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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; GIOVANNINA 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. 18853

MEMORANDUM OF AMICI CURIAE RIGHT TO LIFE OF WYOMING, WYOMING LEGISLATORS, AND SECRETARY OF STATE CHUCK GRAY IN OPPOSITION TO EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

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INTRODUCTION AND INTEREST OF AMICI

Wyoming has consistently sought to protect life and ensure women's health and safety. Wyoming has various statutes that aim to accomplish this goal. In the 2023 Legislative Session, the Wyoming Legislature enacted Wyo. Stat. § 35-6-120 *et seq*. (Life is a Human Right Act or "the Act"), specifically seeking to advance Wyoming's legitimate interest in protecting fetal life and ensuring maternal health and safety. Plaintiffs, a coalition of abortion providers and supporters, have asked this court for a Temporary Restraining Order on the Act. Amici Curiae seek to defend this law and oppose the requested TRO. Amici Curiae include Wyoming Legislators Representative Rachel Rodriguez-Williams and Representative Chip Neiman, Wyoming Secretary of State Chuck Gray, and Right to Life of Wyoming.

Wyoming Legislators Representative Rodriguez-Williams and Representative Neiman are members of the Wyoming House of Representatives who respectively represent District 50 and District 1. The Legislators have an interest in preserving the authority of the Wyoming Legislature to protect unborn life, ensure women's health and safety, and regulate the medical profession. Representatives Rodriguez-Williams and Neiman have specific interests in seeing that this law they duly enacted on behalf of their constituents is sustained given their sponsorship and advocacy for pro-life laws.

Secretary of State Chuck Gray is an elected constitutional officer with comprehensive constitutional and statutory duties including maintaining records and proceedings of the Wyoming Legislature, recording agency rules (including those governing health care), and registering nonprofit and for-profit entities (including

those in health care). Secretary of State Gray, as a member of the Wyoming executive branch and a longtime member of the Wyoming pro-life movement, also has an interest in seeing this duly enacted pro-life act upheld and enforced.

Right to Life of Wyoming is a pro-life nonprofit organization that advocates for pro-life laws, educates the public about the sanctity of human life from conception to natural death, and seeks to promote a culture of life in Wyoming. This organization has an interest in seeing the pro-life laws they advocate for sustained. Right to Life of Wyoming has a particular interest in seeing the Life is a Human Right Act upheld given its significant role in the passage of the Act. Right to Life of Wyoming assisted in assembling the bill, drafting multiple amendments, preparing and circulating position papers, meeting with legislators to lobby, and galvanizing public support for this Act. As a part of this advocacy process, it also interviewed OB/Gyns to ensure medical care would not be impaired by the meticulous life-affirming provisions of the Act.

Amici have significant interests implicated by this case; in defending these interests, amici will provide unique legal and factual arguments to assist this Court in resolving this case.

LEGAL STANDARD

In Wyoming, "[i]njunctive relief is authorized by statute." *Brown v. Best Home Health & Hospice, LLC*, 2021 WY 83, ¶ 6, 491 P.3d 1021, 1025–26 (Wyo. 2021). A temporary restraining order or preliminary injunction may be granted "[w]hen . . . the plaintiff is entitled to relief consisting of restraining the commission or continuance of some act . . . of which during the litigation would produce great or

irreparable injury to the plaintiff[.]" Wyo. Stat. § 1-28-102. Thus, "the substantive requirements for granting a TRO and a preliminary injunction are the same." *Brown*, 2021 WY at ¶ 7, 491 P.3d at 1026 n.4. "Injunctive relief is an extraordinary remedy, which will only be granted upon 'a clear showing of probable success [on the merits of the suit] and possible irreparable injury to the plaintiff, lest the proper freedom of action of the defendant be circumscribed when no wrong has been committed.'" *Malave v. W. Wyo. Beverages, Inc.*, 2022 WY 14, ¶ 8, 503 P.3d 36, 39 (Wyo. 2022). Plaintiffs have not made that showing here.

ARGUMENT

I. Plaintiffs are not entitled to a temporary restraining order because they are unlikely to succeed on the merits of their constitutional claims.

A. Plaintiffs do not have standing to challenge HEA 88.

The standing analysis under Wyoming law is not governed by federal law, although federal law can be a helpful guide. *Allred v. Bebout*, 2018 WY 8, ¶ 35, 409 P.3d 260, 269 (Wyo. 2018). Wyoming courts apply a four-part test for standing: Plaintiffs must show (1) "existing and genuine, as distinguished from theoretical, rights or interests"; (2) a controversy "upon which the judgment of the court may effectively operate"; (3) "a controversy the judicial determination of which will have the force and effect of a final judgment in law or decree in equity upon the rights, status or other legal relationships of one or more of the real parties in interest"; and (4) that the proceedings are "genuinely adversary in character and not a mere disputation." *Id.* 2018 WY at ¶ 37, 409 P.3d at 270 (quoting *Brimmer v. Thomson*, 521 P.2d 574, 578 (Wyo. 1974)).

While historically the Wyoming Supreme Court has "relaxed [its] 'definition of standing when a matter of great public interest or importance is at stake,'" it has more recently "retreated from this liberal application of the public interest factor." *Id.* 2018 WY at ¶ 40, 409 P.3d at 271 (quoting *William F. W. Ranch, LLC v. Tyrell*, 2009 WY 62, ¶ 45, 206 P.3d 722, 736 (Wyo. 2009)). Thus, "a great public interest alone is insufficient to warrant the action of the court." *Id.* (quoting *William F. W. Ranch*, 2009 WY at ¶ 46, 206 P.3d at 737). Plaintiffs here have not shown that they meet this high bar.

1. Danielle Johnson lacks standing because her interest in this case is merely theoretical.

Plaintiff Danielle Johnson does not have standing to challenge HEA 88 because she does not even allege she is currently pregnant. *See* Compl. ¶ 46 & n.15; Johnson Aff. ¶ 11, Ex. 1 to Pls.' Mot. for TRO. Ms. Johnson testifies that "[s]hould Wyoming's Abortion Ban . . . become effective, [her] loss of the right to seek appropriate healthcare for [her]self and [her] family and [her] ability to make personal decisions about [her] future pregnancies would influence whether or not [her] family chooses to stay in Wyoming." Johnson Aff. ¶ 12. But Ms. Johnson does not allege any present intention of having an abortion; indeed, she states that her "desire is to have additional children in Wyoming." *Id.* ¶ 11. Nor does she allege any specific health condition that would cause her to be "in a life-threatening situation" if she became pregnant or to have "a fetus with lethal defects." *Id.* ¶¶ 15, 16. Regardless, HEA 88 contains exceptions for abortions performed "to prevent the death of the pregnant

woman" and for abortions on a baby with a "lethal fetal anomaly." Wyo. Stat. § 35-6-124(a).

In other words, Ms. Johnson *may* want an abortion sometime in the future *if* she gets pregnant and *if* that pregnancy endangers her health or *if* her fetus has a lethal fetal anomaly and *if* these circumstances are not covered by HEA 88's exceptions. But in Wyoming, "the declaratory judgment vehicle cannot be called upon to secure advisory opinions and thus a controversy must be demonstrated in which the parties have a real as distinguished from theoretical concern." *Mountain W. Farm Bureau Mut. Ins. Co., Inc. v. Hallmark Ins., Co.*, 561 P.2d 706, 709 (1977). Ms. Johnson's vague allegations are precisely the type of "theoretical" interest that is barred under Wyoming's standing law. *See Brimmer*, 521 P.2d at 578.

Ms. Johnson further alleges that HEA 88 "raise[s] concerns about how to provide evidence-based care to pregnant patients" in her job as an emergency room nurse. Johnson Aff. ¶¶ 18, 19. But Ms. Johnson does not allege that she has ever performed an abortion or that she has any intention of performing abortions. Nor could she: Wyoming law prohibits anyone other than a physician from performing an abortion. Wyo. Stat. § 35-6-111. Thus, Ms. Johnson does not have standing to raise her own rights, nor does she have standing to raise the rights of her patients seeking abortion.

2. Kathleen Dow lacks standing because her interest in this case is merely theoretical.

Like Ms. Johnson, Plaintiff Kathleen Dow does not have standing to challenge HEA 88 because she is not currently pregnant. Compl. ¶ 47; Dow Aff. ¶¶ 11, 12, Ex.

2 to Pls.' Mot. for TRO. Ms. Dow alleges that she is "engaged to be married" and that she and her fiancé "plan to have children." Dow Aff. ¶ 12. But she does not allege any present intention of having an abortion or anticipating any medical conditions that would make pregnancy especially dangerous for her. Instead, she alleges that "*if* [she] experience[s] any complications in [her] intended *future* pregnancies" or "[*i*]*f* [her] *future* pregnancies reveal that [she] is pregnant with a fetus with lethal defects," she *may* have an abortion. Dow Aff. ¶¶ 16, 17. But this theoretical interest is not sufficient to confer standing. *See supra* Part I.A.1.

3. Dr. Giovannina Anthony lacks third-party standing to raise the rights of her patients.

Plaintiff Giovannina Anthony, M.D., is a physician who, prior to the enactment of HEA 88, provided chemical abortions in Wyoming. Compl. ¶ 48; Anthony Aff. ¶¶ 1, 9–10, Ex. 3 to Pls.' Mot. for TRO. She alleges that due to HEA 88, she has "stop[ped] providing all abortions in Wyoming." Anthony Aff. ¶ 15. "Dr. Anthony brings her claims on her behalf and on behalf of her patients." Compl. ¶ 48. Because abortion providers have no constitutional right to perform abortions, *see Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 912 (6th Cir. 2019), Dr. Anthony is left with the rights of her patients.

The Wyoming Supreme Court has never addressed whether abortion providers have third-party standing to assert the rights of their patients. In fact, the Wyoming Supreme Court has never recognized third-party standing at all in the constitutional context. On the contrary, the Court has held that "a party who asserts the violation of a constitutional provision by a legislative enactment must show an adverse effect

upon *his* rights." *William F. W. Ranch*, 2009 WY at ¶ 16, 206 P.3d at 728 (quoting *Budd v. Bishop*, 543 P.2d 368, 371–72 (Wyo. 1975)) (emphasis added). Consequently, "[n]o one is entitled to present a claim that a particular statute is unconstitutional as to other persons or classes of persons, but he must demonstrate injury to *his own rights*." *Id.* (emphasis added).

This Court should decline to extend Wyoming standing doctrine to include third-party standing for abortion providers wishing to assert the rights of their patients. Even under the federal standing doctrine, the U.S. Supreme Court has recently retreated from allowing abortion providers to assert standing in this context. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2275 (2022) (criticizing the Court's abortion precedents for "ignor[ing] the Court's third-party standing doctrine").

Relying on this statement from *Dobbs*, the Kentucky Supreme Court recently rejected third-party standing for abortion providers under its state constitution. *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, No. 2022-SC-0329-TG, 2023 WL 2033788, at *13 (Ky. Feb. 16, 2023). The court held that the plaintiff abortion providers "ha[d] not shown that there is a hinderance or genuine obstacle to their patients challenging the trigger ban and heartbeat ban on their own behalf." *Id.* at 16. It further held that the providers had not shown a close relationship with their patients because "the abortion providers' interest in not being civilly or criminally prosecuted under the statutes appears to potentially conflict with a pregnant woman's interest in receiving adequate medical care." *Id.*

The same concerns are present in this case. First, pregnant women can and have sued on their own behalf in Wyoming. *See Doe v. Burk*, 513 P.2d 643, 644 (Wyo. 1973) ("Plaintiff Doe . . . filed her petition alleging that she was in the fourteenth week of her pregnancy and had applied for therapeutic abortion to her physician, who had refused to perform this because of his fear of prosecution under these sections of the abortion law."). Second, as in *Cameron*, Dr. Anthony testifies that if she "resume[s] providing normal services to [her] Wyoming patients," she "will face the possibility of criminal prosecution and risk losing [her] [medical] license permanently" and that as a result, Wyoming women "will be forced to remain pregnant against their will" and she "will be forced to delay appropriate medical care for women with desired pregnancies." Anthony Aff. ¶¶ 15–17. Thus, Dr. Anthony's interests differ from those of the patients that she purports to represent.

For these reasons, Dr. Anthony does not have third-party standing to assert the rights of her patients.

4. Dr. Rene Hinkle lacks standing because she is not an abortion provider.

Plaintiff Rene Hinkle, M.D, is a Wyoming physician who "does not perform elective abortions." Compl. ¶ 49; Hinkle Aff. ¶ 1, Ex. 4 to Pls.' Mot. for TRO. She testifies that her clinic "offer[s] counseling to pregnant women about all the medical options available to them, including abortion," and "offer[s] prescription medication to terminate pregnancies" for "pregnant patients who have a desired pregnancy, but in which the fetus has a lethal abnormality." Hinkle Aff. ¶¶ 12, 13. "Dr. Hinkle brings her claims on her behalf, and on behalf of her patients." Compl. ¶ 49.

But HEA 88 does not prohibit counseling pregnant women about their legal options within Wyoming, nor advising them about the availability of legal abortion out of state. Moreover, it contains an exception for an abortion of a fetus with a lethal fetal anomaly. Wyo. Stat. § 35-6-124(a)(iv). Because Dr. Hinkle does not provide the type of abortions prohibited by HEA 88, she has no standing to challenge it.

Regardless, Dr. Hinkle would not have standing to challenge HEA 88 on her own behalf or on behalf of her patients seeking abortion for the same reasons that Dr. Anthony does not have standing. *See supra* Part I.A.3.

5. Chelsea's Fund lacks standing because it is simply an interest group that wishes to spend money on elective abortion.

Plaintiff Chelsea's Fund is an organization that provides information, funding, and logistical support to Wyoming women seeking abortion. Compl. ¶ 50; Lichtenfels Aff. ¶¶ 4–6, Ex. 5 to Pls.' Mot. for TRO. Chelsea's Fund does not allege that it provides abortions. Instead, it alleges that HEA 88 will "result in the denial of access to needed abortion care for our clients" and "significant organizational and financial burdens" to itself. Lichtenfels Aff. ¶ 16. "Chelsea's Fund brings its claims on behalf of itself and on behalf of its constituents who rely upon their association with the organization to protect their rights." Compl. ¶ 50.

As explained above, abortion providers do not have third-party standing to assert the rights of their patients in Wyoming. *See supra* Part I.A.3. But Chelsea's Fund is not even an abortion provider, meaning that it would not have standing even under the federal pre-*Dobbs* standard. *See Singleton v. Wulff*, 428 U.S. 106, 117, 96 S. Ct. 2868, 2875–76 (1976) (relying on the doctor-patient relationship to hold that

an abortion provider had third-party standing to assert patient's rights). Nor does Chelsea's Fund allege that it is a membership organization giving rise to association standing on behalf of its members. *See N. Laramie Range Found. v. Converse Cnty. Bd. of Cnty. Comm'rs*, 2012 WY 158, ¶ 29, 290 P.3d 1063, 1074 (Wyo. 2012) ("An association can establish standing on its own or through the associational rights of its members.").

Consequently, Chelsea's Fund is left with only its own interests, which essentially boil down to its interest in paying for women's abortions. But just as there is not constitutional right to perform abortions, there is no constitutional right to pay for other people's abortions. Any abortion right, if one exists, belongs to the woman seeking the abortion. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 896, 112 S. Ct. 2791, 2807 (1992) (finding the abortion right in "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child" (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453, 92 S. Ct. 1029, 1038 (1972))). Therefore, Chelsea's Fund does not have standing to challenge HEA 88.

6. Circle of Hope does not have third-party standing to raise the rights of its patients.

Plaintiff Circle of Hope Health Care Services, Inc., is "a medical clinic in Casper, Wyoming" that wishes to "offer abortion and other health-related services." Compl. ¶ 51. The clinic "hope[s] to open in the next several weeks." Burkhart Aff. ¶ 16, Ex. 6 to Pls.' Mot. for TRO. When it opens, Circle of Hope aspires to provide both chemical and surgical abortions. *Id.* ¶¶ 12, 14. "Circle of Hope brings its claims on

behalf of itself, and on behalf of its clients and patients who rely upon their association with the organization, and its clinics and health care providers, to protect each and all of their rights." Compl. ¶ 52. But, based on its allegations, Circle of Hope has no abortion clients or patients at all.

Moreover, Circle of Hope has no constitutional right to perform abortions. *See Hodges*, 917 F.3d at 912. And it does not have third-party standing to assert the rights of its hypothetical patients. *See supra* Part I.A.3. Nor does it have associational standing on behalf of its members. *See supra* Part I.A.5. Consequently, Circle of Hope does not have standing to challenge HEA 88.

B. HEA 88 does not violate the Wyoming Constitution.

Plaintiffs argue that HEA 88 violates four provisions of the Wyoming Constitution: (1) "the constitutional prohibition on vague criminal statutes that do not provide sufficient notice to regulated parties of what conduct is prohibited;" (2) "the constitutional right of Wyoming citizens to control their own health care free from undue government interference;" (3) "the constitutional prohibition on establishment of religion;" and (4) "the constitutional right to equal protection." Pls.' Mem. in Supp. of Mot. for TRO 16 ("Pls.' Memo"). Because none of these constitutional provisions protects a right to abortion, Plaintiffs have no likelihood of success on the merits of their constitutional claims.

1. HEA 88 is not unconstitutionally vague.

Under the Wyoming Constitution, "[a] statute is impermissibly vague if people of common intelligence must necessarily guess at its meaning and would differ as to its application." *EOG Res., Inc. v. JJLM Land, LLC*, 2022 WY 162, ¶ 20, 522 P.3d

605, 611 (Wyo. 2022) (quoting *Travelocity.com LP v. Wyo. Dep't of Revenue*, 2014 WY 43, ¶ 98, 329 P.3d 131, 152 (Wyo. 2014)). "To succeed on a claim of vagueness, 'the complainant must demonstrate that the law is impermissibly vague in all of its applications.'" *Id.* (quoting *Vill. of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 497, 102 S. Ct. 1186, 1193 (1982)). Thus, "[i]f legislative intent can be ascertained with reasonable certainty, the statute will not be declared inoperative." *Id.* Conversely, "lack of precision is not itself offensive to the requirements of due process." *Id.*

Plaintiffs appear to concede that the legislature cured any vagueness in HEA's exception for sexual assault and incest by "includ[ing] language suggesting that a physician could rely upon a patient's police report of sexual assault or incest." Pls.' Mem. 30. However, they argue that HEA 88's exception for the life and health of the mother remains vague. *Id.*

But HEA 88 allows a physician to exercise his or her "reasonable medical judgment" in determining whether a particular pregnancy fits into one of the statute's exceptions. Wyo. Stat. § 35-6-124(a)(i). While the Wyoming Supreme Court has not specifically addressed the "reasonable medical judgment" standard, other courts have held that "a reasonable medical judgment standard does not render a statute void for vagueness in the abortion-regulation context." *See, e.g.*, *Planned Parenthood of Ind. & Ky., Inc. v. Marion Cnty. Prosecutor*, 7 F.4th 594, 601 (7th Cir. 2021).

Moreover, the provisions of HEA 88 that require a physician to apply his or her reasonable medical judgment are straightforward and easy to understand. Physicians

are well-equipped to determine when a medical procedure is "necessary . . . to prevent . . . death," when a medical condition presents "a substantial risk of death," and what constitutes "a life-sustaining organ." Wyo. Stat. § 35-6-124(a)(i); *see also* Pls.' Mem. 30. Indeed, physicians make these types of determinations every day. *See* Skop Aff. ¶ 23, attached as Exhibit 1 (explaining that "[t]here should not be confusion about when [medical] intervention is needed" because "[t]he law allows a physician to use his 'reasonable medical judgment'").

Nor does the term "separation procedure" render the statute vague. Pls.' Mem. 30. In the context of the statute, "separation procedure" clearly means a procedure to separate the fetus from the mother. According to Dr. Ingrid Skop, "ACOG supports maternal fetal separation (which can be done by abortion or labor induction)." Skop. Aff. ¶ 24. And the statute only requires reasonable medical efforts . . . to preserve . . . the life of the unborn baby," Wyo. Stat. § 35-6-124(a)(i), so a doctor need not fear prosecution if the baby cannot survive due to its gestational age or a lethal fetal anomaly.

Apparently unsatisfied, Plaintiffs next turn to the "lethal fetal anomaly" exception, arguing that "it is impossible for a physician to determine in advance whether a fetus with a fatal anomaly will survive minutes, hours, days, or months following birth." Pls.' Mem. 31. But the statute does not require certainty, but only a "substantial likelihood of death of the child within hours of the child's birth." Wyo. Stat. § 35-6-122(a)(vi). And according to Dr. David Lind, a physician who is concerned about violating this provision can get "a second opinion from a perinatologist that

concurs the baby would die in utero or shortly after birth." Lind Aff. ¶ 7, attached as Exhibit 2.

Because a physician exercising his or her reasonable medical judgment could understand the meaning of the statute, HEA 88 is not unconstitutionally vague.

2. Abortion is not health care within the meaning of Article 1, section 38.

Article 1, Section 38 of the Wyoming Constitution provides that "[e]ach competent adult shall have the right to make his or her own health care decisions." Wyo. Const. art. 1, § 38(a). However, it further provides that "[t]he legislature may determine reasonable and necessary restrictions on the rights granted under this section to protect the health and general welfare of the people or to accomplish the other purposes set forth in the Wyoming Constitution." *Id.* § 38(c).

The Wyoming Supreme Court has never interpreted this provision, which was just adopted in 2012. But in general, constitutional interpretation is "guided primarily by the intent of the drafters." *Powers v. State*, 2014 WY 15, ¶ 8, 318 P.3d 300, 303 (Wyo. 2014). Because "the intent must be found in the instrument itself," "the language of the text is of primary importance in constitutional interpretation." *Id.,* 2014 WY at ¶¶ 8–9, 318 P.3d at 304.

HEA 88 specifically provides that "abortion as defined in this act is not health care," but "the intentional termination of the life of an unborn baby." Wyo. Stat. § 35-6-121(a)(iv). Moreover, the history surrounding the ratification of section 38 confirms that the Legislature and the voters did not intend for it to implicitly confer a right to abortion. Instead, voters understood section 38 to provide an alternative to the federal

Affordable Care Act. *See* Elizabeth Dias, *Ballot Initative of the Day: Will Wyoming Resist Obamacare?*, Time (Oct. 31, 2012), http://bit.ly/3JXihLt; Robert B. Keiter, The Wyoming State Constitution 110 (Oxford Univ. Press 2d ed. 2017) .

Thus, Section 38 does not protect a right to whatever health care a patient might want, but instead a right to make "health care decisions." In other words, a patient may choose between legal health care options without "undue governmental infringement," not demand availability of illegal treatments. Plaintiffs, relying on the now-moot preliminary injunction order against Wyoming's trigger law, argue that Wyoming citizens have a right to "any care, treatment, service or procedure to maintain, diagnose or otherwise affect an individual's physical or mental condition." Pls.' Mem. 19. But that broad interpretation would lead to a host of new rights that voters could not have anticipated when they ratified the amendment, including one to physician-assisted suicide.

Regardless, HEA 88 only prohibits elective abortions and specifically exempts abortions necessary to save the life or health of the mother. Wyo. Stat. § 35-6-124(a). Therefore, HEA 88 does not prohibit any needed health care services for women. *See* AAPLOG Letter, attached as Exhibit 3. Because abortion does not qualify as healthcare, HEA 88 does not violate section 38.

3. HEA 88 does not establish a religion in violation of the Wyoming Constitution.

The Wyoming Constitution does not have an establishment clause. While the Wyoming Supreme Court has said that "the Wyoming Constitution . . . contains its own variation of the federal establishment clause," *In re Neely*, 2017 WY 25, ¶ 48, 390

P.3d 728, 744 (Wyo. 2017), the provisions it cites are more specific than the federal establishment clause.[1] First, Article 1, Section 19 prohibits the State from giving money "to any sectarian or religious society or institution." Wyo. Const. art. 1, § 19. Second, Article 7, Section 12 prohibits public schools from requiring "sectarian instruction, qualifications or tests," "attendance . . . at any religious service," and teaching "sectarian tenets or doctrines." *Id.* art. 7, § 12.

Because HEA 88 has nothing to do with either government funding for religious institutions or public schools, it does not violate those provisions. Plaintiffs do not cite a single case striking down a law on establishment grounds outside of this context. *Neely* is a free exercise case. 2017 WY at ¶ 16, 390 P.3d at 735. And *Snyder v. Snyder*, 2021 WY 115, 496 P.3d 1255 (Wyo. 2021), and *Wilson v. Wilson*, 473 P.2d 595 (Wyo. 1970), are family law cases, not establishment clause challenges. Finally, while a federal court found a violation of Article 7, Section 12 in *Williams v. Eaton*, that case dealt with a state-funded university. 333 F. Supp. 107, 113–14 (D. Wyo. 1971). Moreover, Plaintiffs' proposed establishment clause test, Pls.' Mem. 33–34, is no longer good law even in the federal system. *See Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022) ("[T]his Court long ago abandoned the *Lemon* test and its endorsement offshoot.").

Regardless, the viewpoint that "life begins at conception" is not a religious one. *See Harris v. McRae*, 448 U.S. 297, 319, 100 S. Ct. 2671, 2689 (1980) (holding that a

[1] Although Plaintiffs cite two additional provisions of the Wyoming Constitution, Pls.' Mem. 32, they make no substantive argument that HEA 88 violates those provisions, which protect free exercise. *See* Wyo. Const. art. 1, § 18; art. 21, § 25.

statute does not "violate[] the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions'"); *see also Dobbs*, 142 S. Ct. at 2256 (rejecting argument that abortion statutes were grounded in religious discrimination because "even *Roe* and *Casey* did not question the good faith of abortion opponents").

For these reasons, HEA 88 does not establish a religion in violation of the Wyoming Constitution.

4. HEA 88 does not violate the Equal Political Rights provision of the Wyoming Constitution.

Unlike the U.S. Constitution, the Wyoming Constitution "does not contain an express 'equal protection' clause." *Newport Int'l Univ., Inc. v. State, Dep't of Educ.*, 2008 WY 72, ¶ 15, 186 P.3d 382, 387 (Wyo. 2008). Instead, "it contains a variety of equality provisions." *Id.* However, the Wyoming Supreme Court "uses the conventional federal equal protection analysis in the interpretation of the equality provisions of the Wyoming Constitution." *Id.*

Plaintiffs argue that HEA 88 "discriminates on the basis of sex." Pls.' Mem. 38.[2] But in *Dobbs*, the U.S. Supreme Court reiterated the longstanding principle that "a State's regulation of abortion is not a sex-based classification and is thus not subject to the 'heightened scrutiny' that applies to such classifications." 142 S. Ct. at 2245; *see also Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 268–74, 113 S. Ct. 753, 758–760 (1993) (rejecting the idea that opposition to abortion is equivalent

[2] Ironically, Plaintiffs also state that "people with other gender identities, including transgender men, agender, and gender-diverse individuals, may also become pregnant and seek abortion services." Pls.' Mem. 18 n.3. This statement conflicts with their argument that HEA 88 constitutes impermissible sex discrimination.

to "animus against women" or that to disfavor abortion "is ipso facto to discriminate invidiously against women as a class"); *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20, 94 S. Ct. 2485, 2492 (1974) ("While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification.").

Under Wyoming law, "[i]f a suspect class or a fundamental right is not involved, a rational relationship test is used to determine if the classification has a rational relationship to a legitimate state interest." *Newport*, 2008 WY at ¶ 16, 186 P.3d at 387. "A party attacking the rationality of the legislative classification has the heavy burden of demonstrating the unconstitutionality of a statute beyond a reasonable doubt." *Id.*

HEA 88 easily passes that test. The State has a legitimate interest in "respect for and preservation of prenatal life at all stages of development." *Dobbs*, 142 S. Ct. at 2284. HEA 88 advances this interest by prohibiting most abortions. The State also has a legitimate interest in "preserv[ing] the integrity of the medical profession" by "elininat[ing] particularly gruesome or barbaric medical procedures." *Id.* HEA 88 advances that interest by prohibiting physicians from intentionally killing unborn children. In addition, HEA 88 rationally advances the State's legitimate interest in "protect[ing] . . . maternal health and safety," *id.*, by prohibiting *elective* procedures that can cause sepsis, blood transfusions, hemorrhaging, hysterectomies, infertility, emergency hospitalization, death to the mother, and severe depression or trauma.

For these reasons, Plaintiffs do not have a likelihood of success on their equal political rights claim.

II. HEA 88 will not cause irreparable harm to Plaintiffs.

Plaintiffs have not established irreparable harm under the requisite legal standard. The courts explain that "harm is irreparable when there is no adequate remedy at law to compensate for it" *Malave,* 2022 WY at ¶ 8, 503 P.3d at 39 (cleaned up), or "where it is of a peculiar nature, so that compensation in money cannot atone for it." *Brown*, 2021 WY at ¶ 7, 491 P.3d at 1026. This harm must also be "concrete and imminent." *Awad v. Ziriax*, 670 F.3d 1111, 1131 (10th Cir. 2012). Plaintiffs have failed to articulate such harms.

A. There is no constitutional right to abortion.

HEA 88 does not impose irreparable harm because there is no constitutional right to abortion. Wyoming's constitution contains no explicit or implicit right to abortion. *See supra* Part I.B. Despite this, Plaintiffs allege that HEA 88 denies a constitutional right to abortion, and thus irreparably harms Plaintiffs. While it is true that "the violation of a constitutional right must weigh heavily in [the irreparable harm] analysis" *Fish v. Kobach*, 840 F.3d 710, 752 (10th Cir. 2016), there has to be an actual violation of a constitutional right for this consideration to apply. *See Johnson v. Saffle*, 203 F.3d 835 (10th Cir. 2000) (unpublished) (holding magistrate judge correctly denied motion for temporary injunction when he "properly determined that plaintiff ha[d] no constitutional right to provide legal representation to other inmates," and found plaintiff had failed to establish irreparable harm among other factors).

Wyoming has never recognized a constitutional right to abortion. The various provisions and rights that Plaintiffs cite as a basis for supporting this alleged right to abortion (including a right to privacy, right to make health care decisions, the overarching right to be left alone, etc.) are unpersuasive. Moreover, these arguments are at odds with the Wyoming Supreme Court's textualist approach to construing the state constitution which at the time of its enactment would never have been considered to bestow a right to abortion. *Powers*, 2014 WY at ¶ 36, 318 P.3d at 313 (noting "[w]hen determining the meaning of constitutional language, [the Court] must attempt to understand the meaning of the language as it was understood at the time our Constitution was ratified.").

Plaintiffs also cite a 1979 pre-*Dobbs* U.S. Supreme Court case for the proposition that a violation of a constitutional right to abortion constitutes irreparable harm especially in the abortion context because "the abortion decision is one that simply cannot be postponed, or it will be made by default with far-reaching consequences." *Bellotti v. Baird*, 443 U.S. 622, 643, 99 S. Ct. 3035, 3048 (1979). This case and statement are inapplicable. The statement was made in a part of the Supreme Court's analysis of a parental consent to abortion law under its prior undue burden standard. The Court no longer performs the undue burden analysis and now reviews laws regulating abortion under rational-basis review. *Dobbs*, 142 S. Ct. at 2284. Additionally, *Bellotti* did not concern an injunction or an irreparable harm analysis.

Plaintiffs additionally allege purportedly "separate" irreparable harms that HEA 88 inflicts including forcing women to suffer the physical, emotional, and financial costs of pregnancy and causing abortion providers to suffer risk of imprisonment and loss of licensure. Pls.' Memo at 5. Despite the different phrasing, these allegations of harm are no different from the alleged harm of denying a right to abortion. A right to abortion would guarantee that a woman could legally terminate her pregnancy and abortionists will not be penalized for performing abortions. That a woman is unable to terminate her pregnancy and will thereby experience the biological conditions of pregnancy is not a separate harm. Nor is it a separate harm that doctors may be penalized for illegal procedures. Plaintiffs claim that "pregnancy is a significant medical condition that the Ban forces on Wyomingites," Pls.' Memo at 7, but this is simply untrue; the ban prohibits abortion under certain circumstances, it does not force or create any medical condition.

Moreover, the individual Plaintiffs are not even pregnant. For all these claims of harm that Plaintiffs allege the law imposes on pregnant women, Plaintiffs are not members of this class and fail to establish standing in this regard. *See supra* Part I.

B. HEA 88 does not impose any harm at all on patients who qualify for the Act's exceptions.

HEA 88 has exceptions for the life and health of the mother, and it will not imperil women's health. Once again, the individual Plaintiffs are not even pregnant (let alone do they allege that they anticipate a rare medical emergency in a future pregnancy that might implicate the exception). In articulating the harms HEA 88 poses upon patients who qualify for exceptions, Plaintiffs allege (1) under the

substantial risk of death exception, patients who could have obtained abortion previously now have to qualify for an exception in order to obtain an abortion and thereby may experience pain and suffering, (2) under the devastating fetal diagnosis exception, patients will be forced to wait for medical providers to decide whether a diagnosis qualifies for abortion, and (3) sexual assault survivors seeking abortion will be forced to choose between accessing services and maintaining privacy in order to obtain an abortion. Pls.' Memo at 12–14.

There is no harm in requiring Plaintiffs to qualify for an exception in order to obtain an abortion. The Wyoming Legislature is entitled to "regulate abortion for legitimate reasons, and when such regulations are challenged . . . courts cannot 'substitute their social and economic beliefs for the judgment of legislative bodies.'" *Dobbs*, 142 S. Ct. at 2283–84 (citations omitted); *see also Denny v. Stevens*, 52 Wyo. 253, 75 P.2d 378, 378 (1938) (holding "[t]he wisdom or unwisdom of legislation, as is generally known, is not a matter for the courts to determine."). While Plaintiffs additionally allege that the substantial death exception is vague and will somehow lead to physical pain and suffering for patients, this is untrue, and unsupported by any evidence besides conjectural claims. *See supra* Part I.B.1. These allegations also fail for lack of concreteness. Moreover, there is no harm in forcing patients to wait for medical providers to decide whether a diagnosis qualifies for abortion. Even prior to this law, abortion providers in Wyoming would have to conduct an analysis to determine if abortion was appropriate or legal. Waiting for a diagnosis is a routine part of many medical procedures and not an irreparable harm. Plaintiffs have thus

failed to articulate any irreparable harm HEA 88 poses upon patients who qualify for the Act's exceptions.

C. The abortion providers will not be harmed by the law because they have no constitutional right to perform abortions.

The abortion providers do not have standing to assert the rights of their patients. *See supra* Part I. And abortion providers have no constitutional right to perform abortions. *See Hodges*, 917 F.3d at 912–15 (noting "[t]he Supreme Court has never identified a freestanding right to perform abortions" and "[m]edical centers do not have a constitutional right to offer abortions"). Plaintiffs claim that abortion providers are faced with irreparable harm because the law "eliminate[s] their ability to offer abortion services or provide evidence-based medical care which may result in the termination of a pregnancy." Pls.' Memo at 12–14. This is not an irreparable harm. Plaintiffs have no right to commit illegal activity even if they claim the inability to perform this activity would violate "their ethical oaths as physicians." Pls.' Memo at 12–14; *see also Hodges*, 917 F.3d at 912–15.

D. Chelsea's Fund does not allege a constitutional harm because an interest group has no right to spend money on activity the legislature deems unlawful.

Plaintiff Chelsea's Fund does not suffer irreparable harm from being unable to spend money on elective abortions in Wyoming. Chelsea's Fund, which seeks to enable Wyomingites "to access abortion services through information, funding support, and other logistical support" has no constitutional right or plausible harm implicated in this case. Compl. ¶ 50. There is no constitutional right to spend money on an activity the legislature deems unlawful or otherwise detrimental to the health, welfare, and safety of the people of Wyoming. *See Collection Ctr., Inc. v. State*

Through Collection Agency Bd., 809 P.2d 278, 280 (Wyo. 1991) (holding "[t]here is no constitutional right to advertise a willingness to engage in illegal activity, and the government may ban commercial speech related to illegal activity."); *United States v. Bailey*, 228 F.3d 637, 639 (6th Cir. 2000) (noting defendant does not have a First Amendment right to attempt to persuade minors to engage in illegal acts). Moreover, just as the abortion providers have no right to perform abortions, *Hodges*, 917 F.3d at 912–15, Chelsea's Fund has no specific right to enable access to abortion on demand. Chelsea's Fund also fails to allege, let alone demonstrate, how it has third-party standing on behalf of its hypothetical future abortion-grant recipients. *See supra* Part I.A.5.

III. The public interest and the balance of the equities favor the State.

While Wyoming Law does not specifically require courts to consider the balance of equities or the public interest when determining if a grant of injunctive relief is appropriate, *see Brown*, 2021 WY at ¶ 7, 491 P.3d at 1026, both of these factors favor the State. The public has a strong interest in upholding a law duly enacted by its elected representatives. See *Hardison v. State*, 2022 WY 45, ¶ 5, 507 P.3d 36, 39 (Wyo. 2022) (noting "[s]tatutes are presumed to be constitutional, and we will resolve any doubt in favor of constitutionality."); *Planned Parenthood of Heartland v. Heineman*, 724 F. Supp. 2d 1025, 1048–49 (D. Neb. 2010) (holding "[t]he public has a strong, legitimate interest in the enactment and enforcement of bills passed by their duly-elected representatives, and that interest weighs heavily against the granting of any injunctive relief."). This law particularly implicates the important legitimate interests of "protecting fetal life," "respect for and preservation of prenatal

life at all stages of development," and "the protection of maternal health and safety[.]" *See Dobbs*, 142 S. Ct. at 2284 (reaffirming the legitimacy of these interests). The harms Wyomingites would face as a result of an injunction substantially outweigh the harms Plaintiffs assert. Enjoining this law would threaten the health and safety of women and certainly end the lives of many unborn Wyomingites. The Plaintiffs' conjectural harms pale in comparison to these serious and concrete harms an injunction would pose. Thus, an injunction is not in the public interest and the balance of equities does not favor an injunction.

CONCLUSION

The Individual Legislators, the Secretary of State, and Right to Life Wyoming therefore respectfully request that this Court deny the Motion for Temporary Restraining Order.

RESPECTFULLY SUBMITTED this 22nd day of March, 2023.

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**Pro hac vice application forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of March 2023, a true and correct copy of the foregoing document was email filed with the Teton County District Court. It was also served upon the following person(s) in the following manner as indicated:

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