecting Proposed Intervenors' showing on this element, the trial court found that their asserted interests "do not create a legally protectable interest to qualify for intervention of right." R. at 1343 [Intervention Order II at ¶ 15].

With respect to the Individual Legislators, the trial court noted that their asserted interests were in "preserving the authority of the Legislature to pass laws that promote [ ] policies," upholding their role "as the main sponsor and [ ] co-sponsor" of the Criminal Abortion Ban, and furthering their personal advocacy work. R. at 1340 [Intervention Order II at ¶ 9]. The trial court described the interest of RTLW as one based on a "long history" of "advocacy work in promoting and supporting pro-life policies, organizations, and legislation." *Id.*

The trial court found each of these claimed interests insufficient to support intervention. In particular, the Court determined that "[a]dvocacy efforts" of both the Individual Legislators and RTLW "alone do not create a legally protectable interest." R. at 1342 [Intervention Order II at ¶ 14]. The Court further held that, while all Proposed Intervenors "played a role in promoting pro-life policies and legislation in Wyoming," this "does not amount to a legally protected interest . . . ." *Id.* [Intervention Order II at ¶ 15]. Finally, the trial court noted that "courts routinely find that state legislators do not have a legally protectable interest sufficient to intervene in lawsuits challenging the constitutionality of a law." *Id.* [Intervention Order II at ¶ 14]; *see id.* at 1343 [Intervention Order II at ¶ 15].

For the same reasons, this Court should affirm the trial court's holding that Proposed Intervenors have failed to identify interests sufficient to satisfy the requirements for intervention as of right.

a. Right to Life Wyoming Has No Significantly Protectable Interest

RTLW does not have a legally protectable interest for intervention based on its "advocacy efforts." R. at 1343 [Intervention Order II at ¶ 15]. Appellants describe RTLW's interests as "time, funds, and other resources in specifically lobbying and advocating for the statutes challenged in this case." App. Br. at 16. Such generalized interests are not a significantly protectable interest for purposes of intervention.

"[C]ourts have denied intervention to entities whose only interest in legislation is that they lobbied for its passage." *League of Women Voters Minn. v. Ritchie*, 819 N.W.2d 636, 642 (Minn. 2012); *see also Allard v. Frizzell*, 536 F.2d 1332, 1334 (10th Cir. 1976) (denying intervention to entities who work "on matters of general interest" and finding that entities "interests in scientific and educational causes, and their ability to advance them, would not be impeded" by disposition of constitutional action). "Where . . . an organization has only a general ideological interest in the lawsuit—like seeing that the government zealously enforces some piece of legislation that the organization supports—***and the lawsuit does not involve the regulation of the organization's conduct*** . . . such an organization's interest in the lawsuit cannot be deemed substantial." *Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 782 (6th Cir. 2007) (emphasis added). RTLW does not claim—nor could it—that this lawsuit seeks to regulate, or would have the effect of regulating, its conduct.

The Sixth Circuit rejected the same argument advanced by the Proposed Intervenors here in *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323 (6th Cir. 2007). In that case, the lower court denied a motion to intervene in a lawsuit challenging an abortion statute. 487 F.3d at 345. The proposed intervenor was a ballot-question committee formed by Right to Life of Michigan, an advocacy group with a substantially identical mission to RTLW. As in the present case, the proposed intervenor in *Northland* "was involved in the process" leading to the adoption of the challenged statute. *Id*.

The Sixth Circuit nonetheless found that the proposed intervenor "lack[ed] a substantial legal interest in the outcome a case," *Northland Family Planning Clinic, Inc*., 487 F.3d at 346, because it had "only an ideological interest in the litigation, and the lawsuit [did] not involve the regulation of [the advocacy group]'s conduct in any respect." *Id.* at 345. The court concluded that the group's "interest in this case simply pertains to the enforceability of the statute in general, which we do not believe to be cognizable as a substantial legal interest sufficient to require intervention as of right." *Id.* at 346. As the Sixth Circuit noted, "[w]ithout these sorts of limitations on the legal interest required for intervention, Rule 24 would be abused as a mechanism for the over-politicization of the judicial process." *Id*.

The Seventh Circuit similarly found that organizations dedicated to anti-abortion advocacy did not have a significantly protectable interest in a case challenging abortion legislation. *Keith v. Daley*, 764 F.2d 1265, 1269 (7th Cir. 1985). In that case, the court denied intervention by an interest group in litigation brought by physicians challenging an Illinois statute regulating abortion. The Seventh Circuit found that the group's interest as

"chief lobbyist" in support of the bill was not "a direct and substantial interest sufficient to support intervention." *Id.*; *see also Edwards v. Beck*, 2013 WL 12146739, at *2–3 (E.D. Ark. June 6, 2013) (denying motion to intervene by anti-abortion advocacy and counseling organization because "neither [its] general mission nor its lobbying efforts" constituted "a recognized, protectable interest in the subject matter of this litigation").

Appellants do not attempt to distinguish RTLW's interests from the interests of the lobbyists in *Keith* and *Northland Family Planning Clinic*. Instead, they rely primarily on the Tenth Circuit's holding in *Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Department of Interior*, 100 F.3d 837, 841 (10th Cir. 1996). App. Br. at 16–17. The trial court held, however, that "*Coalition of Counties* [is] distinguishable from the facts of the present case." R. at 1342 [Intervention Order II at ¶ 13]. In *Coalition of Counties*, the proposed intervenor filed a petition and successfully sued the government to list the Mexican Owl under the Endangered Species Act. 100 F.3d at 841. He then sought to intervene in a lawsuit challenging that listing.

The Tenth Circuit began its analysis by noting that intervention requires that the "interest in the proceedings be 'direct, substantial, and legally protectable.'" *Coal. of Cntys.*, 100 F.3d at 840 (citations and quotation omitted). The court then broke that test into two sub-parts. First, it found that the intervenor's work in the wild with the owl as a naturalist and photographer, along with his advocacy efforts, constituted a "direct and substantial interest in the listing of the Owl for the purpose of intervention as of right." *Id.* at 841. It is this section of the Tenth Circuit's ruling that Proposed Intervenors quote at length. App. Br. at 17.

But the Tenth Circuit did not stop there—it then went on to consider whether the intervenor also had a legally protectable interest—a portion of the court's analysis entirely omitted by Appellants. The Tenth Circuit looked to the provisions of the Endangered Species Act and determined that it "provided [the intervenor] with the legal right to protect his interest in the Owl," and afforded "private citizen[s] the right to 'commence a civil suit on [their] own behalf.'" *Coal. of Cntys.*, 100 F.3d at 841. The intervenor availed himself of this right by petitioning, and then successfully suing, for listing of the Owl. The Tenth Circuit relied upon the intervenor's statutory rights for purposes of establishing a "legally protectable interest" to support intervention. *Id.* at 841–42.

Having no such statutory right, Proposed Intervenors simply ignore the second prong of the Tenth Circuit's analysis. By doing so, they effectively concede they cannot satisfy the requirement for a "legally protectable interest" under that case.

Appellants cite other cases that similarly fail to demonstrate a legally protected interest for RTLW. *Washington State Building & Construction Trades Council, AFL-CIO v. Spellman* involved intervention by the official sponsor of a challenged ***ballot initiative***. 684 F.2d 627, 630 (9th Cir. 1982). The Ninth Circuit found that the district court erred in denying intervention, but provided no explanation of its reasoning. The court also found that the denial of intervention was harmless error and ordered no relief. *Id.* Whatever the basis for the Ninth Circuit's ruling may have been, the court's failure to explain it deprives the case of any persuasive weight. *See, e.g.*, *Valley View Angus Ranch, Inc. v. Duke Energy Field Servs., Inc.*, 497 F.3d 1096, 1105 n.13 (10th Cir. 2007) (affording out-of-circuit case "no persuasive weight" where it offered no analysis); *United States v. Pelullo*, 14 F.3d 881,

891 (3d Cir. 1994) (refusing to treat as persuasive cases that "provide little or no legal analysis for their holding").[2]

While it is impossible to know why the Ninth Circuit in *Spellman* found that intervention should have been granted, it may relate to the unique status of organizations that sponsor voter initiatives. As another Ninth Circuit case noted, organizations that sponsor ballot initiatives have "official rights and duties distinct from those of the voters at large." *Yniguez v. State of Ariz*., 939 F.2d 727, 733 (9th Cir. 1991) ("While the people may not always be able to count on their elected representatives to support fully and fairly a provision enacted by ballot initiative, they can invariably depend on its sponsors to do so.").

RTLW's advocacy efforts are distinguishable from the initiative sponsors in *Spellman*. The Criminal Abortion Ban and Criminal Medication Ban were not the result

[2] The Sixth Circuit has distinguished *Spellman* and similar Ninth Circuit cases on the grounds that they involved challenges to the "*procedure* required to pass a particular rule, as opposed to the government's subsequent enforcement of the rule after its enactment." *Northland Family Planning Clinic,* 487 F.3d at 345 (emphasis in original). The Sixth Circuit found this distinction to be "compelling, as the public at large—including public interest groups—has an interest in the procedure by which a given legal requirement is enacted as a matter of democratic legislative process. On the other hand, in a challenge to the constitutionality of an already-enacted statutes, the public interest in its enforceability is entrusted for the most part to the government . . . ." *Id.*

of a ballot initiative. Nor can Proposed Intervenors credibly argue that Wyoming's "elected representative[]" failed to "support fully and fairly" the Criminal Abortion Ban and Criminal Medication Ban. *Id.*

Planned Parenthood v. Citizens for Community Action is even further afield. There, the Eighth Circuit recognized only that the proposed intervenors had a significantly protectable interest in ***protecting their property values*** and did not even address their other purported interest in the litigation—"insur[ing] that abortion facilities do not affect the health, welfare and safety of citizens." 558 F.2d 861, 869 (8th Cir. 1977). Unlike the intervenors in *Citizens for Community Action*, RTLW does not claim to have any property interest in the stake of this litigation, nor could it do so.

In short, Appellants cite no legal authority to support their assertion that RTLW has a significantly protectable interest for purposes of intervention. This Court should reject RTLW's attempt to inject its political advocacy into this legal proceeding.

b. The Individual Legislators Have No Significantly Protectable Interest

The trial court correctly held that "[e]ven with the liberal construction [of] Rule 24 [ ] in favor of intervention," none of the interests proffered by the Individual Legislators is sufficient to establish a significantly protectable interest. R. at 1342 [Intervention Order II at ¶ 14]. Here, the Individual Legislators assert an interest "in protecting the Legislature's authority to enact [ ] laws." App. Br. at 19. However, Courts consistently hold that individual legislators lack a significantly protectable interest in litigation challenging legislation they supported. *See, e.g.*, *Planned Parenthood of Mid-Mo. & E. Kan., Inc. v. Ehlmann*, 137 F.3d 573, 577 (8th Cir. 1998); *Roe v. Casey*, 464 F. Supp. 483, 486 (E.D.

Pa. 1978), *aff'd*, 623 F.2d 829, 832 n.7 (3d Cir. 1980); *One Wisconsin Inst., Inc. v. Nichol*, 310 F.R.D. 394, 397 (W.D. Wis. 2015); *NCAA v. Corbett*, 296 F.R.D. 342, 348 (M.D. Pa. 2013); *Land v. Delaware River Basin Comm'n*, 2017 WL 63918, at *4 (M.D. Pa. Jan. 5, 2017); *Buquer v. City of Indianapolis*, 2013 WL 1332137, at *4 (S.D. Ind. Mar. 28, 2013); *United States v. Arizona*, 2010 WL 11470582, at *3 (D. Ariz. Oct. 28, 2010).[3]

These holdings apply equally to the sponsors of legislation, who courts routinely find do not have a "sufficiently substantial, direct or legally protectable interest[] to warrant intervention." *Casey*, 464 F. Supp. at 486; *see also Buquer*, 2013 WL 1332137, at *4 (holding that law's co-authors' "interest is not distinguishable from the injury suffered by all members of the state legislature" if statute was invalidated); *Arizona*, 2010 WL 11470582, at *2 (rejecting motion to intervene by challenged bill's "chief sponsor" and acknowledging lack of "authority giving an individual sponsor of a piece of legislation a 'significantly protectable' interest in lawsuit simply by virtue of that person's involvement in the law's passage").

As one court observed, "[i]f a legislator's personal support for a piece of challenged legislation gave rise to an interest sufficient to support intervention as a matter of right, then legislators would have the right to participate in every case involving a constitutional

[3] A number of these cases employ an Article III standing analysis in considering attempts by legislators to intervene. Ex. B, Intervention Order I at ¶ 21. Either way, however, the cases stand for the proposition that legislators do not have interests sufficient to warrant party status.

challenge to a state statute. *But Rule 24 is not designed to turn the courtroom into a forum for political actors who claim ownership of the laws that they pass*." *One Wisconsin Inst., Inc.*, 310 F.R.D. at 397 (emphasis added).

Appellants ignore this overwhelming authority and instead rely on *Berger v. North Carolina State Conference of the NAACP*, 142 S.Ct. 2191 (2022), for the proposition that the Individual Legislators have a legally recognized interest in "presenting evidence in defense of the statutes they enacted." App. Br. at 20. The *Berger* court made no such finding. In that case, the United States Supreme Court held that state legislative leaders had a sufficiently protectable interest to justify intervention because ***a state statute*** "*expressly authorized* the legislative leaders to defend the State's practical interests." 142 S.Ct. at 2202 (2022) (emphasis added).

Appellants can point to no such statutory authorization for intervention by individual Wyoming legislators, because there is none. In fact, the original language of House Bill 152 included language that would have provided a "right of intervention . . . in the event of a challenge to this act." H.R. 152, 67th Leg., Gen. Sess., Ch. 184 (Introduced Bill) (Wyo. 2023), https://wyoleg.gov/2023/Introduced/HB0152.pdf; *see also* H.R. 152, 67th Leg., Gen. Sess., Ch. 184 (Sen. Am. HB0152SW001), https://wyoleg.gov/2023/Amends/HB0152SW001.pdf. [4] But this provision was not included in the final law.

[4] The provision for intervention in the draft bill generated significant controversy among legislators who felt that authorizing legislators to intervene would infringe on the court's

Appellants nonetheless assert that this action threatens the authority of the Individual Legislators to "determine reasonable and necessary restrictions on the [constitutional right of each competent adult to make his or her own health care decisions]

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authority. *See* Committee of the Whole in the Senate, *Senate Floor Session—Day 33*, YouTube (Feb. 27, 2023), https://www.youtube.com/watch?v=8O2bRdO_F5U (passing Amendment 1 to House Bill 152, which strikes portion of the bill permitting automatic right of intervention); *id.* at 1:10:33 to 1:10:45 (Senator Tara Nethercott expressing that carving out a statutory right of intervention for legislators is "dictating to the court"); *id.* at 1:12:50 to 1:14:30 (Senator Chris Rothfuss explaining that the statutory intervention provision violates separation of powers principles). Wyoming Representatives similarly raised concerns in earlier sessions in the Committee of the Whole. *E.g.*, Committee of the Whole in the House of Representatives, *House Floor Session—Day 19*, YouTube, at 2:18:53 to 2:19:25 (Feb. 6, 2023), https://www.youtube.com/watch?v=ynn-N0JNa48 (Representative Martha Lawley stating that "it's the executive branch's responsibility, enumerated in the Constitution, that they are the ones who execute they defend the laws, and in effect, we're saying we want to take over a little bit of that ourselves"); *id.* at 3:02:29 to 3:03:30 (Representative Barry Crago pointing out that "[t]he other big constitutional problem . . . is where we talk about the right of intervention, and this provision I believe violates the separation of powers . . . It tells the courts how they make their rules . . . It tells the executive branch, 'You're not doing your job prosecuting this case like you should . . . so we're going to take that over. We don't do that in any other area of the law").

to protect the health and general welfare of the people." App. Br. at 19 (citing Wyo. Const. art. I, § 38). But the Individual Legislators have no such authority—only the legislature as a whole may adopt legislation and, as demonstrated above, neither individual sponsors of legislation nor the Wyoming legislature itself has an interest in defending challenges to legislation sufficient to warrant intervention.

Finally, the Individual Legislators' purported interest in representing their constituents' preferences for anti-abortion legislation, and their personal interests in promoting the same, do not amount to significantly protectable interests sufficient to support intervention as of right. This expressed policy interest is a "general" one "shared by many other citizens of the state . . . as well as some of [their] fellow legislators." *Arizona*, 2010 WL 11470582, at *3. As the trial court held in the Trigger Ban Action, "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." Ex. B, Intervention Order I at ¶ 23.

Ultimately, as the trial court found, the Individual Legislators fail to show that they have any significantly protectable interest in this litigation. Their status as co-sponsors of the Wyoming Criminal Abortion Ban and preference for anti-abortion legislation is insufficient to establish an interest different from "any member of the public at large." *Platte Cnty. Sch. Dist. No. 1*, 638 P.2d at 1279. Because Proposed Intervenors have failed to demonstrate any significantly protectable interest, the district court properly denied their motion to intervene as of right.

2. Appellants' Interests Cannot Be Impaired By This Action

Even if the Proposed Intervenors' purported interests were sufficient (they are not), this litigation does not threaten those interests. As the trial court concluded, the "[Individual Legislators] can continue to enact legislation" regardless of the outcome of this litigation. Ex. B, Intervention Order I at ¶ 24. This litigation in no way would prevent the Individual Legislators from sponsoring, debating, and voting on legislation; nor could it prevent the legislature as a whole from voting on or adopting legislation. In fact, the Individual Legislators sponsored, and the legislature adopted, the Criminal Abortion Ban and Criminal Medication Ban during the 2023 legislative session, despite the preliminary injunction in the Trigger Ban Action.

Nor can this litigation in any way interfere with the Individual Legislators' personal advocacy. Representative Rodriguez-Williams speaks of her own experiences in pregnancy and parenting, her support for the work of pregnancy resource centers in educating and providing support to pregnant women, her service on the board or directors of such a center, her advocacy for adoption and foster care, her membership in multiple pro-life advocacy groups, her attendance at pro-life conferences, and her efforts to persuade others to her viewpoints—all of which she was doing when the United States Supreme Court recognized a federal right to abortion. App. Br. at 7–9. Representative Rodriguez-Williams can continue to engage in all of these activities regardless of the outcome of this litigation.

Representative Nieman likewise mentions his personal financial donations to support pregnant women, his contributions of time and money to organizations supporting

adoption and foster care, and his involvement with religious organizations that build orphanages and support orphans, as well as his international travel to support such work, which he also engaged in when *Roe v. Wade* was the law of the land. App. Br. at 9–10. This litigation cannot possibly interfere with these activities by Representative Nieman.

Finally, as the trial court correctly found, 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," whatever the result of this litigation. Ex. B, Intervention Order I at ¶ 25.

What is at issue here is not the Proposed Intervenors' ability to participate in the legislative process or personally advocate for their viewpoints, but instead the question of whether laws adopted by the legislature conflict with the Wyoming Constitution. As a matter of law, resolution of this question cannot impair any significantly protectable interest of the Individual Legislators. "[E]very time a statute is not followed or is declared unconstitutional, the votes of legislators are mooted and the power of the legislature is circumscribed in a sense, but that is no more than a facet of the generalized harm that occurs to the government as a whole." *Newdow v. U.S. Cong.*, 313 F.3d 495, 500 (9th Cir. 2002).

Proposed Intervenors' cited cases do not hold otherwise. Several of these cases involved a direct threat to the proposed intervenor's ***economic interests***. *Barnes v. Security Life of Denver Insurance Company*, 945 F.3d 1112, 1124 (10th Cir. 2019) involved potential impacts to the economic interests of the proposed intervenor—a reinsurer responsible for administration of the plaintiff's policy—because the reinsurer could be liable as a result of the action and because resolution of the action could cause the reinsurer

to modify how it carried out its administrative duties. *Western Watersheds Project v. United States Forest Service Chief*, 2020 WL 13065066, at *3 (D. Wyo. July 29, 2020), concerned the potential impairment of the intervenor's interest in "profits from outfitting and guiding elk hunts," as well as its "environmental conservation and aesthetic interests." *Id.* at *3. No such economic interests are at stake here.

The remaining cases cited by Proposed Intervenors likewise offer no support for their claim that this case can impair their interests. In *Citizens for Balanced Use v. Montana Wilderness Association*, 647 F.3d 893, 897 (9th Cir. 2011), the only contested issue was adequacy of representation. The court briefly discussed the other elements for intervention, which were "not now disputed," finding that three conservation groups had demonstrated a significantly protectable interest that could be impaired in an action challenging an agency order regulating recreation activities in a national forest. *Id.* at 897–98.

That interest arose because the intervenors had established in a prior lawsuit that the agency was violating the Montana Wilderness Study Act of 1977 ("MWSA") and the National Environmental Policy Act, and the challenged order was issued by the agency to comply with the ruling. *Citizens for Balanced Use*, 647 F.3d at 896. There, unlike here, the intervenors could "establish that the[ir] interest is ***protectable under some law*** and that there is a relationship between the legally protected interest and the claims at issue." *Id.* at 897 (emphasis added). In the present case, Proposed Intervenors have established no comparable protectable interest in the abortion statutes and therefore cannot show that this action could impair any such interest.

Finally, Proposed Intervenors rely on two Ninth Circuit opinions that provide no analysis or explanation of their holdings on impairment of a significantly protectable interest. In *Idaho v. Freeman*, 625 F.2d 886 (9th Cir. 1980), the Ninth Circuit offered just one sentence stating its intervention holding without any analysis or explanation: "We hold that NOW has such an interest in the continued vitality of [Equal Rights Amendment], which would as a practical matter be significantly impaired by an adverse decision and which is incompletely represented here." *Id.* at 887. And in *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983), the Ninth Circuit offered no analysis or explanation of its holding that the Audubon Society had a legally protectable interest in protection of the environment, but merely cited cases such as *Idaho v. Freeman* and *Washington State Building & Construction Trades*, which themselves provide no analysis or explanation of their holdings. *Id.* at 527–528. Devoid of any legal discussion, these Ninth Circuit opinions provide no persuasive legal authority for this Court.

Because no possible outcome of this case will impair the interests asserted by the Proposed Intervenors, they cannot establish an entitlement to intervene as of right.

3. Appellants Have Failed to Rebut the Presumption of Adequate Representation by Defendants

Appellants have failed to show that Defendants inadequately represent their interests, as required by Rule 24(a)(2). "Where the intervenor and an existing party have the same *objective*, a presumption of adequacy of representation arises." *Concerned Citizens*, 2008 WY at ¶ 20, 185 P.3d at 41 (emphasis added). "A simple difference between a party and an intervenor's motivation in the litigation is not enough to show inadequacy

of representation." R. at 1344 [Intervention Order II at ¶ 18 (citing *Concerned Citizens*, ¶ 20, 185 P.3d at 40)].

Proposed Intervenors' objectives are identical to those of State Defendants—to defend and uphold the Bans. Attorney General Bridget Hill is charged by law with representing the State Defendants in this lawsuit. The trial court noted that "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." R. at 1344 [Intervention Order II at ¶ 19 (citing Wyo. Stat. § 9-1-603(a))].

As Attorney General, she is charged with defending Wyoming's laws and safeguarding any legitimate interests that RTLW and the Individual Legislators seek to protect through their motion to intervene. The Attorney General has vigorously defended this action and the Proposed Intervenors do not suggest otherwise. The trial court further noted that the State Defendants' Answer is nearly identical to the proposed answer filed by Appellants. R. at 1345 [Intervention Order II at ¶ 21].

Accordingly, "[t]he [Appellants'] objective and the objective of the State is the same, defending the constitutionality of the Act." R. at 1344 [Intervention Order II at ¶ 19]; *see id.* at 1346 [Intervention Order II at ¶ 25 ("The State Defendants and [Appellants] seek the same objective in this litigation")]; *see also Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793, 801 (7th Cir. 2019) (denying intervention of legislators who had the "unenviable task of convincing a court that the Attorney General inadequately represents *Wisconsin*, despite his statutory duty" (emphasis in original)).

On appeal, Proposed Intervenors have again failed to rebut this presumption of adequate representation. There is no alleged collusion between the State Defendants and Plaintiffs, and no animosity between the Defendants and the Appellants (in fact, there is a "very cordial relationship"). R. at 1345 [Intervention Order II at ¶ 20]; *see id.* [Intervention Order II at ¶¶ 18–19 (citing *Sanguine, Ltd., v. U.S. Dept. of Interior*, 736 F.2d 1416, 1419 (10th Cir. 1984))]. Appellants "can point to no evidence that the State, represented by the Attorney General, has expressed any misgivings [regarding the disputed law], or that the State is concerned with interests distinct from the [Proposed Intervenors'] that would prevent it from focusing solely on defending the law vigorously on the merits." *United States v. Idaho*, 2022 WL 3346255, at *5 (D. Idaho Aug. 13, 2022) (denying intervention as of right by Idaho Legislature when prospective intervenors possessed same interest as Defendant) (quotations omitted).

Appellants' claim that the Attorney General does not adequately represent their interests boils down to a simple difference in litigation strategy: the Proposed Intervenors seek to introduce factual evidence that the Attorney General has argued is irrelevant and inadmissible. When Proposed Intervenors made the same claim in the Wyoming Trigger Ban case, the Attorney General directly affirmed that she would fully participate in any evidentiary hearing:

> [I]f it turns out there is going to be an evidentiary hearing the state defendants fully intend to participate in that evidentiary hearing. . . . [A]ny suggestion that the Attorney General or the state defendants will present no evidence and that that decision has been definitively made, that's just not accurate.

Nov. 21, 2022 Transcript of Hearing on Motion to Intervene, *Johnson et al. v. Wyoming, et al*., Civil Action No. 18732, at 30–31 (Dist. Ct. Teton Cnty.) (attached as Ex. C). Appellants themselves acknowledge that the Attorney General has confirmed that "the state defendants fully intend to participate in [an] evidentiary hearing." App. Br. at 25 (alteration in original).

In any event, as the trial court found, "decisions made regarding what factual evidence to present during litigation amount to a tactical litigation decision," and do not rebut a presumption of adequate representation. R. at 1345 [Intervention Order II at ¶ 22]. Other courts have held that disparity in litigation tactics or strategy alone is not enough to satisfy the element of inadequate representation. *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) ("A mere disagreement over litigation strategy . . . does not, in and of itself, establish inadequacy of representation."); *Planned Parenthood of Mid-Mo.*, 137 F.3d at 578 (holding that proposed intervenors failed to show that AG's representation was inadequate where proposed intervenors' "complaint merely concerns a disagreement over litigation strategy. . ."); *Planned Parenthood of Wisconsin, Inc.*, 942 F.3d at 801 (holding that state legislature failed to show that AG's representation was inadequate where state legislature "has offered only 'quibbles with . . . litigation strategy'") (citation omitted).

The Fourth Circuit squarely rejected the same argument advanced by Proposed Intervenors. *Stuart v. Huff*, 706 F.3d 345, 349 (4th Cir. 2013); *see also* R. at 1345–46 [Intervention Order II at ¶ 22]. In *Stuart*, an advocacy group moved to intervene in an action challenging abortion restrictions. The proposed intervenors argued "that their interests were not being adequately represented because the Attorney General did not

introduce evidence in opposition to the preliminary injunction motion." *Stuart*, 706 F.3d at 349. The court of appeals upheld the denial of intervention, finding that "the relevant and settled rule is that disagreement over how to approach the conduct of the litigation is not enough to rebut the presumption of adequacy" of representation. *Id.* at 353.

The evidence that Proposed Intervenors seek to present illustrates that the only difference between them and the Attorney General is one of litigation tactics and that granting intervention would cause duplication, delay and confusion. First, some of this evidence is already addressed by the existing parties. For example, Proposed Intervenors argue that because not all women who have abortions do so for reasons of their physical health, abortion does not always meet the legal definition of "health care" under Article I, Section 38 of the Constitution. App. Br. at 27. Although this argument is wrong, the State has already raised this precise issue. Specifically, the State has pointed to evidence that women obtain abortions for reasons of career and finances and argued that such abortions do not qualify as health care. R. at 1039–40.

Proposed Intervenors also seek to offer evidence that the exceptions to the abortion statutes allow physicians to use their medical judgment to protect women from life-threatening conditions. App. Br. at 29. Wyoming physicians have recently submitted an amicus brief that includes a lengthy discussion of this same issue, with citation to evidence. Supp. R. at 2547–2579 [Motion for Leave of Court to File Brief of *Amici Curiae* and Proposed Brief in Support of State Defendants].

Other evidence that Proposed Intervenors seek to offer is immaterial to the issues in this case. For example, Proposed Intervenors reference evidence that some fetal anomalies

may be treatable. App. Br. at 28-29. This evidence has no bearing on any issue in the case, as the statutes do not address the scenario where a fetal anomaly can be treated after birth.

Nor is the Proposed Intervenors' discussion of potential complications from abortion relevant. App. Br. at 28. It is undisputed that all medical procedures have risks, including abortion. Pregnancy and childbirth themselves involve substantial risks to women, causing over 1,200 U.S. deaths in 2021. *See* Donna L. Hoyert, *Maternal Mortality Rates in the United States, 2021*, CDC, Nat'l Ctr. for Health Stats., Mar. 2023, at Table, https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2021/maternal-mortality-rates-2021.htm. Whether the benefits of an abortion outweigh the risks is quintessentially a question for the woman to decide, in consultation with her physician, family and spiritual advisors and based on her unique circumstances.[5] Wyoming law generally requires

[5] Research has revealed no other medical procedure for which the State seeks to assume authority to make such decisions on behalf of patients, even where the risks are far greater than with abortions. For example, the United States Centers for Disease Control and Prevention ("CDC") reports that the mortality rate for abortions is 0.43 per 100,000. *See* Katherine Kortsmit, et al., *Abortion Surveillance — United States, 2020*, CDC, Nov. 25, 2022, at 6, https://www.cdc.gov/mmwr/volumes/71/ss/ss7110a1.htm?s_cid= ss 7110a 1_w. By comparison, the mortality rate for buttock augmentation is 5 per 100,000. *See* Rod J. Rohrich, et al., *Assessing Cosmetic Surgery Safety: The Evolving Data*, Plast Reconstr. Surg. Glob. Open, May 2020, at 2, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7572219. We are aware of no Wyoming statute restricting the right of

physicians to defer to the patients' decision concerning her preferred course of treatment. Wyo. Stat. § 35-22-408(d)(i). And if the constitutional right to make one's own health care decisions means anything, it means that pregnant persons have the right to make such decisions for themselves. Wyo. Const. art. I, § 38.[6]

Proposed Intervenors' evidentiary presentation on purported risks of abortion therefore offers no support for the constitutionality of the abortion statutes. While it remains to be seen whether the Attorney General will attempt to present such evidence, she surely cannot be faulted for so far declining to offer such irrelevant evidence.

The cases cited by Proposed Intervenors refute their claim that the Attorney General does not adequately represent their interests. In *Northfork Citizens for Responsible Development v. Board of County Commissioners of Park County*, this Court held that the proposed intervenors' interests were not adequately represented by the Board of County Commissioners where the "Board's attitude toward [the proposed intervenor] could more readily be described as adversarial than as representative." 2010 WY 41, ¶ 56, 228 P.3d 838, 856–57 (Wyo. 2010) (finding after reviewing the "extensive record in great detail" that the proposed intervenor's "interests do not appear from the record to have been shared

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Wyomingites to decide for themselves whether the risks of a buttock augmentation procedure are outweighed by the benefits.

[6] To the extent Proposed Intervenors argue that a fetus is itself a patient, then the pregnant person also has the legal right to make health care decisions on its behalf. Wyo. Const. art. I, § 38(a); Wyo. Stat. § 14-1-101(b).

by, no less championed by, the Board"). Proposed Intervenors here have made no such showing of adversity with the Attorney General, nor could they. It is undisputed that the Attorney General and the Proposed Intervenors have identical objectives and the Attorney General is strongly defending those interests.

In *Coalition of Counties*, the government defendants had actually opposed the policies they were obliged to defend and only took action after the intervenors successfully sued the government in related litigation. 100 F.3d at 845 ("DOI's ability to adequately represent [intervenor] . . . is made all the more suspect by its reluctance in protecting the Owl, doing so only after [intervenor] threatened, and eventually brought, a law suit [sic] to force compliance with the Act.").

The same was true in *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1398 (9th Cir. 1995) ("FWS delayed its decision on the listing proposal for years and took action only after [intervenor] filed suit to compel FWS to make a decision. FWS was unlikely to make strong arguments in support of its own actions considering that it proceeded to make a decision largely to fulfill the settlement agreement in the suit [the intervenor] filed.").

And in *Berger*, the governor had vetoed the election law at issue and had filed his own briefs in the litigation calling the law "unconstitutional." 142 S.Ct. at 2205. Other defendants in the action were appointed and potentially removable by that same governor. *Id.* The Court recognized that even the attorney general, who represented the Board, was an "elected official who may feel allegiance to the voting public." *Id.* The legislators who sought to intervene, on the other hand, had no "misgivings about the law's wisdom" and sought to "defend[] the law vigorously on the merits." *Id.*

None of those same concerns apply here. The Attorney General has "vigorously" defended the Bans and is aligned with Proposed Intervenors on everything but legal strategy on how to defend the statutes. Such "quibbles with defendant's litigation strategy" do not render the Attorney General's representation inadequate. *E.g.*, *Planned Parenthood of Wisconsin, Inc.*, 942 F.3d at 801 (citation and quotation omitted).

Appellants have failed to overcome the presumption that the Attorney General adequately represents the interests of Proposed Intervenors. Because the Proposed Intervenors cannot establish any of the requirements for intervention as of right, this Court should uphold the District Court's denial of intervention.

B. The Trial Court Properly Denied Appellants' Petition for Permissible Intervention

This Court also should uphold the trial court's denial of permissive intervention. A trial court's denial of permissive intervention is reviewed for abuse of discretion. *Concerned Citizens*, 2008 WY at ¶ 12, 185 P.3d at 38. Appellants have not even attempted to meet this heavy burden of proof.

Permissive intervention may only be allowed "when the intervenor's claim or defense has a question of fact or law in common with the main action and the court in its discretion determines intervention will not unduly delay or prejudice the adjudications of the rights of the original parties." *Masinter v. Markstein*, 2002 WY 64, ¶ 6, 45 P.3d 237, 240 (Wyo. 2002). However, "when intervention of right is denied for the proposed intervenor's failure to overcome the presumption of adequate representation by the government, the case for permissive intervention disappears." *One Wisconsin Inst., Inc*.,

310 F.R.D. at 399 (quoting *Menominee Indian Tribe of Wisconsin v. Thompson*, 164 F.R.D. 672, 678 (W.D. Wis. 1996)).

As the trial court found, permissive intervention is not appropriate because "Defendants are adequately representing the interests of the [Proposed Intervenors]." R. at 1346 [Intervention Order II at ¶ 24 (citing *City of Stilwell, Okla. v. Ozarks Rural Elec. Co-op Corp.*, 79 F.3d 1038, 1043 (10th Cir. 1996))]. In light of the adequacy of the Attorney General's representation of Proposed Intervenors' interests, allowing permissive intervention would "unduly delay and prejudice the adjudication of the rights" in this matter. *Id.*

Notably, Appellants did not seek to stay the underlying action while they appealed the intervention order. In the interim, discovery has closed, experts have been disclosed, and the District Court will hear pending cross-motions for summary judgment on December 14. Supp. R. at 2292–2293[Order upon Telephone Status Conference (Oct. 4, 2023)]; *id*. at 1142–43 [Case Management Order (June 9, 2023)]. As a result, granting Proposed Intervenors a meaningful opportunity to participate in the litigation would require that the District Court and the parties re-litigate the entire case, leading to delay and confusion.

In denying permissive intervention, the trial court invited Proposed Intervenors to present their defenses by way of a timely filed *amicus* brief. R. at 1346 [Intervention Order II at ¶ 24]. Although Proposed Intervenors did seek leave to file an *amicus* brief on the day of the TRO hearing on the Abortion Ban (which was denied as untimely), they have not taken the court up on its invitation to submit an *amicus* brief on the merits. R. at 611–12.

Nonetheless, other parties have recently sought leave to file an *amicus* brief in support of the State's position that makes arguments similar to those advanced by the Proposed Intervenors. Supp. R. at 2547–2579 [Motion for Leave of Court to File Brief of *Amici Curiae* and Proposed Brief in Support of State Defendants].[7] This *amicus* brief demonstrates that Proposed Intervenors could have presented their arguments without the need for permissive intervention.

Even more troubling is the potential for Proposed Intervenors to inject politics into this legal proceeding. Along with their *amicus* brief in opposition to Plaintiffs' motion for a temporary restraining order against the Abortion Ban, Proposed Intervenors offered an "expert" declaration of Dr. Ingrid Skop. Supp. R. at 505–26 [Aff. of Ingrid Skop, M.D.]. Dr. Skop works for the Charlotte Lozier Institute, which is part of an anti-abortion political advocacy organization, Susan B. Anthony Pro-Life America. *See id.* at 506 [Skop Decl. at ¶ 5]; *About Us*, Charlotte Lozier Institute, https://lozierinstitute.org/about/ (last visited Oct. 25, 2023).

For this reason, courts have rejected Dr. Skop's testimony. *E.g.*, *Planned Parenthood of Sw. & Cent. Fla. v. State*, 2022 WL 2436704, at *13 (Fla. Cir. Ct. July 5, 2022) ("Dr. Skop has no experience in performing abortions; admitted that her testimony

[7] Plaintiffs note that this *amicus* brief was filed on behalf of four Wyoming physicians, two of whom (Drs. David Lind and Michael Nelson) had submitted declarations in support of Proposed Intervenors' *amicus* brief on the Abortion Ban TRO. Supp. R. at 527–30 [Aff. of David M. Lind, M.D.]; *id.* at 556–58 [Aff. of Michael R. Nelson, M.D.].

on the risks of certain abortion complications was inaccurate and overstated, or based on data from decades ago; admitted that her views on abortion safety are out of step with mainstream, medical organizations; and provided no credible scientific basis for her disagreement with recognized high-level medical organizations in the United States."), *rev'd on other grounds*, 344 So.3d 637 (Fla. 1st Dist. Ct. App. 2022), *review granted*, 2023 WL 356196 (Fla. Jan. 23, 2023). The public has a diversity of genuine and strongly-held views on abortion. While the political process should provide a full opportunity for expression of these viewpoints, this lawsuit should not be a vehicle to reprise the political debate.

Because Appellants' involvement would only serve to complicate, delay and politicize these proceedings, the Court should affirm the trial court's denial of Proposed Intervenors' request for permissive intervention. *See Northland Family Planning Clinic,* 487 F.3d at 346 (affirming denial of permissive intervention by anti-abortion advocacy group where it would delay proceedings, group had been afforded opportunity to submit amicus brief, and proposed intervenor was taking an "ideological approach to the litigation.").

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's denial of the Individual Legislators and Right to Life of Wyoming's motion to intervene.

RESPECTFULLY SUBMITTED this 30th day of October 2023.

By:*/s/* 

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October 2023, a true and correct copy of the foregoing was served via Wyoming Supreme Court C-Track Electronic Filing System to the following:

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