DISTRICT COURT, CITY AND COUNTY OF DENVER STATE OF COLORADO City and County Building 1437 Bannock Street Denver, CO 80202	DATE FILED: October 10, 2023 4:04 PM FILING ID: BB61659AAA17F CASE NUMBER: 2023CV495
PLAINTIFF: **COLORADO LIVESTOCK ASSOCIATION**, a Colorado nonprofit corporation, v. DEFENDANTS: **STATE OF COLORADO; JARED POLIS**, in his official capacity as Governor of Colorado; **JOSEPH M. BARELA**, in his official capacity as Executive Director of the Colorado Department of Labor and Employment; and **SCOTT MOSS**, in his official capacity as Director of the Division of Labor Standards and Statistics, Colorado Department of Labor and Employment	Δ COURT USE ONLY Δ
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REPLY IN SUPPORT OF MOTION TO INTERVENE

Colorado Legal Services (CLS) and agricultural worker Jane Doe rely on Colo. Rev. Stat. § 8-13.5-202(1)(b) for the lifeline it provides agricultural workers who need to see a doctor, lawyer, or social worker, but cannot because of their isolation, punishing work schedules, or employer intimidation. Baca Decl. ¶¶ 5, 9–10, 28; Doe Decl. ¶¶ 9–11. More than 41,000 workers labor in Colorado's fields, orchards, dairies, ranches, and farms, and on the range — largely in the shadows, isolated, and vulnerable to exploitation.[1] Yet in 2021, these workers for the first time gained the right to meet with key service providers free from interference by employers, enabling providers like CLS to meet with workers like Doe to provide much-needed legal counsel and referrals for healthcare and other social services. This lawsuit is about one thing only: a livestock trade group's effort to strip away that right on behalf of its unknown members.

CLS and Doe moved swiftly to protect interests that are not coterminous with the Government Defendants' and will be left unprotected without Proposed Intervenors' participation. Plaintiff Colorado Livestock Association mischaracterizes Proposed Intervenors'

[1] *See* Project Protect Food Systems Workers, *Why Colorado Must Protect Agricultural Workers* 2 (Mar. 2021).

declarations in an attempt to deny the obvious harm that invalidating § 8-13.5-202(1)(b) would wreak, and wrongly argues that Colo. R. Civ. P. 24(a) requires CLS and Doe to make a "compelling showing" that the State Defendants' representation will be inadequate. But Colorado courts have made clear that only a "minimal" showing of inadequacy is needed, and any daylight between Proposed Intervenors' interests and the State Defendants suffices.[2] Yet even in this case, CLS and Doe can already make such a compelling showing of inadequacy: the State Defendants are overlooking obvious arguments that could lead to the dismissal of the complaint and have agreed to a case management schedule that puts the Livestock Association on a glide path to its desired relief. Proposed Intervenors satisfy Colo. R. Civ. P. 24(a) or, in the alternative, 24(b). Their motion should be granted.

I. Proposed Intervenors Have An Interest In the Relief Plaintiff Seeks

Proposed Intervenor Colorado Legal Services ("CLS") provides legal services and vital referrals for healthcare and other social services to agricultural workers throughout Colorado. As a result, CLS is a "key service provider" pursuant to Colo. Rev. Stat. § 8-13.5-201(7). As detailed in the Motion to Intervene ("Motion"), CLS's ability to speak privately with agricultural workers seeking legal assistance is essential to its mission and, as a result, it relies on its ability to meet with agricultural workers at any location at which they can reach workers while they are not working. CLS has a clear interest in the preservation of *all* key service provider access rights

[2] The Livestock Association does not argue that the Motion to Intervene is untimely, nor that, if Proposed Intervenors have an interest, that interest would not be impaired by the outcome of this litigation. Accordingly, those issues are conceded. *See Merham Partners, LLC v. Advantage Plus Mortg., LLC*, No. 07-CV-200419, 2008 WL 8170618, *1 (Colo. Dist. Ct. Oct. 27, 2008) (issue not addressed in response brief "deemed confessed"); *Hall v. Good Samaritan Med. Ctr.*, No. 17-CV-30490, 2018 WL 11222694, *1 (Colo. Dist. Ct. Dec. 28, 2018) (similar).

guaranteed under Section 8-13.5-202, including the provision the Livestock Association seeks to invalidate.

The Livestock Association mischaracterizes the declaration of CLS's Executive Director, Matthew Baca, in an attempt to minimize the scope of CLS's work. Plaintiff erroneously suggests that Mr. Baca claims that CLS's interest is *solely* in the statutory protection for workers to receive visitors at their housing, *see* Pl.'s Resp. to Mot. to Intervene ("Resp.") at 6, 10, when he makes clear that CLS relies on § 8-13.5-202(1)(b) because it needs to visit with workers *wherever they are* outside their working hours. Baca Decl. ¶¶ 11, 14–15. Indeed, Mr. Baca explains that "[i]f section 8-13.5-202(1)(b) is struck down, the Migrant Farm Worker Division likely also will be thwarted in our efforts to visit sheepherders and other range workers," because of the difficulty in meeting with these workers, who work around the clock and do not have fixed housing. *Id.* ¶¶ 18, 28.

Even if CLS did not rely on § 8-13.5-202(1)(b), it has nevertheless satisfied the interest requirement because it provided critical information and testimony in connection with Senate Bill 21-087, and thus has an interest in preserving all parts of that law. *See*, Mot. to Intervene at 11-12; *see also City of Thornton v. Bd. Of County Com'rs*, 2019 WL 3228258, at *7 (Colo. Dist. Ct. July 16, 2019) (nonprofit organization had interest in case when sought-after relief would harm organization's advocacy goal). The Livestock Association makes no attempt to refute that interest.

The Livestock Association fails to dispute Jane Doe's interest in this matter other than to claim that she did "not indicate that [she] has ever" invited a service provider to visit. *See* Resp. at 7. But as she avers, Ms. Doe is one of the agricultural workers who directly and personally benefits from the challenged provision and relies on the law's protections to have the freedom to

meet with key service provider services like a doctor or her child's teacher. *See* Mot. to Intervene at 9, 12; Doe Decl. ¶¶ 8, 10–12.

Finally, Proposed Intervenors' fear that agribusinesses would weaponize an adverse ruling is not, as the Livestock Association suggests, speculative. Resp. at 10. *Judicial Watch, Inc. v. Griswold*, on which Plaintiff relies, involved organizations' fear that a court order requiring that Colorado's voter roll maintenance efforts be strengthened would result in eligible voters being removed from the rolls. No. 20-CV-02992-PAB-KMT, 2021 WL 4272719, at *3 (D. Colo. Sept. 20, 2021). The groups' failure to show "how their fears would materialize in th[e] particular case," *id.* at *3–4, is a far cry from the direct negative effect invalidating § 8-13.5-202(1)(b) would have on Proposed Intervenors, together with CLS's first-hand experience encountering agricultural employers who attempted to deny access by referencing "legal challenges" to the "Farmworker Bill of Rights," regardless of which particular provisions of the statutory scheme were at issue in a given case. Baca Decl. ¶¶ 24–25.

II. The Defendants Do Not Adequately Represent the Proposed Intervenors' Interests

Because CLS and Doe's interest is not "identical to" the State Defendants', "intervention ordinarily should be allowed unless it is clear that the party will provide adequate representation for the absentee," and "all reasonable doubts should be resolved in favor of allowing" intervention. *Cherokee Metro. Dist. v. Meridian Serv. Metro. Dist.*, 266 P.3d 401, 407 (Colo. 2011) (quoting 7C Charles Wright, Alan Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1909 (3d ed. 1997)). The Livestock Association wrongly contends that Proposed Intervenors must make a "compelling showing" of inadequacy, but that is unnecessary. Even were such a showing required, CLS and Doe could make it: the Government Defendants' willingness to forego obvious arguments exceeds mere disagreements about litigation strategy. Proposed Intervenors' absence would leave their rights in jeopardy.

A. A "Compelling Showing" Is Not Required

First, Proposed Intervenors need not make a "compelling showing" of inadequacy because their interests are distinct from the Government Defendants, and no party is charged with defending them. As Plaintiff's authority makes clear, "[t]he likelihood of a divergence of interest need not be great to satisfy the requirement" of inadequate representation and "where a governmental agency is seeking to represent both the interests of the general public and the interests of a private party seeking intervention, [courts] have repeatedly found representation inadequate." *Tri-State Generation & Transmission Ass'n, Inc. v. New Mexico Pub. Regul. Comm'n*, 787 F.3d 1068, 1072 (10th Cir. 2015)*; see also Trbovich v. United Mine Works of Am.*, 404 U.S. 528, 538 n.10 (1972) (noting, where government defendant and proposed intervenor had overlapping but distinct interests, that "the burden of making that showing [of inadequacy of representation] should be treated as minimal").

Proposed Intervenors' interest is not only in the constitutionality of § 8-13.5-202(1)(b), but also in its *continued enforceability* against agricultural employers, even if the law were deemed a taking. In contrast, the Government Defendants must balance their obligation to defend statutes against constitutional attack — which is not nearly so absolute as the Livestock Association implies[3] — against their responsibilities to various constituencies and to the public fisc. Most

[3] The Livestock Association appears to assume that the Government Defendants have an unflagging duty to defend statutes against constitutional attack. Resp. at 12. To the contrary, when the Government Defendants' counsel has "grave doubts" about the constitutionality of a state statute, they have an obligation to bring suit *challenging* that statute. *See People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1231 (Colo. 2003); *see also* Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. 2100, 2117, 2133, 2160 (2015). Moreover, the Government Defendants'

obviously, if this Court were to hold that § 8-13.5-202(1)(b) effected a taking, the Government Defendants' obligation to conserve public resources might well mean that they would accept an injunction against enforcing the law (the Livestock Association's desired remedy) rather than an order to pay just compensation (the proper remedy for a Takings Clause violation). *See Smuck v. Hobson*, 408 F.2d 175, 183 (D.C. Cir. 1969) (school board did not adequately protect interests of parents because "considerations of publicity, cost, and delay may not have the same weight for the parents as for the school board" and "the Board of Education, buffeted as it . . . is by conflicting public demands, may possibly have less interest in preserving its own untrammeled discretion than do the parents"). Thus, the Livestock Association's framing of the question as a "binary" question of the statute's constitutionality is false. Resp. at 12; *see also Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 748 (7th Cir. 2020) ("[I]t's not enough that a defense-side intervenor 'shares the same goal' as the defendant in the brute sense that they both want the case dismissed. . . . If that's all it takes to defeat intervention, then intervention as of right will almost always fail.").

Compare the diverging interests of the Proposed Intervenors and Government Defendants with the facts of *Concerning Application for Underground Water Rights*, 304 P.3d 1167 (Colo. 2013), on which the Livestock Association relies heavily. *See* Resp. at 8, 11, 13–14. *Water Rights* rejected a law firm's effort to intervene in a water rights matter to minimize a malpractice judgment against it, because the firm had an identical financial interest to the water rights holder in minimizing the holder's losses. 304 P.3d at 1171. Moreover, the firm "presented no specific example of something [the water rights holder] ha[d] done or failed to do to protect their common

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counsel has previously "declined to defend the constitutionality of" a statute against claims that it violated the Takings Clause of the Colorado Constitution, demonstrating that any duty to defend a statute against a challenge like the Livestock Association's is far from absolute. *See Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161, 169 n.6 (Colo. 2008).

interest," and "d[id] not even present a logical hypothetical decision adverse to [the firm]'s interest that [the holder] may make in the future." *Id.* at 1172. Critically, the water rights holder "ha[d] zealously litigated the interest it shares in common with [the firm] for nearly five years and ha[d] already appealed adverse rulings to this court on two occasions," and yet the firm could not point to any action the holder had failed to take to protect their interest. *Id.*

Here, by contrast, while the Government Defendants bear a responsibility to the public fisc that could affect their preferred remedy should the law be deemed a taking, the Proposed Intervenors' sole interest is in ensuring the continued enforceability of § 8-13.5-202(1)(b), even if that means requiring the payment of "just compensation." Moreover, unlike the five years of effective litigation in *Water Rights*, here, CLS and Doe in the first few months of the case can point to efforts they would make that the State Defendants have failed to pursue (*see infra* at 9-10; Motion 14-15), as well as "logical hypothetical decision[s]" the Government Defendants may take that would leave Proposed Intervenors' interests unprotected. 304 P.3d at 1172.[4]

[4] The Livestock Association's other authority is similarly inapposite. Initially, Plaintiff cites a case for the proposition that in Wisconsin, there is a presumption of adequate representation when a proposed intervenor seeks to defend a statute alongside the government. *Helgeland v. Wis. Munis.*, 745 N.W.2d 1, 46 (Wis. 2008). Presumably, the Livestock Association cites a Wisconsin case because it, like Proposed Intervenors, is unable to find any case establishing a similar presumption under Colorado law. Another of Plaintiff's cases suggests that government representation is presumptively adequate "when the applicant *shares the same interest*" as the government. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (emphasis added). Here, the Government Defendants' interests are not coterminous with the Proposed Intervenors' interests. Finally, even assuming that governmental representation is presumptively adequate under Colorado law, Proposed Intervenors have rebutted that presumption. *See infra* at 8–10. The Livestock Association's reliance on *New Jersey v. New York*, 345 U.S. 369, 373 (1953) and *South Carolina v. North Carolina*, 558 U.S. 256, 266–67, 276 & n. 8 (2010), is similarly unavailing, as both cases concern the interests of cities and states proceeding in *parens patrie* in original jurisdiction actions in which there is a "heightened standard for intervention," *South Carolina*, 558 U.S. at 276, n. 8. Unlike a State that sues on behalf of its citizens collectively, no current party is bound to advocate for CLS and Doe's interest.

At bottom, the Livestock Association elides that the Government Defendants' primary interest is not solely in the enforcement of section 8-13.5-202(1)(b), but in the enforcement of Colorado's laws generally — including those protecting the property rights of agricultural employers. So too, they ignore that Proposed Intervenors are not politically accountable to agricultural employers. When government defendants are thus cross-pressured by competing interests, courts have found that "the government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a particular member of the public. . . . [T]he government is obligated to consider a broader spectrum of views, many of which may conflict with the particular interest of the would-be intervenor." *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 996–97 (10th Cir. 2009); *accord Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 899 (9th Cir. 2011) (similar); *see also Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2205 (2022) (allowing intervention to defend state statute alongside state attorney general "who may feel allegiance to the voting public or share . . . administrative concerns" regarding statute's implementation); *Trbovich*, 404 U.S. at 538 (union member established inadequacy of government's representation where government was not only charged with enforcing member's rights, but also "has an obligation to protect the vital public interest in assuring free and democratic union elections that transcends [member's] narrower interest." (internal quotation marks omitted)).

B. Proposed Intervenors Have Made a Compelling Showing of Inadequacy

Even though Proposed Intervenors need not make a "compelling showing" of inadequacy, they have nevertheless done so. The Livestock Association complains that allowing the Proposed Intervenors to participate will throw a wrench into their efforts to "work[] cooperatively" with the Government Defendants to "move this case to a resolution on the merits in an efficient and cost-effective manner." Resp. at 16. This gives the game away. The Government Defendants' apparent

willingness to forgo pursuing jurisdictional issues, as well as pleading and evidentiary deficiencies, demonstrates the inadequacy of their representation of Proposed Intervenors' interests.

A proposed intervenor demonstrates the inadequacy of an existing party's representation of its interests by showing that the existing party is failing or will fail to present potentially dispositive arguments. *See O'Hara Grp. Denver, Ltd. v. Marcor Hous. Sys., Inc.*, 595 P.2d 679, 688 (Colo. 1979) (proposed intervenor's interests not adequately represented where putative intervenor "has available to it several arguments which could not be asserted by" the existing party); *see also Feigin v. Alexa Grp.*, 19 P.3d 23, 32 (Colo. 2001) (government representation adequate where proposed intervenors "have raised no issues or arguments that could not be adequately represented by the" government party).[5] Similarly, an existing party's failure to engage on evidentiary issues may demonstrate inadequacy of representation. *See Berger*, 142 S. Ct. at 2205 (representation inadequate where existing government party "declined to offer expert-witness affidavits in support of" the challenged law); *Sanguine Ltd. v. Dep't of Interior*, 736 F.2d 1416 (10th Cir. 1984) (representation inadequate in part because government "called no witnesses and made no significant arguments against Sanguine's motion"). Such failures go well beyond mere disagreements over strategy and demonstrate inadequacy.

Here, the Government Defendants have agreed that, assuming the Livestock Association's complaint survives a motion to dismiss, "discovery . . . will not be necessary." *See* Case Mgmt. Order at 5 (Sept. 21, 2022). To the contrary, if the complaint survives a motion to dismiss, discovery will be necessary on standing and the merits. On standing: Who are the Livestock

[5] Indeed, the Livestock Association's own authority states that "adequacy of representation" depends, in part, on whether "a present party . . . will undoubtedly make all of a proposed intervenor's arguments; and . . . whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Arakaki*, 324 F.3d at 1086; *see also* Resp. at 11–12 (citing *Arakaki*).

Association's members? Has anyone used § 8-13.5-202(1)(b) to enter those members' properties? Will any of those members imminently be subjected to enforcement action? On the merits, Plaintiff must demonstrate that the government has taken something of value. Without evidence as to whether § 8-13.5-202(1)(b) has harmed the value of the Livestock Association's members' property, Plaintiff cannot prove its case, and thus cannot obtain any remedy for a taking. As the Government Defendants do not appear interested in probing any of these issues, protection of Proposed Intervenors' interests requires that they have a chance to do so. Thus, Proposed Intervenors have made a compelling showing that the Government Defendants' representation of their interests is inadequate.

III. Permissive Intervention is Appropriate

In the alternative, Proposed Intervenors satisfy Rule 24(b)'s requirements because their "claim and the original cause of action present common questions of law or fact," and "intervention will not unduly delay or prejudice" the existing parties. CLS and Doe's motion came mere weeks after the suit was filed, and no dispositive motions have been filed. The only prejudice the Livestock Association can muster is that CLS and Doe's participation will put a damper on its preferred plan to invalidate § 8-13.5-202(1)(b) as quickly and efficiently as possible.[6] That Proposed Intervenors intend to pursue the so-called "maneuver" of filing a motion to dismiss (Resp. at 15) is entirely appropriate. Motions to dismiss are intended to identify jurisdictional defects and determine whether the plaintiff has asserted a claim or claims upon which relief can be granted, *Hemmann Mgmt. Servs. v. Mediacell, Inc.*, 176 P.3d 856, 858 (Colo. App. 2007), and

[6] The Livestock Association's argument on this point is internally incoherent. The Livestock Association asserts both that allowing intervention will drag out the case because Proposed Intervenors will raise issues that the Government Defendants have declined to address, and that the Government Defendants are vigorously defending Proposed Intervenors' interests. Both cannot be true.

serve to preserve judicial resources and avoid needless expenditure of time and effort by all parties involved.[7] If the Court concludes that Proposed Intervenors do not meet the requirements for intervention of right, it should permit them to intervene.

* * *

The Livestock Association claims that CLS's and Doe's need for and benefiting from § 8-13.5-202(1)(b) are irrelevant, and that they should be permitted only to file an amicus brief.[8] Amici are persons with a perspective to offer; intervention is for those whose rights are on the line. *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997) (intervention warranted because "[a]t stake is more than just the opportunity to present argument to the district court, an interest that can be accommodated by amicus participation"). Proposed Intervenors are the latter. Intervention is warranted.

CONCLUSION

For the reasons stated herein and in Proposed Intervenor's opening brief, their motion to intervene should be granted.

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[7] The Livestock Association's suggestion that Proposed Intervenors "improperly attempt to inject prejudice" (Resp. at 15) by noting that similar plaintiffs voluntarily dismissed claims nearly identical to the ones the Livestock Association here pursues, is baseless. Colorado courts do not bar litigants from relying on a case simply because one party disagrees with its significance.

[8] The Livestock Association relies on cases such as *Cook v. Pan Am. World Airways, Inc.*, 636 F. Supp. 693, 698 (S.D.N.Y. 1986), for this argument, but they are readily distinguishable. In *Cook*, the court found an amicus brief and not intervention appropriate because there was "no indication that movants would add any necessary element to th[e] case which w[ould] not be addressed by an existing party." *Id.*

CERTIFICATE OF SERVICE

This is to certify that on October 10, 2023, the undersigned duly served the Reply in Support of the Motion to Intervene upon all counsel of record who have entered their appearances on behalf of the parties to Case No. 2023CV495 via the Colorado Courts e-Filing System.

/s/ Valerie L. Collins

Valerie L. Collins