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CASE NUMBER: S-24-0225

IN THE SUPREME COURT, STATE OF WYOMING

CLIFFORD C. BAIN,)
)
 Petitioner (Plaintiff),)
)
 v.) Case No. S-24-0225
)
 CITY OF CHEYENNE, a Wyoming)
 municipality, and EDWARD BROOKMAN,)
)
 Respondents (Defendants).)

PETITIONER'S RESPONSE IN OPPOSITION TO *MOTION OF LOCAL GOVERNMENT LIABILITY POOL, WYOMING COUNTY COMMISSIONERS ASSOCIATION, AND WYOMING ASSOCIATION OF MUNICIPALITIES FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF SUPPORTING AFFIRMANCE*

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Petitioner (Plaintiff) Clifford C. Bain, by and through his undersigned counsel, Burg Simpson Eldredge Hersh & Jardine, P.C., hereby submits his response in opposition to the motion for leave to file an amicus curiae brief (Motion) filed by the Local Government Liability Pool (LGLP), Wyoming County Commissioners Association (WCCA), and Wyoming Association of Municipalities' (WAM) (collectively "Movants"). Petitioner opposes the Motion because the factors favoring the allowance of allowing the proposed amicus brief are not present. The Motion should therefore be denied.

STANDARD FOR AMICUS CURIAE

"A brief of an amicus curiae may be filed only by leave of court granted on motion or the request of the appellate court." W.R.A.P. 7.12 (a). In its motion, the potential amicus curiae must state:

1. the movant's interest in the issues raised in the case;
2. the reasons an amicus brief is appropriate and desirable;
3. the view of the movant with respect to whether a party is not represented competently or is not represented at all;
4. the interest of the amicus in some other case that may be affected by the decision in the case before the court; and
5. any unique information or perspective the amicus has that can be of assistance to the court beyond that the lawyers for both parties can provide.

W.R.A.P. 7.12(b). On balance, these factors substantially tip the scales against LGLP, WCCA, and WAM's Motion and in favor of denial.

Amicus curiae briefs are not designed for parties to inject their own arguments into a case or to act as a party to the case. Instead, these "friends of the court" are intended to help the court on questions of law. To this point, this Court has previously stated,

An effort to inject extraneous issues is not helpful to this court and it subverts the purpose of an amicus curiae participation. The appropriate purpose generally "is to aid the court on questions of law, * * *." 4 AM. JUR. 2D Amicus Curiae § 3, at 110-111 (1962). That means the amicus is called to assist the court in the case or call attention to facts, laws, or circumstances pertaining to the issues the court may overlook. It is

clear the amicus may "present facts or arguments in a different context from those presented by the parties" (ROBERT L. STERN, APPELLATE PRACTICE IN THE UNITED STATES, Ch. 10.19, at 309 (2d ed. 1989)), but the presentation of entirely novel issues is not justified.

Wyoming Coalition v. Wyoming Game & Fish Comm'n, 875 P.2d 729, 734 (Wyo. 1994).

ARGUMENT

All parties are adequately and competently represented.

Under Wyo. Stat. Ann. § 1-37-113 (LexisNexis), when a statute is alleged to be unconstitutional, such as in this case, the parties are required to serve copies of the proceeding on Attorney General, who may be heard. See *Conrad v. Uinta Cnty. Republican Party*, 2023 WY 46, ¶29, 529 P.3d 482, 494 (Wyo. 2023). The Wyoming Attorney General has intervened in this matter.

Between the Wyoming Attorney General and the Respondents, the Court has received two briefs containing over 62 pages of legal arguments. Movants, three of the state's largest lobbying entities, now desire to supplement the briefs of the State's capital and the State itself with their own 21 pages of argument on the issue of "balance." Movants have admitted that the "City of Cheyenne is very competently represented." Instead of educating the Court with a unique perspective, movants instead present additional argument as quasi-intervenors.

Even if Movants believes the Respondents and Intervenor failed to raise the issue of "balancing," this still does not provide a sound basis for allowing Movants' participation as amicus curiae.

While an amicus "may present facts or arguments in a different context from those presented by the parties . . . the presentation of entirely novel issues is not justified" and "raising new issues is beyond the scope of participation by an amicus curiae." *Wyoming Coal.*, 875 P.2d at 734. (citations omitted). See also *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 19 n.4 (1st Cir. 2016)(stating "It is ... clear beyond hope of contradiction that amici cannot interject into a case issues which the litigants, whatever their reasons might be, have chosen to ignore.")(internal marks and citations omitted); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 721 (2014) (declining to consider amici's argument because the Court does not "generally entertain arguments

that were not raised below and are not advanced in this Court by any party”); *MeadWestvaco Corp. ex rel. Mead Corp. v. Ill. Dep't of Revenue*, 553 U.S. 16, 31, (2008) (declining to address amici's issue because the question they “call upon us to answer was neither raised nor passed upon in the state courts”); *Simko v. U.S. Steel Corp.*, 992 F.3d 198, 206 (3d Cir. 2021) (“We have held that the role of an amicus brief is to elaborate issues properly presented by the parties, not inject new issues into an appeal. Thus, an amicus normally cannot expand the scope of an appeal with issues not presented by the parties on appeal, at least not in cases where the parties are competently represented by counsel.” (internal marks and citations omitted)); *M.E. v. T.J.*, 854 S.E.2d 74, 114 (N.C. Ct. App. 2020) (stating “[i]n view of the rule that an amicus curiae must accept the case before the court with issues as made by the parties, a new question raised only in a brief filed by an amicus curiae, by leave of court, will not be considered.”) (internal marks and citations omitted).

(Respondent’s Response Opposing Wyoming Trial Lawyers Association’s Motion for Leave to File Amicus Brief at 4-5).

Because the State of Wyoming and the City of Cheyenne are both competently represented, this factor weights in favor of denying the Motion.

Movants have no significant protectable interest in this matter nor any particular case that would be affected.

While participating in a case as amicus curiae under W.R.A.P. 7.12 differs significantly from participating as an intervenor under W.R.C.P. 24, both processes require that the party wishing to participate have an interest in the outcome of the litigation and both processes look to whether the parties are adequately represented.

This interest in the outcome is more than merely a passing or contingent interest but instead is best described as a “significant protectable interest.” “A significant protectable interest is distinguished from a merely contingent interest, an interest shared by members of the public at large, or a mere concern in the outcome.” *Rodriguez-Williams v. Johnson*, 2024 WY 16, ¶10, 542 P.3d 632, 636 (Wyo. 2024) (additional citations omitted). Movants have no direct or significant

protectable interest in the outcome of this matter and instead admit that their interest is shared broadly with every governmental entity or agency (Movant's Motion at 2-4, 6).

In addition to not having any significant protectable interest, Movants have no particular case to which they can cite that would be affected by the outcome of this matter. Instead, they state that "every case" brought under the Wyoming Governmental Claims Act would be affected. This abstract, collateral interest is simply not sufficient to grant Movant's Motion.

Movants Motion is not relevant to the ultimate question at issue and is therefore neither appropriate nor desirable.

The ultimate issues before the Court are whether portions of the Wyoming Governmental Claims act are unconstitutional under the Wyoming Constitution. Movants would like the Court to consider their perceived challenges with procuring and maintaining insurance if the statute is found to be unconstitutional. These perceived challenges, while unfortunate if true, have no bearing on the ultimate issue of constitutionality. These issues are neither unique to the Movants nor relevant to the issues presented. See *Voices for Choice v. Ill. Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir.2003). Courts should not preserve unconstitutional statutes merely because the results of doing so would cause some alleged discomfort.

Because Movant's proposed arguments are not relevant to the ultimate issue, they should not be permitted.

CONCLUSION

Because Movants have no significant protectable interest, nor any specific case interest in the outcome of this matter; Movant's concerns are not unique and are certainly shared by the City of Cheyenne, which appears to be a member of both WAM and LGLP; Movants' proposed brief is

not appropriate, desirable, or relevant; and because all parties are competently and adequately represented. Therefore, Movants' motion for leave to file an amicus curiae brief should be denied.

RESPECTFULLY SUBMITTED this 28th day of January, 2025.

/s/ Larry B. Jones

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CERTIFICATE OF SERVICE

This is to certify on this 28th day of January 2025 a true and correct copy of the forgoing PETITIONER'S RESPONSE IN OPPOSITION TO MOTION OF LOCAL GOVERNMENT LIABILITY POOL, WYOMING COUNTY COMMISSIONERS ASSOCIATION, AND WYOMING ASSOCIATION OF MUNICIPALITIES FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF SUPPORTING AFFIRMANCE, was served upon the following electronically via the Wyoming Supreme Court's Electronic Filing System:

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I certify that all required privacy redacts have been made and, with the exception of those redactions, every document submitted in digital form or scanned .pdf is an exact copy of the written document filed with the Clerk, and that the document has been scanned for viruses and is free of viruses. The original plus six copies were sent to the Wyoming Supreme Court this 28th day of January 2025.

/s/ Larry B. Jones

Larry B. Jones