No. ____

In the Supreme Court of the United States

STANDING TOGETHER TO OPPOSE PARTIAL-BIRTH-ABORTION,

Petitioner,

v.

NORTHLAND FAMILY PLANNING CLINIC, INC., et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court should grant review to resolve the split in the circuit courts regarding the "interest" sufficient to intervene as of right under Federal Rule of Civil Procedure 24(a)(2). At present, there is no clear definition of the nature of the interest required for intervention. Moreover, there is conflict in the courts regarding the relationship between the "interest" required for Rule 24 and the interest required for Article III standing.

Petitioner Standing Together To Oppose Partial-birth-abortion, a ballot question committee formed by Right to Life of Michigan, Inc., seeks intervention to defend the constitutionality of the Legal Birth Definition Act, which was proposed by initiative petition pursuant to Article 2, § 9 of the Michigan Constitution.

Petitioner, the primary sponsor and supporter of this legislation, initiated the petition process, drafted the language of the petition, presented the petition to the Secretary of State and the Board of State Canvassers for approval, and acquired nearly 460,000 signatures to support it. Petitioner did not simply endorse or lobby for the Act; rather, it was responsible for ensuring that the legislation was enacted.

Petitioner timely filed a motion to intervene in defense of the Act pursuant to Rule 24. This motion was denied in the district court, and the denial was affirmed by the Sixth Circuit, which held that Petitioner lacked a sufficient "interest" to intervene.

1. Whether Petitioner, a public interest group, has a sufficient "interest" to intervene in an action challenging legislation it sponsored and supported.

PARTIES TO THE PROCEEDING

The Petitioner is Standing Together to Oppose Partial-birth-abortion ("Petitioner"), a proposed intervenor in the action.

The Respondent plaintiffs in the action are Northland Family Planning Clinic, Inc.; Northland Family Planning Clinic, Inc.—West; Northland Family Planning Clinic, Inc.—East; Summit Medical Center, Inc.; Planned Parenthood of Mid-Michigan Alliance; Planned Parenthood of South Central Michigan; Stanley M. Berry; Timothy R.B. Johnson; Karoline S. Puder; and Ronald C. Strickler ("Plaintiffs").

The Respondent defendants in the action are Michael A. Cox, Attorney General of the State of Michigan ("Attorney General"); and Kim L. Worthy, Prosecuting Attorney for Wayne County (collectively referred to as "Defendants").[1]

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[1] Article III standing is not an issue here because the Attorney General is seeking review of the decision below. *See Diamond v. Charles*, 476 U.S. 54, 64 (1986).

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JURISDICTION

The opinion of the panel was issued on June 4, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL LAW PROVISION INVOLVED

Rule 24 of the Federal Rules of Civil Procedure states in relevant part:

> (a) **Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT OF THE CASE

The Legal Birth Definition Act was proposed by initiative petition pursuant to Article 2, § 9 of the Michigan Constitution. Petitioner, a ballot question committee formed by Right to Life of Michigan, Inc. and registered with the Michigan Department of State pursuant to the Michigan

Campaign Finance Act, played a crucial role in enacting this citizen-initiated legislation. *See* App. 1a, 5a, 43a-44a, 66a.

In October 2003, Michigan Governor Jennifer Granholm vetoed a bill passed by the Michigan legislature to ban partial-birth abortion. In response, in January 2004, the citizens of Michigan, through the efforts of Petitioner, initiated legislation pursuant to Article 2, § 9 of the Michigan Constitution that would be immune from future vetoes by the governor. Petitioner organized and conducted one of the most successful petition drives in recent Michigan history. The campaign to initiate legislation to ban the controversial abortion procedure turned in nearly 460,000 signatures to state election officials, which was 200,000 more than needed to adopt the legislation without the governor's approval. The Act was subsequently passed by a simple majority vote in both the Michigan House (74 to 28) and Senate (23 to 12). *See generally* App. 66a.

The Legal Birth Definition Act states that "[a] perinate shall be considered a legally born person for all purposes under the law." M.C.L. § 333.1083. App. 74a. According to the Act, a "'[p]erinate' means a live human being at any point after which any anatomical part of the human being is known to have passed beyond the plane of the vaginal introitus until the point of complete expulsion or extraction from the mother's body." M.C.L. § 333.1085. App. 75a. The Act was based on the following findings:

> (a) That in *Roe v. Wade* the United States supreme court declared that an unborn child is not a person as understood and protected by the constitution, but any born child is a legal person with full constitutional and legal rights.

(b) That in *Roe v. Wade* the United States supreme court made no effort to define birth or place any restrictions on the states in defining when a human being is considered born for legal purposes.

(c) That when any portion of a human being has been vaginally delivered outside his or her mother's body, that portion of the body can only be described as born and the state has a rational basis for defining that human being as born and as a legal person.

(d) That the state has a compelling interest in protecting the life of a born person.

M.C.L. § 333.1082. App. 76a.

Through this legislation, Petitioner and the people of Michigan were asserting their significant and substantial interest in protecting and preserving human life. App. 67a.

On March 1, 2005, Plaintiffs filed a complaint, challenging the constitutionality of the Act. Plaintiffs sought declaratory and injunctive relief, claiming that the Act violated various liberty interests protected by the Fourteenth Amendment to the United States Constitution. Plaintiffs also filed a motion for preliminary injunction. App. 4a.

On March 14, 2005, Plaintiffs and the Attorney General stipulated to a Temporary Restraining Order ("TRO"), enjoining the enforcement of the Act until the resolution of Plaintiffs' motion for preliminary injunction. App. 4a.

On March 16, 2005, Petitioner filed a motion to intervene as a defendant.[2] This motion was "accompanied by a pleading setting forth the claim or defense for which intervention is sought" pursuant to Federal Rule of Civil Procedure 24(c). The accompanying pleading was Petitioner's "Answer in Intervention," the only filing permitted under the rules until intervention is granted. *See* Fed. R. Civ. P. 24(c); App. 65a-73a.

In its Answer, Petitioner denied much of the factual basis for Plaintiffs' claims. For example, Petitioner contested the following assertions:

- That the Act prohibited suction curettage, D&E, and induction;

- That the Act criminalized a broad range of procedures and actions physicians regularly perform during common methods of pre-viability abortions, as well as certain obstetrical procedures;

- That physicians would have to "guess as to what procedures or actions are encompassed by the Act";

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[2] Petitioner sought intervention as of right under Rule 24(a)(2) and permissive intervention under Rule 24(b)(2). Both were denied. It should be noted that the confusion in the circuit courts regarding the "interest" sufficient to intervene as of right and the interest required for Article III standing also exists in cases brought under Rule 24(b)(2). *See* Amy M. Gardner, Comment, *An Attempt to Intervene in the Confusion: Standing Requirements for Rule 24 Intervenors*, 69 U. Chi. L. Rev. 681 (2002). Therefore, granting this petition could help resolve issues related to permissive intervention as well.

- That the Act endangers the lives and health of pregnant women;

- That physicians cannot know what the Act means by its requirement that the physician make "every reasonable effort" to preserve the life of both the mother and the perinate when taking actions necessary to save the life of the mother; and

- That the Act fails to give adequate notice to physicians of what procedures or actions will subject them to liability. App. 65a-72a; *see generally* App. 35a.

The Attorney General moved to dismiss the complaint for failure to state a claim. Consequently, he did not submit affidavits or declarations in opposition to Plaintiffs' factual assertions, nor did he seek discovery to test their veracity. As a result, Plaintiffs' assertions, which ultimately served as the factual basis for the final decision in this case, remained uncontested in the proceedings below. *See* App. 4a, 5a-8a, 19a, 51a-57a.

Had Petitioner been permitted to intervene, it would have provided a more complete factual record, including expert testimony from qualified physicians and other medical personnel, demonstrating the inaccuracies of Plaintiffs' allegations. Moreover, Petitioner, the organization largely responsible for this citizen-initiated legislation, would have provided an important perspective as to the meaning and, therefore, the constitutionality of the Act. *See* App. 35a.

On September 15, 2005, the district court entered an order denying the Attorney General's motion to dismiss, granting a motion agreed upon by Plaintiffs and the Attorney General to consolidate Plaintiffs' motion for preliminary injunction with

a final hearing on the merits, denying Petitioner's motion to intervene and request to file a brief on the merits, and declaring the Act unconstitutional. App. 42a-62a.

Final judgment was entered in favor of Plaintiffs and against Defendants, disposing of all parties' claims. App. 63a.

On October 7, 2005, Petitioner and the Attorney General filed timely notices of appeal. On June 4, 2007, the court of appeals affirmed. App. 41a.

In its decision, the Sixth Circuit acknowledged that a remand would be fitting if the district court had improperly denied Petitioner's motion to intervene. The court stated, "[I]n light of STTOP's argument that it would have argued the case and developed the factual record differently than the state, a remand might be necessary to provide STTOP such an opportunity if the motion to intervene was incorrectly denied." App. 35a.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE CIRCUIT CONFLICT REGARDING THE "INTEREST" REQUIRED FOR INTERVENTION AS OF RIGHT UNDER FED. R. CIV. P. 24.

A. THERE IS A CIRCUIT SPLIT ON WHETHER A PUBLIC INTEREST GROUP IS ENTITLED TO INTERVENE IN AN ACTION CHALLENGING A MEASURE IT HAS SUPPORTED.

There is a recognized split of authority in the circuit courts regarding the interest necessary for a proposed

intervenor to intervene as of right in a federal action pursuant to Federal Rule of Civil Procedure 24. This is particularly true for cases in which a public interest group seeks to intervene in an action challenging legislation that it supported. In this case, the "interest" is heightened since Petitioner did more than simply endorse or lobby for legislation; it assumed the initial role of introducing the legislation through the arduous petition process.[3]

Some circuits, such as the Ninth Circuit, take a very liberal approach to intervention. For example, the Ninth Circuit has adopted a rule that "[a] public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397-98 (9th Cir. 1995) (concluding that the district court properly granted intervention to environmental groups in an action challenging the final rule listing the snail as an endangered species under the Endangered Species Act); *Washington State Bldg. & Constr. Trades v. Spellman*, 684 F.2d 627 (9th Cir. 1982) (holding that a public interest group was entitled as a matter of right to intervene in an action challenging the legality of a measure which it had sponsored and supported); *see also State of Idaho v. Freeman*, 625 F.2d 886 (9th Cir. 1980) (holding that the National Organization for Women had a right to

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[3] In *Doe v. Department of Soc. Serv.*, 439 Mich. 650 (1992), a case challenging a Michigan statute that prohibited the use of public funds to pay for an abortion unless the abortion was necessary to save the mother's life, Committee to End Tax Funded Abortions, a ballot question committee formed by Right to Life of Michigan, Inc., was permitted to intervene as a defendant. The challenged statute, similar to the legislation at issue here, was the result of an initiative petition sponsored and supported by the ballot question committee.

intervene in a suit challenging procedures for ratification of the proposed Equal Rights Amendment to the U.S. Constitution, a cause which that organization had championed).

The Ninth Circuit applies this liberal approach to intervention in other cases as well, particularly those involving aesthetic and environmental issues. *See, e.g., Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527-28 (9th Cir. 1983) (holding that a national, nonprofit organization devoted to the protection of birds and other animals was entitled to intervene as a matter of right in a suit challenging the creation of a "birds of prey" conservation area in Idaho).

The Tenth Circuit has also broadly construed the interest sufficient to intervene as a matter of right. *See National Farm Lines v. Interstate Commerce Comm'n*, 564 F.2d 381, 384 (10th Cir. 1977) ("Our court has tended to follow a somewhat liberal line in allowing intervention."). For example, in *Coalition of Arizona/New Mexico Counties v. Department of the Interior*, 100 F.3d 837 (10th Cir. 1996), the court held that a proposed intervenor, who was a photographer and self-proclaimed amateur biologist and naturalist with an interest in preserving the Mexican spotted owl, could intervene as of right in an action challenging the decision to protect the owl under the Endangered Species Act. Accordingly, the Tenth Circuit views "the 'interest' test [as] primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Id.* at 841 (internal quotations and citation omitted); *see also San Juan County v. United States*, 420 F.3d 1197, 1209 (10th Cir. 2005) ("It is not necessary, however, for a party intervening as a matter of right to be able to assert its own cause of action.").

In comparison with those circuits that liberally construe Rule 24 in favor of intervention, the Seventh Circuit takes a very narrow view of the "interest" necessary to support intervention as of right. In *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985), for example, the court held that "[a] proposed intervenor must demonstrate a direct, significant and legally protectable interest in the property at issue in the law suit." The court stated that the "interest" in the action "must be so direct that the applicant would have a right to maintain a claim for the relief sought." *Id.* In *United States v. 36.96 Acres of Land*, 754 F.2d 855, 859 (7th Cir. 1985), the court emphasized its strict view of the "interest" necessary to intervene, holding that this interest "must be greater than the interest sufficient to satisfy the standing requirement."

Accordingly, the Seventh Circuit rejects the view that a public interest group that is involved in the process leading to the adoption of legislation has a sufficient interest to intervene in an action to defend that legislation. *See Keith*, 764 F.2d at 1269-70. The Seventh Circuit also rejects the argument that aesthetic and environmental interests constitute a "direct, substantial, and legally protectable" interest sufficient to justify intervention, *36.96 Acres of Land*, 754 F.2d at 859, contrary to the Ninth and Tenth Circuits. And the Seventh Circuit holds that the "interest" necessary for intervention is greater than the interest necessary to confer standing. *Id.* As noted further below, this holding is at odds with several other circuits.

The Sixth Circuit claims to have "opted for a rather expansive notion of the interest sufficient to invoke intervention of right." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997); *see also Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) ("[T]his court has acknowledged that 'interest' is to be construed

liberally."). In fact, the court "noted that an intervenor need not have the same standing necessary to initiate a lawsuit, and cited with approval decisions of other courts 'reject[ing] the notion that Rule 24(a)(2) requires a specific legal or equitable interest.'" *Miller*, 103 F.3d at 1245 (internal citation omitted) (emphasis added).

Accordingly, the Sixth Circuit has cited with approval the broad rule adopted by the Ninth Circuit "that a public interest group that is involved in the process leading to adoption of legislation has a cognizable interest in defending that legislation." *Id.* at 1245-46 (citing *Idaho Farm Bureau Fed'n*, 58 F.3d at 1397-98; *Sagebrush Rebellion, Inc.*, 713 F.2d at 527-28; *Freeman*, 625 F.2d at 886). However, it now appears from the panel's decision below that the court has adopted a less "liberal" view of intervention, making arguments that more closely equate "interest" under Rule 24 with the interest required for standing. *See* App. 37a (finding no legal interest in the action since Petitioner "is not itself regulated by any of the statutory provisions at issue here").

As a consequence of this circuit split, one's ability to intervene in an action tends to be less dependent upon the Federal Rules of Civil Procedure or the Constitution than it is upon the circuit in which the lawsuit is brought. This anomaly has the deleterious effect of causing inconsistent results, creating confusion for the courts and the litigants, and encouraging forum shopping by plaintiffs who anticipate the likelihood that a third party will intervene. A circuit split in an area as fundamental as whether a party may participate in

an action in which it has an interest is one that this Court should resolve by granting review of this case.[4]

B. THERE IS CONFUSION AND A CIRCUIT SPLIT REGARDING THE RELATIONSHIP BETWEEN RULE 24 AND ARTICLE III STANDING.

The relationship between the "interest" required to satisfy intervention under Rule 24 and the interest required to satisfy standing under Article III are often conflated, leading to contradictory results in the circuit courts.

The Eighth and D.C. Circuits, for example, have held that an "interest" sufficient to satisfy Article III standing is required to intervene. *Mausolf v. Babbit*, 85 F.3d 1295, 1300 (8th Cir. 1996); *Building & Const. Trades Dept., AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994); *see also*

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[4] In addition to the split over the "interest" requirement of Rule 24, the circuit courts also apply different standards for determining whether a proposed intervenor's interests are "adequately represented by existing parties." *See* Fed. R. Civ. P. 24(a)(2). For example, the Sixth Circuit "has declined to endorse a higher standard for inadequacy when a government entity is involved." *Grutter v. Bollinger*, 188 F.3d 394, 400 (6th Cir. 1999). In comparison, the Seventh Circuit holds that "[a]dequacy can be presumed when the party on whose behalf the applicant seeks intervention is a governmental body or officer charged by law with representing the interests of the proposed intervenor." *Keith*, 764 F.2d at 1270. Petitioner contends that the Sixth Circuit has the better view, particularly in cases such as this, because the sponsor of a successful ballot initiative should not be forced to rely on representation by government officials to protect its interests when the very purpose of the initiative was to overcome the lack of responsiveness of the public officials to the public will in the first instance.

Southern Christian Leadership Conference v. Kelley, 747 F.2d 777, 779 (8th Cir. 1984) (equating Rule 24 "interest" with interest required for standing under Article III). The Eleventh Circuit has stated that while Article III standing is not required, it is "relevant" to identifying the "interest" required to satisfy Rule 24. *Chiles v. Thornburgh*, 865 F.2d 1197, 1212-13 (11th Cir. 1989). The Second, Fifth, Sixth, and Ninth Circuits have all concluded that standing is not required for intervention under Rule 24. *United States Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978); *Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998); *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 690 (6th Cir. 1994); *Yniguez v. Arizona*, 939 F.2d 727, 731 (9th Cir. 1991). And, as noted previously, the Seventh Circuit maintains that Rule 24 requires an "interest" greater than the interest necessary to confer standing. *36.96 Acres of Land*, 754 F.2d at 859.

It is evident from these conflicting decisions that the "interest" required by Rule 24 has evaded a precise definition that is generally accepted by the lower federal courts, causing significant confusion between the Rule 24 "interest" requirement and the interest required for standing under Article III.

Arguably, this Court's decision in *Diamond v. Charles*, 476 U.S. 54 (1986) has contributed to this confusion. In *Diamond*, the Court stated,

> This Court has recognized that certain public concerns may constitute an adequate "interest" within the meaning of Federal Rule of Civil Procedure 24(a)(2) . . . and has held that an interest under Rule 24(a)(2), which provides for intervention as of right, requires a "significantly protectable interest." However, the

> precise relationship between the interest required to satisfy the Rule and the interest required to confer standing, has led to anomalous decisions in the Courts of Appeals. We need not decide today whether a party seeking to intervene before a District Court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III.

Id. at 68-69 (citations omitted).

Of interest here is the fact that the conflicting cases generally struggle with defining Rule 24's "interest" requirement and not the Article III standing requirements. *See also* 7C Wright, Miller, and Kane, *Federal Practice & Procedure: Civil 2d* § 1908 (2d. ed. 1986) at 263 ("There is not as yet any clear definition, either from the Supreme Court or from the lower courts, of the nature of the 'interest relating to the property or transaction which is the subject of the action' that is required for intervention of right.").

In sum, this Court should grant review of this case to provide a clear definition of the nature of the interest that is required for intervention and to resolve the conflict between the "interest" required to intervene and the interest required for Article III standing.

II. THE HOLDING IN THE CASE BELOW CREATES AN ANOMALOUS, IF NOT TRAGICALLY IRONIC, RESULT REGARDING THE "INTEREST" NECESSARY TO ALLOW PUBLIC INTEREST GROUPS TO INTERVENE.

Some circuit courts have permitted groups and individuals to intervene to protect their interests in the preservation and protection of "birds of prey," *see Sagebrush Rebellion, Inc.*,

713 F.2d at 527, the Mexican spotted owl, *see Coalition of Arizona/New Mexico Counties*, 100 F.3d at 837, and even the snail, *see Idaho Farm Bureau Fed'n*, 58 F.3d at 1397. Consequently, one should expect the circuit courts to acknowledge a proposed intervenor's interest in the preservation and protection of human life, which is at least as "significant" and "substantial" as an environmental group's interest in the preservation and protection of a snail. Unfortunately, that was not the case here.

In *Gonzales v. Carhart*, 127 S.Ct. 1610 (2007), this Court reaffirmed the people's "legitimate and substantial interest in preserving and promoting fetal life." *Id.* at 1626. The Court also affirmed the right of the people to enact legislation that draws a clear line between abortion and infanticide, *id.* at 1633-34, as Petitioner and the people of Michigan have done here through the Legal Birth Definition Act.

In sum, today it cannot be gainsaid that the preservation and protection of human life is a significant public interest. Consequently, it is an interest that should satisfy the "interest" requirement of Rule 24. *See, e.g., Diamond*, 476 U.S. at 68 (recognizing that "certain public concerns may constitute an adequate 'interest' within the meaning of Federal Rule of Civil Procedure 24(a)(2)").

CONCLUSION

The circuit courts are split on the issue of whether a public interest group responsible for enacting legislation has a sufficient interest to intervene as of right in an action challenging the legislation. Essentially, the circuit courts disagree on the scope and application of Rule 24, particularly with regard to the "interest" required for intervention. Consequently, this Court should grant review of this case in

order to clarify the standard for intervention so as to secure and maintain uniformity of decisions on this important issue of federal law.

Upon review, this Court should reverse the denial of intervention and remand to provide Petitioner the opportunity to fully develop the factual record and to argue the merits of the case.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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