

EXHIBIT C

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,)
)
vs.) Number 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.)
-----)

TRANSCRIPT OF HEARING ON MOTION TO INTERVENE

Proceedings before the Honorable Melissa M. Owens, District Judge of the Ninth Judicial District, State of Wyoming, at the Teton County Courthouse, Jackson, Wyoming, November 21, 2022.

Reported by Lance D. Oviatt, Official Reporter

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A P P E A R A N C E S

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1 JACKSON, WYOMING

2 TUESDAY, FEBRUARY 22, 2005; 9:45 A.M.

3 --oOo--

4 THE COURT: All right. We can go on the
5 record in Johnson v. State, Civil Action number 18732.
6 For the plaintiffs we have John Robinson, Peter Modlin,
7 Marci Bramlet, and I believe Megan Cooney.

8 Is that correct, ma'am?

9 MS. COONEY: Yes, Your Honor.

10 THE COURT: All right. Welcome.

11 MS. COONEY: Thank you.

12 THE COURT: For the defendants we have
13 Mr. Jerde. Welcome.

14 MR. JERDE: Hello, Your Honor.

15 THE COURT: And he's appearing on behalf of
16 Governor Mark Gordon and Attorney General Bridget Hill.
17 On behalf of the Teton County Sheriff Matt Carr we have
18 Erin Weisman. Welcome.

19 MS. WEISMAN: Thank you, Your Honor.

20 THE COURT: And on behalf of the Chief of
21 Police Michelle Weber we have Lea Colasuonno. Welcome.

22 MS. COLASUONNO: Afternoon, Your Honor.

23 THE COURT: And then we have Frederick
24 Harrison and Denise Harle on behalf of the proposed
25 intervenors. Welcome to you.

1 MS. HARLE: Thank you, Your Honor.

2 THE COURT: All right. So, we are here to
3 hear your motion, Ms. Harle. Are you making the
4 argument?

5 MS. HARLE: Yes, Your Honor.

6 THE COURT: All right. Please proceed.

7 MS. HARLE: Would you like me --

8 THE COURT: Podium's best, if you're
9 comfortable up there.

10 MS. HARLE: Thank you, Your Honor. And how
11 much time would you allow me?

12 THE COURT: I'm not very good at restricting
13 people on time, so why don't you just take the time that
14 you need.

15 MS. HARLE: I'm not very good at estimating,
16 but I think probably 15 to 20 minutes will be enough and
17 I'll reserve a little time for rebuttal.

18 THE COURT: Of course.

19 MS. HARLE: Thank you, Your Honor.

20 THE COURT: You're welcome.

21 MS. HARLE: I'm Denise Harle, counsel for
22 proposed intervenors Right to Life of Wyoming and
23 Representative Neiman and Rodriguez-Williams. I'm
24 joined today with Fred Harrison from Fred Harrison Law
25 Offices in Cheyenne.

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May it please the Court? Counsel.

THE COURT: Counsel.

MS. HARLE: The Supreme Court has held that intervention of right is to be broadly construed in favor of intervention. And the 10th Circuit has held that the standard for intervention of right is relaxed in cases of public importance, as this one clearly is. Under this standard Right to Life of Wyoming and the legislators easily clear the bar for intervention both of right and permissive.

The test for intervention of right is whether the proposed intervenors have a significant protectable interest that could possibly be adversely affected and might not be adequately represented. They do here.

Under the caselaw significant protectable interest receives a liberal construction and the burden to show that an interest may be impaired is minimal. All we need to show is that impairment of an interest is possible. Those are direct quotes from the 10th Circuit cases. We've cited several cases in our briefs where public interest groups and issue advocates and sponsors of ballot initiatives all have been entitled to intervention of right, even where the government was on the same side of the V defending the same law.

1 All of those cases strongly support
2 intervention of right here and I'd like to highlight
3 just a couple of them in a minute, but first I'll focus
4 on the specific interests at stake of my clients.

5 Right to Life of Wyoming, their entire
6 existence as an advocacy group is to advocate for and
7 effectuate policies that protect human life in the state
8 of Wyoming. They were the chief lobbyists for this
9 bill. They devote all of their organizational resources
10 to defending the sanctity of life and advocating against
11 abortion and promoting policies that do the same. The
12 law at issue here is the fruit of their advocacy efforts
13 and it rises or falls with this case.

14 But beyond that, this case could be mission
15 critical to Right to Life of Wyoming and that's because
16 if in this case it's determined that there is now a
17 Wyoming state constitutional right to abortion then all
18 of Right to Life's future advocacy efforts against
19 abortion could be entirely futile.

20 The bill's authors who crafted and lobbied
21 for this law also have a unique interest in making sure
22 that it's defended. Representative Rodriguez-Williams
23 was the solo sponsor. Representative Neiman was
24 cosponsor and the chief architect of the law. They are
25 longtime pro-life advocates who have been involved in

1 their communities for years advocating for the pro-life
2 cause, being involved in the movement. They ran on
3 pro-life platforms and the bill at issue was the
4 signature policy achievement of their tenure.

5 Section 38 that the plaintiffs rely on also
6 expressly gives the two legislators the authority to
7 regulate on issues of health and safety related to these
8 deep issues of concern for them, so obviously these
9 interests may be impaired by in case.

10 Just to touch on a couple of the analogous
11 cases, the *Coalition of Arizona* case out of the 10th
12 Circuit involved the nature enthusiast and photographer
13 who had spent a few years in active efforts to lobby for
14 and protect the Mexican Spotted Owl. He was allowed
15 intervention of right in an Endangered Species Act
16 challenge where the owls' protections were at issue
17 because those were the protections that he had lobbied
18 for.

19 And that is in line with several other cases
20 that we cite. The *Citizens for Balanced Use* and the
21 *Washington State Building Council* cases out of the 9th
22 Circuit as well as the *Utah Association of Counties* case
23 out of the 10th Circuit where intervention of right was
24 granted, overturning the lower courts that had denied
25 intervention granted to various public interest and

1 conservationist groups that were focussed on protecting
2 wildlife, wilderness, and the environment. Surely if
3 there's a significant protectable interest in preserving
4 the life of a Spotted Owl or an area of forest there's a
5 significant protectable interest in preserving human
6 life.

7 The second case that I'd like to highlight
8 from our brief is *Planned Parenthood versus Citizens for*
9 *Community Action* out of the 8th Circuit. That case
10 involved a neighborhood association with the purpose of
11 ensuring that abortion facilities did not harm the
12 health and safety of the community. When Planned
13 Parenthood sued the neighborhood association as well as
14 two couple that lived in the area were allowed to
15 intervene to defend their interests in ensuring that
16 abortion facilities weren't constructed and were kept
17 out of the neighborhood. And that's true even though he
18 mayor and the city council were on the same side of the
19 V defending the ordinance. The interest groups and the
20 individual land owners were granted intervention because
21 their interests and objectives were not identical to the
22 government parties.

23 The showing on inadequate representation is
24 not a high bar. The Wyoming Supreme Court in *Spring*
25 *Creek Ranch* explained that the potential intervenor only

1 has to show that their interest may not be adequately
2 represented. Related interests are not enough to
3 satisfy adequate representation and when the objectives
4 and interests are disparate at all, as they are here,
5 intervention is warranted.

6 Just to flesh that out a little bit, the
7 Attorney General of Wyoming has a generic interest in
8 defending all of the laws of the state on behalf of all
9 of the people of the state as a general matter, that is
10 not the same as specific issue advocacy and those sorts
11 of interest that my clients possess.

12 THE COURT: Ms. Harle, can I interrupt you
13 for just a moment?

14 MS. HARLE: Of course, yes.

15 THE COURT: Will you slow down a little
16 because my staff attorney and I and the court reporter
17 are trying to keep up with what you're saying.

18 MS. HARLE: Yes, I'm sorry.

19 THE COURT: Thank you.

20 MS. HARLE: I'll try. Please remind me
21 again, Your Honor, if I speed up.

22 THE COURT: Okay.

23 MS. HARLE: So, the Attorney General's
24 representations to this court show that Right to Life of
25 Wyoming and the legislators' interests may not be

1 adequately represented. The Attorney General has made
2 clear that their office views this as a purely legal
3 issue. They consented to plaintiffs' evidence and did
4 not object or rebut the affidavits that were offered,
5 whatsoever.

6 While we agree with the Attorney General's
7 Office that the plaintiffs should lose as a matter of
8 law, my clients' interests motivate them to put into the
9 record facts, evidence, and argument that would directly
10 go to what the plaintiffs have offered so far if this
11 Court would allow that. And that shows the different
12 stakes and the different approach, the different
13 objectives, and the different interests that my clients
14 have versus the Attorney General's Office.

15 And I'll give a couple of concrete examples
16 of what my clients' interests and objectives would
17 motivate them to contribute to the case as compared to
18 the Attorney General. One is evidence of what
19 constitutes evidence-based medical care in this context.
20 One is what are essential healthcare services. My
21 clients would also offer evidence of harms to unborn
22 children and pregnant mothers from abortion as well as
23 what constitutes reasonable medical judgment and
24 standard of care when pregnancy complications arise.

25 Those go to the vagueness question that's

1 been raised in this case which Your Honor has already
2 considered and Your Honor may want to know the other
3 side of the facts and the evidence of the arguments as
4 to what plaintiffs have put forth. I think no matter
5 what, no one in this room wants this case to go up on a
6 completely one-sided record and have the Wyoming Supreme
7 Court send it back down for further factual development,
8 that would be completely inefficient and certainly not
9 in the interest of justice.

10 In any event, we think permissive
11 intervention is warranted here. This is a very liberal
12 standard, the minimum requirements are met. We will not
13 pose any delay. We will obviously abide by any
14 scheduling order.

15 My friends on the other side have only said
16 that we might submit irrelevant evidence and they don't
17 offer a basis for that. We would be directly rebutting
18 plaintiffs' evidence, limiting our participation to the
19 facts and issues and arguments that plaintiffs raise and
20 offering a counterpoint to that. There would be nothing
21 unduly prejudicial but it actually would advance the
22 interests of justice to have a complete factual
23 adversarial record in this very important case.

24 And so I'm happy to answer any questions
25 Your Honor has, otherwise I would like to just reserve a

1 few minutes for rebuttal.

2 THE COURT: I don't have any questions at
3 this time and, yes, you will be given another
4 opportunity. Thank you, Ms. Harle.

5 MS. HARLE: Thank you.

6 THE COURT: All right. Please?

7 MR. MODLIN: Thank you, Your Honor. I have
8 a slide deck that I was hoping to use I shared with the
9 parties. I don't think there's objection. If that's
10 all right with you, Your Honor?

11 THE COURT: Yes.

12 MR. MODLIN: Let me get it connected. I'm
13 hoping this works.

14 (Break in the proceedings.)

15 THE COURT: Mr. Modlin, so you know I see it
16 here. So, if it looks like I'm not paying attention to
17 you, it's because I'm paying attention to what you're
18 trying to show me.

19 MR. MODLIN: Okay. Thank you.

20 Your Honor, I would point out that the
21 Wyoming Supreme Court while acknowledging that Rule
22 24(a) does have a liberal construction nonetheless
23 pointed out that the proposed intervenor still must
24 satisfy all the elements for an intervention.

25 And focussing first on the intervention as

1 of right, we are focussed on three of the four elements.
2 We do not dispute the timeliness element. And so the
3 three elements -- I don't think there's any dispute --
4 there's a significantly protectable interest, that
5 interest would be impaired or could be impaired by the
6 litigation, and there is not adequate representation of
7 the proposed intervenors' interests by the existing
8 parties, here it would be the Attorney General.

9 And again, the Wyoming Supreme Court has
10 noted a critical distinction between significantly
11 protectable interest and a concern in the litigation.
12 We have no doubt than the proposed intervenors have very
13 much a concern in the litigation, we don't question that
14 at all. The question for you, Your Honor, is whether
15 that concern rises to the level of a legally protectable
16 interest.

17 And in that regard, if we look focussing
18 first on the two legislators what they have said their
19 interest is, their asserted interests, in their opening
20 brief they focus on their authority to make laws and
21 their role as sponsor of the statute. And when we
22 pointed out in our response that those interests really
23 aren't implicated by this case they changed gears a
24 little bit in their reply brief and focussed on a claim
25 that this action in its entirety seeks to usurp their

1 legislative prerogative and violates separation of
2 powers.

3 I would just point out, Your Honor, that the
4 legislature has no authority to pass legislation that is
5 contrary to the constitution and it's for this Court to
6 make that determination, not for the legislature. So, I
7 don't believe the claim of usurpation of legislative
8 authority or separation of powers comes into play at all
9 in this action.

10 So, let's focus instead on the claim that
11 the significantly protectable interest is their interest
12 in sponsoring, debating, passing legislation. While
13 many courts have grappled with this very same issue,
14 including in cases addressing abortion legislation and
15 other legislation, cases involving sponsors of the
16 legislation, cases involving the entire legislature,
17 cases involving individual legislators, all of them have
18 come to the conclusion that the legislators do not have
19 a significantly protectable interest in defending the
20 constitutionality of laws they pass for purposes of
21 intervention. That is the unanimous conclusion of these
22 cases.

23 And, Your Honor, here's a list of the cases
24 cited by the proposing intervenors that find legislators
25 do have a significantly protectable interest in

1 defending legislation they enact. I don't mean to be
2 flip, Your Honor, the slide is blank because there is
3 none.

4 And much the same is true for Right to Life
5 Wyoming. Here are their asserted interests, which
6 really come down to advocacy, they want to advocate for
7 certain legislation. They've indicated today that they
8 were the chief lobbyist -- I think you said -- for this
9 legislation. And, again, this very issue has been
10 addressed in the context of challenges to legislation
11 regulating abortion.

12 Multiple cases have considered whether
13 advocacy groups -- these cases typically involve the
14 chief lobbyist -- the advocacy group that was the chief
15 lobbyist supporting the legislation that was challenged.
16 They sought to intervene and again the courts
17 unanimously have found that advocacy groups do not have
18 a significantly protectable interest where they lobbied
19 for legislation, for abortion related legislation, that
20 is challenged.

21 And once again, here is a slide with all the
22 cases cited by the proposed intervenors in the context
23 of challenges to abortion related legislation where the
24 courts have found that advocacy groups do have
25 significantly protectable interests. There is none.

1 Now, there are a number of cases that the
2 proposed intervenors have cited where courts have found
3 that advocacy groups did have significantly protectable
4 interests, advocacy groups and others, allowing them to
5 intervene as of right in various cases. Many of those
6 cases involved environmental statutes and that's very
7 different from the context of abortion statutes.

8 And that's very different because the courts
9 looked to those statutes themselves and found that the
10 environmental statutes give the public specific legal
11 rights to petition for administrative action, to
12 challenge administrative action. And I'll point to a
13 couple of those cases in a moment. Other cases by the
14 proposed intervenors focus on economic interests,
15 private economic interests of the proposed intervenors,
16 and found that those were significantly protectable.

17 And then finally, I'm from California so I
18 can speak about the 9th Circuit perhaps more than others
19 can. There are a couple of 9th Circuit cases that do
20 find that advocacy groups have significantly protectable
21 interests for intervention, but offer no explanation at
22 all as to the basis for their holdings. Other cases
23 have tried to divine what was behind those holdings and
24 I'll get to that in a moment.

25 One of the cases that the proposed

1 intervenors focus on quite a bit is the *Coalition of*
2 *Arizona and New Mexico Counties* case, a 10th Circuit
3 case that involved a challenge to the listing of an owl
4 as endangered under the Endangered Species Act. And the
5 intervenor in that case was someone who did more than
6 simply lobby for that.

7 The intervenor exercised his rights under
8 the Endangered Species Act to petition for protection of
9 the owl, when he didn't obtain protection he sued and he
10 won. And then someone else challenged the government's
11 listing of the owl as protected, the very listing that
12 the intervenor had brought a lawsuit successfully to
13 obtain. And they're in a very different situation
14 obviously than we're confronted with here. And there
15 the court focussed on the legal interests of the
16 intervenor under the Endangered Species Act and found
17 that the Act itself provided the legal right to protect
18 the owl and provided the intervenor with the legal
19 rights that constituted significantly protectable
20 rights.

21 The court also -- the 10th Circuit in that
22 case focussed on the administrative context of that case
23 and found that to be an important distinction to what it
24 termed traditional intervention challenging a statute.
25 Because, again, in the administrative process the public

1 at large has a right to participate in the
2 administrative process in the federal government and
3 under the Endangered Species Act and the court found
4 that to be significant.

5 Another case that the proposed intervenors
6 focus on is the *Idaho Farm Bureau* case, really very much
7 the same as the 10th Circuit's decision in *Coalition of*
8 *Counties of -- sorry, I forget, the New Mexico or*
9 *Arizona counties*, the case we just discussed. Again, it
10 was under the Endangered Species Act. The proposed
11 intervenor had sued to get a snail listed as protected,
12 had won and then someone else brought an action
13 challenging that listing. Exact same situation where
14 it's the Act itself, the Endangered Species Act itself,
15 that gave the proposed intervenor the legally
16 protectable interest.

17 The *Planned Parenthood of Minnesota* case
18 really doesn't seem very analogous to this case at all.
19 In that case the court focussed on private property
20 values. The homeowners in the neighborhood where the
21 abortion clinic wanted to operate sought to intervene
22 because they claimed that operation of an abortion
23 clinic in their neighborhood would impact their property
24 values and the 8th Circuit focussed on that -- on those
25 private property interests as a basis for a

1 significantly protectable interest. Obviously not
2 something we have in the present case.

3 The *Kleissler* case, very similar. Again,
4 the focus was on private economic interests of a school
5 district that was entitled to funds from logging and
6 from logging companies and a trade association of
7 logging companies that were impacted by whether a
8 logging project was approved. So, it was those private
9 economic interests that furnished the basis for the
10 protectable interests in those cases.

11 And a case that was cited quite frequently
12 by the proposed intervenors, the *Washington State*
13 *Building and Construction Trades* case. Another 9th
14 Circuit Case which allowed the organization that
15 sponsored a voter referendum to intervene and simply
16 found that the sponsor of a voter referendum was
17 entitled to intervene and didn't explain its holding at
18 all. Two sentence holding, just really stated the
19 conclusion.

20 It may be -- I don't know, but it may be
21 that the court was focussed on the fact that government
22 often doesn't agree with a voter referendum and so there
23 may have been a conflict of interest there that the
24 court in its mind was focussed on, I don't know. The
25 court didn't choose to share its thinking with us. One

1 of the very odd things about that case as well, Your
2 Honor, is that intervention was granted at the same time
3 that the 9th Circuit upheld summary judgment resolving
4 the case against the defendants and the proposed
5 intervenors. So, the proposed intervenors were not able
6 to participate, the case was over.

7 I will refrain from commenting on the 9th
8 Circuit since I appear before them with some regularity.

9 Another 9th Circuit case, the *State of Idaho*
10 *versus Freeman* allowed the National Organization of
11 Women to intervene in a case challenging the procedures
12 for ratification of the Equal Rights Amendment. The
13 entire decision is six sentences long, the explanation
14 of holding is one sentence. And it simply said that the
15 National Organization of Women had a sufficient interest
16 for intervention. Again, we're left to wonder what the
17 court was -- what its reasoning is, it did not explain
18 it.

19 The 6th Circuit actually grappled with this
20 case and some of the other 9th Circuit cases that we've
21 talked about and the proposed intervenors have cited,
22 many of which are in the environmental context, this one
23 isn't. And the 6th Circuit distinguished this line of
24 cases in the 9th Circuit on the grounds that they
25 addressed the process by which a rule was enacted. And

1 the 6th Circuit felt that was very different from a case
2 challenging the constitutionality of a statute and that
3 the public had an interest in the democratic process by
4 which rules came into being, whether they be
5 regulations, laws, constitutional amendments, but that
6 the public didn't have a similar interest in defending
7 the constitutionality of a statute that was already
8 enacted.

9 So, the next element, Your Honor, is
10 whether -- if we assume that the proposed intervenors
11 have a significantly protectable interest, whether that
12 interest may be impaired by this action. And I think,
13 Your Honor, it's hard for me to understand how this
14 action could impair the interests asserted by the
15 proposed intervenors.

16 This action seeks declaratory and injunctive
17 relief concerning the abortion ban law. This action
18 does not seek any relief related to the conduct of the
19 legislators or Right to Life Wyoming. No matter what
20 happens in this case they will be free to continue
21 legislating and continue advocating, this case will not
22 in any way impair their ability to do that. So, even if
23 we assume that their articulated interests are
24 significantly protectable we simply don't see how this
25 case can impair them.

1 Turning to the third element, the adequacy
2 of representation. I think we agree that there are
3 three factors that courts look at. But an important
4 thing to keep in mind when looking at adequacy of
5 representation is what the Wyoming Supreme Court has
6 said in the *Concerned Citizens of Spring Creek Ranch*
7 case and that is where the intervenor and here the
8 Attorney General have the same objective then adequacy
9 of representation is presumed. It's rebuttably
10 presumed, but it's presumed. And I don't think anyone
11 disputes that the Attorney General and the proposed
12 intervenors have the identical objective in this case,
13 to defend the constitutionality of the statute that's at
14 issue.

15 And I haven't really heard the proposed
16 intervenors take issue with the first two elements of
17 adequacy of representation. What I think they're really
18 focusing on is the third, I'll go back to that, whether
19 the intervenor would offer any necessary elements to the
20 proceedings that the existing parties would neglect.

21 And as I understand the argument, the
22 proposed intervenors are claiming that they will
23 introduce evidence that the Attorney General will not.
24 If that's true, they have to show that that evidence is
25 necessary to this proceeding and they've identified

1 three types of evidence. The first type of evidence is
2 evidence of the intent behind the constitutional
3 provision concerning Wyoming right to healthcare, to
4 control one's healthcare decisions. Your Honor has
5 already found, we believe correctly, that that provision
6 is unambiguous and that therefore evidence is
7 irrelevant. The Court will not look to any evidence of
8 intent, it's the unambiguous language that controls.
9 So, that proposed evidence is not necessary to this
10 proceeding, it's not even admissible.

11 The second category of evidence I believe
12 the proposed intervenors would like to introduce is
13 evidence of alleged harm to women and fetuses. We would
14 suggest, Your Honor, that evidence is unnecessary. The
15 impact on fetuses from abortion I think is self-evident,
16 I don't think we need evidence of that.

17 And the suggestion that the proposed
18 intervenors will introduce evidence of the harm to women
19 if women are given the right to make their own decisions
20 about their healthcare in consultation with their
21 physicians, I would argue that that's not necessary.
22 It's really absurd.

23 And, finally, the third type of evidence
24 that the proposed intervenors would like to offer is
25 evidence of the standard of care in professional

1 malpractice cases. I'm really not sure what relevance
2 that has to this case. This case involves a strict
3 liability criminal statute, there's no negligence
4 incorporated into the standard incorporated into this
5 statute. So, I don't -- I'm struggling to understand
6 why the standard of care in a civil negligence suit
7 would have any bearing on this case. We don't think
8 it's relevant, it's certainly not necessary.

9 Now, the proposed intervenors do cite a
10 number of cases concerning adequacy of representation
11 where the courts have found that the state does not
12 adequately represent the intervenors' interests.
13 They're all distinguishable from this case, Your Honor.

14 One category of cases is where the
15 government and the intervenors have different interests
16 and therefor the government can't represent the
17 intervenors' interests. Well, that's not the case here,
18 the interests are identical, to defend the statute.

19 The second category of case is where the
20 government and the intervenors are actually adverse to
21 each other and I'll get to those in a moment. And the
22 third category is those private economic interests which
23 the courts very sensibly have noted that the government
24 is not in the business of defending private economic
25 interests.

1 So, cases where government and intervenors
2 have different interests. The lead case is the US
3 Supreme Court case, I'm going to mispronounce the name.
4 I'm going to say *Trbovich*, maybe. And in this case a
5 union member had petitioned the secretary of labor to
6 bring an action to overturn a union election. The
7 secretary of labor brought that case and the Supreme
8 Court found that the secretary of labor had -- under the
9 statute was required to represent interests that were
10 somewhat different from the individual union member's
11 interests. And so their interests were different by
12 statute.

13 The second category of case I talked about
14 is where the intervenor has actually sued the government
15 and the government -- these are those cases under the
16 Endangered Species Act where the intervenor had sued the
17 government to get a species listed, then someone else
18 challenged the listing and the courts noted that the
19 government might be less than enthusiastic about
20 defending a decision they were forced to make against
21 their will by the intervenors. And so that's obviously
22 not anything close to the situation we have here.

23 And then finally the economic interests
24 cases, again this case doesn't involve private economic
25 interests so that is not a basis for inadequacy of

1 representation.

2 What it really boils down to is that the
3 proposed intervenors are saying that because the
4 Attorney General did not introduce evidence at the
5 preliminary injunction stage that they cannot be trusted
6 to represent the proposed intervenor's interests.

7 Your Honor, the 4th Circuit addressed that
8 exact argument. In that case the proposed intervenors
9 argued that their interests would not be adequately
10 represented by the Attorney General because the Attorney
11 General did not introduce evidence in opposition to a
12 preliminary injunction motion. The district court
13 rejected that argument and the court of appeals affirmed
14 holding that disputes over litigation tactics are not
15 sufficient to establish inadequacy of representation by
16 the Attorney General. They are not sufficient to rebut
17 the presumption that we talked about a few minutes ago
18 where the government has the same objective as the
19 intervenors there's adequate representation. And many
20 other cases have held as well that litigation strategy
21 is not a basis for inadequate quit representation.

22 So, that brings us to permissive
23 intervention. The cases are a little thin on discussing
24 permissive intervention. Generally if they deny
25 intervention as of right they deny permissive

1 intervention. If they grant intervention as a right
2 they don't have to get to permissive intervention. But
3 I think a couple of things can be gleaned from the
4 cases. One is where the parties adequately represent
5 the interests of the proposed intervenors that weighs
6 heavily against permissive intervention because what's
7 the point, right? And there's even some cases that say
8 permissive intervention is never allowed where there's
9 adequate representation.

10 Another issue that I think has bearing on
11 permissive intervention is whether the proffered
12 evidence will add anything to the litigation. Well, if
13 it's not necessary for the litigation it certainly won't
14 add anything. All it will do is delay, which is a
15 factor that is to be considered in permissive
16 intervention. Will it consume resources and delay and
17 distract.

18 Courts have pointed out that amicus
19 participation is the more appropriate vehicle where
20 proposed intervenors want to provide their viewpoint but
21 don't meet the standard for intervention. And then
22 finally the courts have cautioned against reprise of the
23 political debate, which obviously in this setting should
24 be a concern given the passions and the strongly held
25 views that everyone has. And I think one has to worry a

1 little bit about that where the proposed intervenors re
2 proposing to offer evidence that really has no bearing
3 on the case.

4 That's it, Your Honor. So, we would ask
5 that the Court deny the motion.

6 THE COURT: Thank you.

7 MR. MODLIN: Thank you.

8 THE COURT: All right. Mr. Jerde?

9 MR. JERDE: Thank you, Your Honor. May it
10 please the Court? Counsel.

11 THE COURT: Counsel.

12 MR. JERDE: I don't know if we're streaming
13 this, but for the record, Jay Jerde for the State of
14 Wyoming, Wyoming Governor Mark Gordon, and Wyoming
15 Attorney General Bridget Hill.

16 Your Honor, the state defendants do not
17 oppose intervention in this case. But as was stated in
18 our written submission the fact that we don't oppose the
19 intervention does not mean that we agree that there
20 should be any type of evidentiary hearing or trial. A
21 couple different filings with this Court explain the
22 state's defendants' position on that. These are
23 questions of law and evidence isn't necessary to resolve
24 them.

25 And then I also want to make a bit of a

1 clarification here so that, you know, if I stay silent
2 it's not misinterpreted. The applicant intervenors in
3 their memorandum in support of the motion to intervene
4 and then in the supplemental authority letter that they
5 I believe filed on Friday, this last Friday, you know,
6 have stated in the memorandum of law in support of the
7 motion to intervene they stated that the Attorney
8 General has represented to this Court that she is not
9 contemplate proffering any evidence at the upcoming
10 evidentiary hearing/trial which is yet to be scheduled.
11 And then in the supplemental authority letter they say
12 the Attorney General has indicated that she does not
13 intend to make factual submissions of her own and cites
14 Page 3 of our response to the motion to intervene.

15 The state defendants disagree there should
16 be an evidentiary hearing, but if it turns out that
17 there is going to be an evidentiary hearing the state
18 defendants fully intend to participate in that
19 evidentiary hearing. What that participation will look
20 like, I can't tell you at this point, Your Honor. This
21 case is going to have to develop before those decisions
22 are made.

23 But I just want to make it clear for the
24 Court that, you know, any suggestion that the Attorney
25 General or the state defendants will present no evidence

1 and that that decision has been definitively made,
2 that's just not accurate. So, with that, that's all I
3 have, Your Honor.

4 THE COURT: Thank you, Mr. Jerde.

5 Ms. Weisman, do you care to make any oral
6 argument?

7 MS. WEISMAN: Thank you, Your Honor, I do
8 not on behalf of the Sheriff. No, thank you.

9 THE COURT: All right. Thank you.
10 How about you, Ms. Colasuonno?

11 MS. COLASUONNO: Thank you, Your Honor. Lea
12 Colasuonno for the Town of Jackson. I would just state
13 that the Town did not oppose intervention in this case.
14 However, as we previously stated also for the Town that
15 we do express an interest in an expeditious resolution
16 that's focussed on the issues in this case. Thank you.

17 THE COURT: Thank you.

18 All right. Ms. Harle, I believe you wanted
19 to address the Court again.

20 MS. HARLE: Thank you, Your Honor. I'll be
21 brief.

22 Your Honor began by saying that you would
23 apply the law even in this contentious issue. And I
24 think what I just heard from my friend is that maybe
25 Rule 24 doesn't apply or shouldn't apply when abortion

1 is the issue. There was a slide that was blank on when
2 advocacy groups had been granted intervention in
3 abortion cases and he pointed out that it seemed to be
4 only in economic or environmental cases. But Rule 24 is
5 the law and it applies just the same regardless of what
6 sorts of issues the American people in different states
7 are advocating for.

8 The one distinction on the *Coalition of*
9 *Arizona* case, I know I talked about it a bit, is he
10 talked about how they're amending a previous lawsuit
11 brought by the plaintiff, by the owl lover. But that
12 was not the basis of the 10th Circuit's decision, it did
13 the straight Rule 24 intervention analysis and found
14 that intervention of right was warranted there.

15 The evidence that plaintiffs have said we
16 would offer that would be unnecessary and irrelevant,
17 but it is truly just on the exact topics and issues that
18 plaintiffs themselves have brought before the Court.
19 There's the same topics that Your Honor has cited and
20 quoted and relied on in the orders so far. And so they
21 obviously are at the heart of this case. Amicus
22 participation in vein would not be sufficient. If we
23 were to participate in discovery or otherwise try to
24 offer rebuttal and counterpoints to plaintiffs' evidence
25 that would need to be in a party's status where we had

1 the full ability to do so.

2 On adequate representation, we have the same
3 objective of defending the law. That is true in all of
4 these cases where intervention of right was granted to
5 different public interest groups and issue advocates,
6 sponsors of legislation. I listed several of them and
7 they're in the briefings: *Citizens for Balanced Use*,
8 *Washington Building Coalition*, the *North Fork* case, the
9 *Citizens for Community Action*. So, there's plenty of
10 examples where the generic objective is the same, but
11 there is some sort of disparate interest in the mix.

12 For example, sometimes it's that the
13 government wants a narrower outcome or is focussed on a
14 different type of ruling whereas issue advocates often
15 are wanting to craft a particular outcome that will
16 allow them to engage in their advocacy and continue to
17 promote policies that are consistent with their beliefs.
18 And that's what it comes down to here, the ability to
19 engage in advocacy as a pro-life legislator, a champion
20 of a bill, or as an interest group that advocates for a
21 bill, that is -- that is meaningless if the fruit of
22 that advocacy is destroyed.

23 It's not the ability to advocate in a
24 vacuum, it's actually to have effective advocacy.
25 That's what all of these cases talk about. And that is

1 why we are requesting intervention here. Again, I'm
2 concerned that this is on a trajectory where the record
3 is very lopsided. That certainly doesn't protect the
4 interests of my clients, I don't know that it's in the
5 best interest of justice. And we would respectfully
6 ask, Your Honor, if you don't think we're entitled to
7 intervention of right you at least grant permissive
8 intervention for those reasons. Thank you.

9 THE COURT: Thank you.

10 (Break in the proceedings.)

11 THE COURT: All right. Well, thank you to
12 all of you online with us as well as present here in the
13 courtroom today. This is an extremely difficult
14 decision for this Court. And I want to take my time in
15 deciding this as I know that it's very important to all
16 of you here today arguing. And so I will try to have a
17 decision out within about a week or two. I will try to
18 move quickly, but I also want to be thorough and
19 thoughtful about my decision. So, I apologize if you
20 were expecting a ruling today.

21 Is there anything else to come before the
22 Court here today on this matter?

23 MR. ROBINSON: Not for plaintiffs, Your
24 Honor.

25 THE COURT: Defendants?

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MS. COLASUONNO: Nothing.

MR. JERDE: No, Your Honor.

MS. WEISMAN: No, Your Honor. Thank you.

THE COURT: Proposed intervenors?

MS. HARLE: No, Your Honor. Thank you.

THE COURT: All right. Well, it was an absolute pleasure to have the old faces I normally get to see in court and the newer faces to the Court. Your presentations were fantastic. So, thank you all and enjoy this cold weather while you're here. We'll be in recess.

(Hearing concluded.)

