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**Pro hac vice application forthcoming*

IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT

IN AND FOR TETON COUNTY, WYOMING

DANIELLE JOHNSON; KATHLEEN DOW; GIAVANNINA ANTHONY, M.D.; RENE R. HINKLE, M.D., CHELSEA'S FUND; and CIRCLE OF HOPE HEALTHCARE d/b/a Wellspring Health Access; Plaintiffs, v. STATE OF WYOMING; MARK GORDON, Governor of Wyoming; BRIDGET HILL, Attorney General for the State of Wyoming; MATTHEW CARR, Sheriff Teton County, Wyoming; and MICHELE WEBER, Chief of Police, Town of Jackson, Wyoming, Defendants.	)	Case No. 18732

MEMORANDUM OF WYOMING LEGISLATORS AND RIGHT TO LIFE OF WYOMING IN SUPPORT OF MOTION TO INTERVENE

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INTRODUCTION

Proposed Intervenors Individual Wyoming Legislators ("The Legislators") and Right to Life of Wyoming ("RTLW") seek intervention to protect and defend their interests, which include preserving the authority of the Legislature to protect unborn life, protect the health and safety of women, and regulate the medical profession—as well as advocating for laws that respect the sanctity of human life. All of these interests are threatened by this action.

Until the United States Supreme Court "discovered" a federal constitutional right to abortion in *Roe v. Wade*, 410 U.S. 113 (1973), abortion was consistently a matter of legislative oversight in Wyoming and was not permitted except to save the life of the mother. *See, e.g.*, 1884 Terr. Wyo. Sess. Laws ch. 1, § 2. *Roe*, however, "abruptly" removed the issue from the province of state legislatures like Wyoming's, thereby "spark[ing] a national controversy that . . . embittered our political culture for a half century." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2241 (2022).

The disequilibrium wrought by *Roe* was rectified when the Supreme Court decided *Dobbs* less than two months ago. *Dobbs* reversed *Roe*, declared that no federal constitutional right to abortion exists, and returned the issue to "the people and their elected representatives." *Id.* at 2259. The people of Wyoming were ready: during the 2022 session, the Legislature passed House Enrolled Act 57 ("HEA 57"). Within HEA 57 was Wyoming Statute § 35-6-102(b), which limits elective abortion except in cases implicating sexual assault, incest, or the life or health of the mother.

But before the Legislature's permissible life-protecting regulation could go into effect, Plaintiffs brought suit, challenging the law under various theories. As part of their challenge, Plaintiffs introduced evidence and arguments purporting to show that the law would harm women, imperil doctors, and violate a host of constitutional rights. In response, the Wyoming Attorney General mounted a

defense, but largely on legal grounds alone. That defense did not include factual evidence or arguments to rebut Plaintiffs' submissions, on which this Court relied in granting a temporary restraining order and then a preliminary injunction. Further, based on the Attorney General's representations to this Court at the hearings on Plaintiffs' Motion for Temporary Restraining Order and Motion for Preliminary Injunction, no evidence from the defense will be forthcoming at the upcoming evidentiary hearing/trial either.

The Legislators and RTLW seek intervention to rectify this evidentiary gap, and to provide this Court, and ultimately the Wyoming Supreme Court, the full record needed to properly adjudicate this case. More specifically, Proposed Intervenors intend to proffer evidence to counter Plaintiffs' arguments that § 35-6-102(b) is vague, that abortion on demand is a fundamental right in Wyoming, and that abortion should be considered health care.

As detailed below, the Legislators and RTLW qualify under Wyoming Rule of Civil Procedure 24 for both intervention as of right and permissive intervention. Proposed Intervenors have filed this motion in a timely manner, have a significantly protectable interest that may be impaired by the disposition of this action, and can show that no existing party adequately represents their interests. Alternatively, Proposed Intervenors will assert defenses that share a common question of fact or law with the main action, and no delay or prejudice will result from their involvement.

In sum, under either pathway contemplated by Rule 24, intervention by the Legislators and RTLW is legally and factually warranted. It is also prudential, because it promises to sharpen the adversarial process and augment the record as this case progresses to a resolution on the merits.

FACTUAL BACKGROUND[1]

The Challenged Law

The Wyoming Legislature enacted HEA 57 during the 2022 Budget Session, and it became law on March 15, 2022. In passing HEA 57 the Legislature chose a policy consistent with Wyoming's long (pre-*Roe*) history and tradition of protecting life from abortion:

> An abortion shall not be performed except when necessary to preserve the woman from a serious risk of death or of substantial and irreversible physical impairment of a major bodily function, not including any psychological or emotional conditions, or the pregnancy is the result of incest as defined by W.S. 6-4-402 or sexual assault as defined by W.S. 6-2-301. . . . .

H.B. 0092, 2022 Leg. 66th Sess. (Wyo. 2022); WYO. STAT. ANN. § 35-6-102(b) (West 2022). That new provision would take effect "five (5) days after the date that the governor, on advice of the attorney general, certifies to the secretary of state that the supreme court of the United States has overruled *Roe v. Wade*, 410 U.S. 113 (1973)." WYO. STAT. ANN. § 35-6-102(b) (West 2022). To carry out this process, the Legislature authorized the Attorney General to "review any final decisions of the supreme court of the United States related to *Roe v. Wade*, 410 U.S. 113 (1973) or otherwise related to abortion to determine whether the enforcement of subsection (b) of this section would be fully authorized under that decision." WYO. STAT. ANN. § 35-6-102(c) (West 2022).

On June 24, 2022, the United States Supreme Court issued its decision in *Dobbs*, overruling *Roe* and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). *Dobbs* held that the United States Constitution "does not confer a right to

[1] For brevity and judicial economy, because existing parties have already briefed basic facts to this Court, Proposed Intervenors discuss only the facts relevant to this Court's ruling on their Motion to Intervene.

abortion." 142 S. Ct. at 2279. It further held that "the authority to regulate abortion must be returned to the people and their elected representatives." *Id.*

Consistent with the Legislature's directive in HEA 57, Attorney General Hill then reviewed the *Dobbs* decision and submitted to the Governor and the Joint Judiciary Interim Committee her required report. In that report she concluded that "the enforcement of Wyo. Stat. § 35-6-102(b) would be fully authorized under [*Dobbs*]" and "is authorized to go into effect under . . . [*Dobbs*]."[2] The next day, July 22, Governor Gordon certified the Attorney General's review to the Wyoming Secretary of State, making Wyoming Statute § 35-6-102(b) effective as of July 27, 2022.[3]

Plaintiffs' Case

But Plaintiffs' brought suit in this Court on July 25, 2022, seeking declaratory and injunctive relief. They also filed a Motion for Temporary Restraining Order that same day, which this Court granted after a hearing and before the law could go into effect. Plaintiffs later filed a Motion for Preliminary Injunction, which this Court heard on August 9 and granted the next day.

Plaintiffs' case essentially contends that § 35-6-102(b) violates the "fundamental right to be left alone," as well as "multiple stand-alone provisions of the Wyoming Constitution." Pls.' Compl. ¶¶ 93–96; Pls.' Memo in Supp. of Mot. for Prelim. Inj. 2–3. ("MPI Memo"). Plaintiffs challenge the clear import and direction of *Dobbs*, which not only declared that the U.S. Constitution contains no right to abortion, but also returned to the states decisions on the regulation of abortion. By Plaintiffs' telling, both *Dobbs* and § 35-6-102(b) are both dead letters, because the Wyoming Constitution provides "guarantees [that] are more expansive than those secured by the Federal Constitution," Pls.' Compl. ¶¶ 1,11, 19, 93–95; MPI Memo 2,

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[2] Ex. 2 to State Defs.' Resp. to Mot. for Prelim. Inj.
[3] Ex. 3 to State Defs.' Resp. to Mot. for Prelim. Inj.

such that abortion should suddenly be considered a fundamental right in Wyoming. *Id.*

More specifically, Plaintiffs argue that § 35-6-102(b) conflicts with Art. I, Sec. 38 of the Wyoming Constitution. MPI Memo 6, 16, 27–29. That constitutional provision provides that "[e]ach competent adult shall have the right to make his or her own health care decisions." WYO. CONST. art. I, § 38. Plaintiffs seek to equate "the right to make . . . health care decisions" with a never-before-recognized fundamental right to abortion, and argue that this provision cabins the authority of the Legislature to regulate abortion. But Plaintiffs have no caselaw supporting this interpretation. And Art. I, Sec. 38 explicitly provides the Legislature the authority to "determine reasonable and necessary restrictions on the rights granted under this section to protect the health and general welfare of the people. . . ." *Id.*

Taken together, Plaintiffs' challenge threatens the Wyoming Legislature's authority to protect the health, welfare, and safety of its citizens by limiting abortion, a power which was returned to it by *Dobbs*. Their challenge also threatens the Legislature's power to make laws generally, even when expressly authorized by a recent constitutional provision like Art. 1, Sec. 38, with respect to specific areas of the law like health care.

Proposed Intervenors

Individual Legislators

Representative Rachel Rodriguez-Williams is a member of the Wyoming House of Representatives who represents District 50. She was the main sponsor of HEA 57 and played an integral role in shepherding the law, including § 35-6-102(b), through to final passage and enactment.[4] Representative Williams has worked in

[4] State of Wyoming 66th Legislature, *House District 50: Representative Rachel Rodriguez-Williams*, https://www.wyoleg.gov/Legislators/2022/H/2083 (last visited Aug. 15, 2022).

the pro-life field for years, serving as the Executive Director of Serenity Pregnancy Resource Center. Serenity provides free medical services, support, and education to pregnant woman and their partners, from conception to delivery.[5] It offers alternatives to abortion and empowers mothers and fathers in crisis pregnancies to value and choose life in all circumstances.[6] Serenity works with and has the support of many pro-life physicians in the community.[7]

Like many in the pro-life movement, Representative Williams is well acquainted with alternatives to abortion like adoption and foster care, and several individuals in her family have been adopted, some even from the foster care system. By both personal vocation and legislative sponsorship, Representative Williams has a direct, significant, and unique interest in seeing that the law challenged by Plaintiffs is not only properly defended but sustained, because it is a proper exercise of the Wyoming Legislature's authority to exercise its powers to advance the health and welfare of Wyoming citizens, most notably women and unborn children.

Representative Chip Neiman is a member of the Wyoming House of Representatives who represents District 1. He was a co-sponsor of HEA 57 and thus also played an integral role in shepherding the law, including § 35-6-102(b), through to final passage and enactment.[8] Representative Neiman has been a personal supporter of pro-life pregnancy centers for years, and has worked with nonprofit organizations helping to educate and support orphans. Like Representative Williams, he also has a direct, significant, and unique interest in seeing that the

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[5] SERENITY PREGNANCY RESOURCE CENTER, https://www.serenityprc.org/about-us (last visited Aug. 15, 2022).
[6] *Id.*
[7] *Id.*
[8] State of Wyoming 66th Legislature, *House District 01: Representative Chip Neiman*, https://www.wyoleg.gov/Legislators/2022/H/2070 (last visited Aug. 15, 2022).

law, and by extension the Legislature's authority to regulate on matters of health and safety, is not discarded but rather sustained and enforced.

Both Representatives have a particular interest in ensuring that their constituents' permissible pro-life policy preferences—duly enacted by the Legislature—are given effect.

Right to Life of Wyoming

RTLW is a pro-life, nonprofit organization whose mission "is to educate the people of Wyoming concerning the reality and tragic consequences of abortion, infanticide, embryonic stem cell research, and euthanasia, including physician-assisted suicide."[9] It exists to "promote a culture of life from conception to natural death."[10] A central part of RTLW's mission and purpose is to work towards achieving changes in the law so that the sanctity of human life is respected.[11] Its longstanding support of pro-life efforts helped make § 35-6-102(b)'s passage a reality—in fact, RTLW's network of pro-life advocates and supporters was instrumental in getting § 35-6-102(b) across the finish line, all the way to the Governor's signing. RTLW has a direct, substantial, and unique interest in seeing § 35-6-102(b) upheld, and seeks intervention to ensure that its advocacy interests on behalf of women and unborn children are not wasted, but instead vindicated.

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[9] RIGHT TO LIFE OF WYOMING, https://www.wyomingrighttolife.com/about_us (last visited Aug. 15, 2022).
[10] *Id.*
[11] *Id.*

LEGAL STANDARD

Under Wyoming Rule of Civil Procedure 24, "the court must permit anyone to intervene who":

1. files a timely motion;
2. "claims an interest relating to the property or transaction that is the subject of the action;"
3. "is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest;" and
4. is not "adequately represented by existing parties."

Wyo. R. Civ. P. 24(a)(2); *Kerbs v. Kerbs*, 2020 WY 92, ¶ 12, 467 P.3d 1015, 1019 (Wyo. 2020). "Intervention of right is construed broadly in favor of intervention." *Concerned Citizens of Spring Creek Ranch v. Tips Up, LLC*, 2008 WY 64, ¶ 14, 185 P.3d 34, 39 (Wyo. 2008) ("*Spring Creek Ranch*") (quoting *Sierra Club v. United States EPA*, 995 F.2d 1478, 1481 (9th Cir.1993)). Also, where the underlying case is so important—as it is here—the "significant public interests" involved mean that "the requirements for intervention may be relaxed." *San Juan Cnty., Utah v. United States*, 503 F.3d 1163, 1201 (10th Cir. 2007).[12]

In the alternative, a court may grant permissive intervention to "anyone . . . who . . . has a claim or defense that shares with the main action a common question of law or fact." Wyo. R. Civ. P. 24(b)(1)(B); *Kerbs*, 2020 WY at 92, ¶ 12, 467 P.3d at 1019.

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[12] "In construing Wyoming rules of procedure, where Wyoming and federal rules of procedure are similar, [Wyoming courts] have repeatedly looked to federal cases construing the federal rule as persuasive authority." *Johnson v. State*, 2009 WY 104, ¶ 14, 214 P.3d 983, 986 (Wyo.2009) (citing *Bird v. State*, 901 P.2d 1123, 1129 (Wyo. 1995)). Here, because Wyo. R. Civ. P. 24 is essentially identical to its federal counterpart, federal precedent is persuasive, as is clear from the Wyoming Supreme Court's repeated citation to federal authorities when adjudicating intervention matters.

ARGUMENT

I. The Individual Wyoming Legislators and RTLW satisfy Rule 24's requirements for intervention of right.

A. The motion to intervene is timely.

In assessing the timeliness requirement, courts consider four factors: 1.) the "length of time" the proposed intervenor "knew or reasonably should have known of its interest" before he filed his motion; 2.) "prejudice [to] the existing parties"; 3.) "prejudice [to]" the movant from being denied intervention; and 4.) any "unusual circumstances" weighing "for or against a determination" of timeliness. *Hirshberg v. Coon*, 2012 WY 5, ¶ 15, 268 P.3d 258, 263 (Wyo. 2012) (cleaned up). The timeliness factor involves a "determination of fact" and presents a "'flexible' question," requiring courts to look at the "totality of the circumstances." *Spring Creek Ranch*, 2008 WY 64, ¶ 15, 185 P.3d at 39 (citing 7A Wright & Miller, *Federal Practice & Procedure*, § 1916, at 572 (1972)). All four of these factors, along with the general principles guiding courts in making this determination, establish that this motion is timely.

First, this action is in its infancy, so there has been no delay in filing this motion.[13] Plaintiffs just filed their complaint on July 25, 2022, and this Court granted Plaintiffs' Motion for Preliminary Injunction last week. No evidentiary hearing or trial has yet been scheduled or held, and the next scheduling conference is not set until August 24. In the meantime, § 35-6-102(b) remains enjoined until the matter is resolved on the merits. *See* Order Granting Mot. for Prelim. Inj. 22.

Proposed Intervenors began consulting with counsel and preparing papers to intervene once they became aware of the lawsuit and realized that their interests would not be fully and adequately represented by any existing parties—no serious

[13] Regardless, "delay in itself does not make a request for intervention untimely." *Oklahoma ex rel. Edmondson v. Tyson Foods, Inc.*, 619 F.3d 1223, 1235 (10th Cir. 2010).

argument can be made that they have been dilatory. *See, e.g.*, *Kane Cnty., Utah v. United States*, 928 F.3d 877, 891 (10th Cir. 2019) (finding intervention motion timely when filed some three months after parties filed joint motion to stay); *W. Energy All. v. Zinke*, 877 F.3d 1157, 1164 (10th Cir. 2017) (finding intervention timely when conservation group moved to intervene more than two months after complaint was filed); *Sawyer v. Bill Me Later, Inc.*, No. CV 10-04461 SJO (JCGx), 2011 WL 13217238, at *3–6 (C.D. Cal. Aug. 8, 2011) (finding timely a motion to intervene filed one year after the case started, where court already ruled on motion to dismiss and choice-of-law arguments and document discovery had recently begun, and noting that other "district courts in the Ninth Circuit have regularly found motions to intervene timely in cases where the stage of the proceedings had advanced further than the instant case").

Next, granting intervention will cause no prejudice to any of the parties. Proposed Intervenors are fully prepared to abide by the Court's deadlines going forward if granted intervention. *Kane Cnty.*, 928 F.3d at 891 (finding meritless the objection that the parties will have to "respond to excess briefs," and concluding that "the prejudice to other parties . . . [must] be prejudice caused by the movant's delay, not by the mere fact of intervention"). But if their motion to intervene is denied, the Legislators and RTLW will be unable to defend their particular interests, and they will be unable to bring their unique perspective, knowledge, and evidence to this Court, which has been tasked with adjudicating an issue of momentous importance to Wyoming citizens. Finally, no unusual circumstances militate against a finding of timeliness.

Thus, Proposed Intervenors satisfy the timeliness requirement.

B. The Legislators and RTLW have significantly protectable interests in this matter, which include protecting the Legislature's authority to regulate for health and safety, ensuring that women and unborn children are protected in law, and vindicating the advocacy achievements of nonprofit organizations and votes of pro-life Wyomingites.

Although "[t]he contours of the interest requirement have not been clearly defined," *Coal. of Ariz./N.M. Cntys. for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 840 (10th Cir. 1996), the interest inquiry "is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Barnes v. Sec. Life of Denver Ins. Co.*, 945 F.3d 1112, 1121 (10th Cir. 2019) (cleaned up). It requires that a movant show a "significant protectable interest" in the matter, *Platte Cnty. Sch. Dist. No. 1 v. Basin Elec. Power Co-op.*, 638 P.2d 1276, 1279 (Wyo. 1982) (citing *Donaldson v. United States*, 400 U.S. 517 (1971)), which simply means "an interest that could be adversely affected by the litigation." *San Juan Cnty.* 503 F.3d at 1199. This inquiry should be guided by the recognition that "Rule 24 traditionally has received a liberal construction in favor of applicants for intervention," *Wash. State Bldg. & Constr. Trades Council, AFL-CIO v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982), as a result of "the broad right of intervention enacted by Congress." *Coal. of Ariz*, 100 F.3d at 841.

As to relevant comparators, in *Coalition of Arizona*, the Tenth Circuit found that a wildlife photographer, amateur biologist, and naturalist who had photographed and studied the Mexican spotted owl and lobbied for its protection had a "direct, substantial, and legally protectable" interest sufficient for intervention in a case brought under the Endangered Species Act. 100 F.3d at 841. In *Washington State Building* the Ninth Circuit permitted a public interest group that sponsored a statute as a ballot initiative to intervene as of right in an action challenging the measure's constitutionality. 684 F.2d at 630. And in *Planned*

Parenthood v. Citizens for Cmty. Action, 558 F.2d 861, 869 (8th Cir.1977), the Eighth Circuit found that a neighborhood association whose "purpose . . . [was] to preserve property values and insure that abortion facilities do not affect the health, welfare and safety of citizens" had a right to intervene in a challenge to a local law that imposed a moratorium on the construction of abortion clinics. In this case, the liberal, expansive construction of Rule 24, combined with these precedents, establish that Proposed Intervenors have a significantly protectable interest.

1. The Legislators have a significantly protectable interest.

The Individual Legislators are sponsors of a pro-life law passed by the Wyoming Legislature. Previously, under *Roe v. Wade*, the Legislature's authority to pass laws like § 35-6-102(b) was negated. Now, nearly fifty years later, the *Dobbs* decision has returned to all state legislatures, including Wyoming's, their rightful authority to reasonably protect the health and safety of women and unborn children. Yet Plaintiffs' suit threatens to again strip the Legislature of its legislative prerogative.

The Legislators have a significantly protectable interest in defending their authority to make laws, which is the Legislature's reason for being. *See* WYO. CONST. art. II, § 1 ("The powers of the government of this state are divided into three distinct departments: The legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.").

The Legislators' interest is all the more compelling given the nature of this case, because Plaintiffs argue that Art. 1, Sec. 38 of the Wyoming Constitution gives rise to a right to abortion. *See* MPI Memo 27–29. Yet that provision, granting Wyoming citizens the "right to make [their] own health care decisions," explicitly empowers the Legislature to "determine reasonable and necessary restrictions on

the rights granted under this section to protect the health and general welfare of the people." WYO. CONST. art. I, § 38, In other words, Plaintiffs' action not only threatens the Wyoming Legislature's long-awaited authority to reasonably regulate abortion, but it does so by rejecting a separate constitutional grant of authority to the Legislature to regulate health and general welfare. The Legislators are "concerned persons," *Barnes* 945 F.3d at 1121, who stand to be "adversely affected by the litigation," *San Juan Cnty.* 503 F.3d at 1199, in more ways than one.

More specifically, the Individual Legislators have a significantly protectable interest in their particular role as sponsors of § 35-6-102(b), which they helped to draft, build coalition support for, and secure the passage of. Representatives Williams and Neiman crafted and lobbied for the legislation at issue; in doing so, they formally represented the interests of their pro-life constituents and the voters in their districts. Their ability to defend the law directly implicates the Legislators' electoral interests and duties to the people who elected them to pass such laws.

This is all the more apparent under the persuasive authority provided by the *Coalition of Arizona*, *Washington State Building*, and *Citizens for Community Action* cases. For if a naturalist who lobbied for an owl's protection under the ESA, and a public interest group who sponsored a challenged ballot initiative, and a neighborhood association concerned that an abortion clinic would affect public health and welfare, were all found to have significantly protectable interests sufficient to warrant a grant of intervention, the Legislators here must too, as they were not mere bystanders or interested private parties but the very sponsors of the challenged law.

2. RTLW has a significantly protectable interest.

RTLW exists to educate the public on the harm of abortion and to advocate for laws that protect women and their unborn children. The *Dobbs* decision and the Wyoming Legislature's passage of § 35-6-102(b) represent the culmination of its

many years of hard work as a pro-life nonprofit organization. Plaintiffs' case—by positing that an amalgam of Wyoming laws and constitutional provisions somehow create a state right to abortion which nullifies the Legislature's right to regulate abortion—threatens to undo all of RTLW's hard-won achievements in one fell swoop. Indeed, much like the intervenors in *Coalition of Arizona*, *Washington State Building*, and *Citizens for Community Action*, RTLW's advocacy efforts and all it has achieved are at stake here, and will likely rise or fall with the Court's ultimate ruling on whether and how the Wyoming Constitution is interpreted to guarantee a right to elective abortion. RTLW's interest is therefore not only significant but "direct, substantial, and legally protectable." *Coal. of Ariz.*, 100 F.3d at 841.

C. The disposition of this case may impair the Legislators' and RTLW's ability to protect their interests.

"[T]he question of impairment is not separate from the question of existence of an interest," and in making this determination courts are not "limited to consequences of a strictly legal nature." *Natural Res. Def. Council v. United States Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1345 (10th Cir.1978). As such, satisfying this factor is not a heavy lift. Indeed, "a would-be intervenor must show *only* that impairment of its substantial legal interest is *possible* if intervention is denied. This burden is *minimal*." *Barnes*, 945 F.3d at 1123 (emphasis added) (cleaned up). Both the Legislators and RTLW comfortably satisfy the impairment factor.

First, this case directly challenges the Legislators' authority to pass reasonable laws protecting life and health, and even to legislate as expressly permitted by Art. 1, Sec. 38 of the Wyoming Constitution. In fact, the case has already adversely affected the Legislators' interests in the very short time of its pendency: this Court halted § 35-6-102(b) before it even took effect, forestalling

their legislative work and blocking their ability to effectively represent their constituents' policy preferences on this important public issue.

Second, this case has the potential to harm the Legislators' prerogative regarding pro-life laws going forward, because if § 35-6-102(b) is permanently enjoined, their ability to limit the harms of abortion may be greatly impaired, despite *Dobbs*, the longstanding history of Wyoming laws protecting unborn life, and the clear policy preferences of today's Wyoming voters. The Legislators therefore pass the impairment test. *See, e.g.*, *W. Watersheds Project v. United States Forest Serv. Chief*, No. 20-CV-67-F, 2020 WL 13065066, at *3 (D. Wyo. July 29, 2020) (finding a group of outfitters showed impairment because the underlying action threatened to stop the supplemental feeding of elk, which could lead to the elk's starvation or movement elsewhere, thereby damaging the groups' use of "elk for aesthetic, conservation, and economic purposes"); *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011) (factor satisfied because if plaintiff prevailed, intervenor's "interest in conserving and enjoying wilderness in the Study Area may . . . be impaired").

So too does RTLW. Like the Legislators, their advocacy efforts are directly threatened by Plaintiffs' suit. Their hard work in supporting and helping to advance pro-life laws has already been at least temporarily thwarted, because § 35-6-102(b) has been enjoined for the foreseeable future. RTLW's goal of protecting the sanctity of all human life is prevented from coming to fruition each day elective abortions continue in the state.

Moreover, if § 35-6-102(b) is permanently enjoined, RTLW's work on behalf of the law will have been squandered. RTLW therefore passes the impairment test. *See, e.g.*, *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983) (finding "no serious dispute" that intervenor wildlife organization had established impairment, where it had participated in administrative process to create

conservation area being challenged); *Idaho v. Freeman*, 625 F.2d 886 (9th Cir.1980) (holding that National Organization for Women had right to intervene in suit challenging procedures for ratification of proposed Equal Rights Amendment, which cause organization had championed).

D. The existing parties do not adequately represent the Legislators' and RTLW's unique interests in guarding the legislative prerogative and in protecting the health of women and unborn children.

The Legislator's and RTLW's burden as to this requirement is only minimal, "in that [they] must only show that [their] interest *may not be* adequately represented." *Spring Creek Ranch*, 2008 WY 64, ¶ 20, 185 P.3d at 34 (citing *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1254 (10th Cir.2001)) (emphasis added); *see also Sanguine, Ltd. v. U.S. Dep't of Interior*, 736 F.2d 1416, 1419 (10th Cir. 1984) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972)) ("burden is . . . 'minimal' one of showing that representation 'may' be inadequate"). Further, a proposed intervenor "should be treated as the best judge of whether the existing parties adequately represent . . . [its] interests, and . . . any doubt regarding adequacy of representation should be resolved in [its] favor." 6 Edward J. Brunet, *Moore's Federal Practice* § 24.03[4][a] (3d ed. 1997); *see also In Def. of Animals v. United States Dep't of the Interior*, No. 2-10-cv-1852, 2011 WL 1085991 (Mar. 21, 2011 E.D. Cal 2011) (same).

Courts look to three factors to make this determination:

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

Spring Creek Ranch, 2008 WY 64, ¶ 20, 185 P.3d at 34 (quoting *Or. Env't Council v. Or. Dep't of Env't Quality*, 775 F. Supp. 353, 358-59 (D.Or.1991)). All three factors establish inadequate representation here.

1. The Attorney General will not "undoubtedly raise the same arguments" as Proposed Intervenors.

It is clear from the Attorney General's previous briefing in response to Plaintiffs' Motions for Temporary Restraining Order and Preliminary Injunction, as well as its arguments on those matters, that its focus in defending the law has been a strictly legal one. Given that this Court has relied on Plaintiffs' factual assertions in enjoining the law,[14] Proposed Intervenors believe that the defense of § 35-6-102(b) can be made more complete.

The record as it currently stands contains no evidence to rebut Plaintiffs' claims that elective abortion is health care, that the law harms women and imperils their doctors, or that Art. 1 Sec. 38 of the Wyoming Constitution confers a right to abortion, all of which has and presumably will continue to inform this Court's legal analysis going forward. The record is also bereft of any evidence to show the harms to women and unborn children posed by abortion itself. The Legislators and RTLW plan to offer evidence and argument to rectify these gaps, which will augment the defense of § 35-6-102(b) and at the same time fully inform this Court of the implications of ruling favorably on Plaintiffs' challenge.

For instance, this Court has found that "Plaintiffs presented evidence that abortion procedures are an essential health care service for women," and that the "decision to have an abortion is a 'health care decision' protected under Art. 1, Sec. 38 of the Wyoming Constitution." Order on Plaintiffs' MPI at 13. The Legislators and RTLW would proffer evidence showing that the Constitution's protections for

[14] *See* Order on Plaintiffs' MPI at 8 (noting that "the Plaintiffs have alleged, through affidavits, significant potential harms that the Court can fairly find that there is no adequate remedy at law").

health care decision making do not, and never were understood, to create or protect a right to elective abortion in Wyoming.

This Court has also held that it "could conclude that it is unclear how a physician can invoke the important life and health exceptions of the HB 92 Amendment," indicating that the Court believes that it is likely Plaintiffs will be able to show § 35-6-102(b) is unconstitutionally vague. *Id.* at 20. The Legislators and RTLW would proffer medical and other evidence to show that the law is not vague, because doctors routinely—as part of standard of care and informed-consent procedures—assess the risks of medical procedures and conditions. That these standards are contained and defined in Wyoming's Civil Pattern Jury Instructions illustrates that Plaintiffs' vagueness allegations are unfounded. *See* Rule 14.02-03 (standard of care defined); 14.06 (informed consent defined). Proposed Intervenors would bring forth information and arguments relevant to Plaintiffs' vagueness challenge, currently missing from the record, on reasonable medical judgment, on OB/GYN care, and on pregnancy complications and treatment.

Finally, the Legislators and RTLW would provide expert evidence and testimony to show the harms to women and unborn children from abortion itself, which would rebut the claim that elective abortion should be considered health care. The Proposed Intervenors are well suited to do so because of their long history of work, relationships, and expertise built specifically on the issue of abortions' harms. This additional argument and evidence would also provide a more complete defense to Plaintiffs' attempt to use Art. 1 Sec. 38 to create a right to abortion where none exists under Wyoming law.

2. The Attorney General will not make the arguments the Legislators and RTLW plan to make.

The Attorney General has already represented to this Court that it does not contemplate proffering any evidence at the upcoming evidentiary hearing/trial, which is yet to be scheduled. *See* Tr. on Hr'g for TRO (July 27, 2022) at 4 (indicating that the Court would "rely on [Plaintiffs'] affidavits," the Attorney General had "no objection" to their consideration, and revealing it had not introduced any affidavits of its own). It made the same representation at the MPI hearing. These representations alone are enough to satisfy this factor. *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 824 (9th Cir. 2001) ("It is sufficient for Applicants to show that, because of the difference in interests, it is likely that Defendants will not advance the same arguments as Applicants."). And as discussed above, there currently is no rebuttal evidence on the record to counter the harms, vagueness, and health care decision making arguments raised by Plaintiffs. Unless the Legislators and RTLW are granted intervention, there will not be any at the evidentiary hearing either. This evidentiary gap bolsters the conclusion that the Attorney General will not make all the arguments Proposed Intervenors will.[15]

3. The Legislators and RTLW will offer necessary elements the Attorney General does not plan to.

A proposed intervenor can satisfy this factor by showing it will offer "necessary elements to the proceeding that other parties would neglect." *Arakaki v. Cayetano*, 324 F.3d 1078, 1087 (9th Cir. 2003). The Proposed Intervenors will provide evidence and legal argument to rebut Plaintiffs' submissions on harm, vagueness, and the import of Art. 1, Sec. 38. As the Court has already relied on Plaintiffs' evidence and arguments to render its preliminary decisions, the elements

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[15] Proposed Intervenors agree with the Attorney General, however, that § 35-6-102(b) is valid and permissible as a matter of law, and that the Court's inquiry does not require factfinding in order to uphold the law.

the Legislators and RTLW plan to introduce and address are necessary to complete the defense of Wyoming Statute § 35-6-102(b).

Proposed Intervenors together have abiding interests in protecting women and unborn children. The Legislators have an ongoing interest in protecting their authority to regulate on abortion and related issues. RTLW has an interest in ensuring that its advocacy efforts on behalf § 35-6-102(b) are fully defended and vindicated. These interests include, but also diverge from, the Attorney General's more circumscribed interest in defending Wyoming Statute § 35-6-102(b). This, along with the fact that Proposed Intervenors will raise significant and necessary arguments in the proceeding, shows that they are not adequately represented. *See, e.g.*, *Utah Ass'n of Cntys.*, 255 F.3d at 1254 ("possibility that the interests of the applicant and the parties may diverge need not be great in order to satisfy this minimal burden") (cleaned up); *Pennsylvania v. President United States of Am.*, 888 F.3d 52, 61-62 (3d Cir. 2018) (finding inadequate representation even where the government was tasked with defending regulations, because the interests at stake, while "related," were not "identical").

The Supreme Court has confirmed that intervention of right is warranted where, as here, a proposed intervenor has raised "sufficient doubt about the adequacy of representation[.]" *Trbovich*, 404 U.S. at 538. In *Trbovich*, the official prosecuting the law was "performing his duties, broadly conceived, as well as can be expected," but the Supreme Court recognized that the individual whose interests were at stake may have valid concerns about deficiencies in the official's representation and may not take "precisely the same approach to the conduct of the litigation." *Id.* at 539; *see also Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 967 (3d Cir. 1998) (finding inadequacy of representation where intervenor raised "reasonable doubt whether the government agency would adequately represent [its] concerns"). The same concerns present in *Kleissler* and *Trbovich* obtain here, where

there is surely "reasonable doubt," based on filings and transcripts already in the Court's record, whether the Attorney General will adequately represent Proposed Intervenors' interests; and it appears beyond doubt that Attorney General and Proposed Intervenors will take a different "approach to the conduct of the litigation." Inadequacy of representation is therefore established.

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The Legislators and RTLW have shown that they have a significantly protectable interest that would be impaired by the outcome of this litigation, and have further shown that no existing party adequately represents their interests. Permitting intervention comports with Rule 24. It will also enhance judicial economy, because the Legislators and RTLW will complete the record for both this Court and the Wyoming Supreme Court, making a final resolution on the merits a much less protracted affair.

II. The Legislators and RTLW should be granted permissive intervention.

"Intervention may be allowed permissively 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). Based on these guideposts, the Legislators and RTLW satisfy the requirements for permissive intervention.

Their motion is timely. *See supra* at 9-10. And they have a question of fact or law in common with the main action, because their defenses will be "directly responsive to the claims . . . asserted by [P]laintiffs." *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1110 (9th Cir. 2002) (commonality standard satisfied). Those defenses will include relevant evidence and argument on the benefits and constitutionality of § 35-6-102(b), and the harm that results when elective abortions

are mistakenly viewed as ordinary health care. Finally, granting intervention will not "unduly delay or prejudice the adjudication of the rights" of either Plaintiffs or the Attorney General. *Spring Creek Ranch*, 2008 WY 64, ¶ 23, 185 P.3d at 42; *see supra* at 10. If anything, permitting intervention will ensure that the upcoming evidentiary hearing/trial will provide this Court, and by extension the Wyoming Supreme Court, with the adversarial completeness needed to render a fully informed decision on the merits. For these reasons, permissive intervention is also appropriate.

CONCLUSION

Both the Legislators and RTLW have unique and significantly protectable interests at stake, interests which no existing party is situated or willing to defend. Rule 24 broadly favors intervention, and the liberal construction courts routinely apply is even more fitting here, because this case implicates an issue of the utmost public importance. *See San Juan Cnty.*, 503 F.3d at1201 ("significant public interests" mean "requirements for intervention may be relaxed"). For these reasons, the participation of the Legislators and RTLW is not only required but prudent. The Individual Legislators and RTLW therefore respectfully request that this Court grant them intervention as of right, or in the alternative, permissive intervention.

RESPECTFULLY SUBMITTED this 16th day of August, 2022.

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**Pro hac vice application forthcoming*

Certificate of Service

I hereby certify that on August 16, 2022, I electronically filed the foregoing paper with the Clerk of Court via email at http://www.tetoncountywy.gov/2069/EmailFax-Filing. A true copy of the foregoing was served via email, mailed, postage prepaid, to the following:

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