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IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT
IN AND FOR TETON COUNTY, WYOMING

DANIELLE JOHNSON; KATHLEEN DOW; GIVOANNINA ANTHONY, M.D.; RENE R. HINKLE, M.D.; CHELSEA'S FUND; and CIRCLE OF HOPE HEALTHCARE d/b/a Wellspring Health Access;	)	
Plaintiffs,	)	Civil Action No. 18853
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 MICHELLE WEBER, Chief of Police, Town of Jackson, Wyoming,	)	
Defendants.	)	

STATE DEFENDANTS' RESPONSE TO
MOTION FOR TEMPORARY RESTRAINING ORDER

On March 17, 2023, Plaintiffs, Danielle Johnson, Kathleen Dow, Giovannina Anthony, M.D., Rene R. Hinkle, M.D., Chelsea's Fund, and Circle of Hope Healthcare

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d/b/a Wellspring Health Access, filed a complaint for declaratory judgment and injunctive relief in this Court. In the complaint, Plaintiffs ask this Court, *inter alia*, to declare that the recently enacted House Enrolled Act Number 88 (original House Bill 152) violates the Wyoming Constitution.[1] (Compl. at 2). They also ask this Court to enjoin House Enrolled Act "from taking effect and/or being enforced during the pendency of this action." *Id.* Plaintiffs filed a motion for a temporary restraining order (TRO) with an accompanying memorandum of law and a request for an emergency hearing.

Defendants, State of Wyoming, Wyoming Governor Mark Gordon, and Wyoming Attorney General Bridget Hill, hereby respond to the motion for TRO. For the reasons explained below, this Court should deny the motion in its entirety.

Introduction

Wyoming Supreme Court precedent has long held that temporary injunctive relief in all of its forms (including TROs) is an extraordinary remedy that should be granted with great caution. This admonition is particularly true when a temporary injunction will enjoin a statute because, in that circumstance, the judicial branch would be exercising its constitutional powers to restrain the constitutional powers of the legislative and executive branches.

To assure that the issuance of a temporary injunction against a statute will not impermissibly infringe upon the constitutional authority of the co-equal branches of state

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[1] The Wyoming Legislature has named the codified sections in House Enrolled Act Number 88 (Wyo. Stat. Ann. §§ 35-6-120 through -138) as the Life is a Human Right Act. To distinguish the codified sections from House Enrolled Act Number 88 as a whole, the State Defendants will refer to codified sections collectively as the Life Act.

government, Wyoming Supreme Court precedent requires the party asking for a temporary injunction to clearly show that the statute in question likely is unconstitutional. To do so, the requesting party must provide the reviewing court with a cogent legal analysis that shows it is likely the statute in question unduly infringes upon a constitutionally protected right. This precedent also requires the party asking for a temporary injunction to show that she possibly will be irreparably injured if the statute remains in effect during the litigation.

Here, Plaintiffs ask this Court to temporarily enjoin the Life is a Human Right Act (hereinafter Life Act), but do not make either of the required showings. They assert that the Life Act is unconstitutional on four distinct grounds, but offer this Court no legitimate legal reason to explain why. Instead, they ask this Court to blindly apply the reasoning it used in granting a preliminary injunction against a different, now repealed abortion statute as the legal basis for temporarily enjoining the Life Act. They also offer this Court a litany of policy reasons why they do not want the Life Act to remain in effect. In addition, they focus their irreparable injury analysis almost entirely on alleged injuries that may happen to individuals who are not parties to this case. They have not shown that any of the named Plaintiffs to this lawsuit will suffer irreparable injury if the Life Act remains in effect.

When all is said and done, Plaintiffs are not entitled to a TRO just because they dislike the policies embodied in the Life Act. To be entitled to a TRO, they must show that the Life Act likely is unconstitutional under the Wyoming Constitution **and** one or more of the Plaintiffs possibly will suffer irreparable injury if the Life Act remains in effect. The law requires them to show both and they have shown neither. As a result, this Court should deny the motion for TRO in its entirety.

Relevant Factual Background

Plaintiffs allege that the Life Act is unconstitutional on its face. (*See generally* Compl.). In support of their request for TRO, Plaintiffs have submitted eight affidavits or declarations – an affidavit from each Plaintiff and declarations from two non-parties (Dr. Ghazaleh Kinney Moayedi and Gillian Frank, PhD).

This Court should not consider any of the affidavit or declaration testimony in assessing the probable success prong of the temporary injunction test. To determine whether Plaintiffs are entitled to temporary injunctive relief, this Court must interpret or construe provisions in the Wyoming Constitution and provisions in the Life Act to assess whether Plaintiffs have shown that they are likely to succeed on their claim that the Life Act is facially unconstitutional. Constitutional interpretation and statutory interpretation are questions of law. *See Saunders v. Hornecker*, 2015 WY 34, ¶ 8, 344 P.3d 771, 774 (Wyo. 2015) (explaining that "[t]he interpretation and application of the Wyoming Constitution is a question of law"); *Harris v. State*, 2006 WY 76, ¶ 15, 137 P.3d 124, 129 (Wyo. 2006) (explaining that a facial vagueness challenge to a statute raises a constitutional issue); *Solvay Chems., Inc. v. Wyo. Dep't of Revenue*, 2022 WY 124, ¶ 7, 517 P.3d 1146, 1149 (Wyo. 2022) (stating that statutory interpretation is a question of law).

Evidentiary facts are not legally relevant to the question of whether the Life Act is facially unconstitutional because "[c]ertainty of facts is not required to answer a pure question of law." *See Sinclair Wyo. Ref. Co. v. Infrassure, Ltd.*, 2021 WY 65, ¶ 10, 486 P.3d 990, 994 (Wyo. 2021) (cleaned up). Therefore, the affidavit and declaration testimony

submitted by Plaintiffs is not legally relevant to this Court's interpretation of the Wyoming Constitution or the Life Act.

This Court also should not consider the declarations from Dr. Ghazaleh Kinney Moayedi and from Gillian Frank, PhD, in assessing the possible injury prong of the temporary injunction test. Both declarants purport to give "opinions" about abortion related matters. (*See generally* Moayedi decl.; Frank decl.). Neither declarant has been qualified as an expert, so the admissibility of their sworn statements should be evaluated under Rule 701 of the Wyoming Rules of Evidence. Under Rule 701, opinion testimony from a non-expert witness must be helpful to this Court to determine a fact in issue. Wyo. R. Evid. 701. Here, neither declaration is admissible to address any fact issues under the possible injury prong because neither declaration speaks specifically to any injuries any Plaintiff may specifically suffer if a TRO is not issued.

Although the affidavit and declaration testimony should not be considered in assessing the probable success prong, historical information informs this Court's assessment of that prong. In particular, information about the history of state regulation of abortion in Wyoming and the legislative history of article 1, section 38 is relevant to this Court's constitutional and statutory interpretation analyses.

I. The History of State Regulation of Abortion in Wyoming

In Wyoming, abortion has been regulated since the first year that Wyoming was designated as a Territory of the United States.[2] *See* Gen. Laws Terr. of Wyo., ch. 3, Title

[2] The Territory of Wyoming was established in 1869. T.A. Larson, *History of Wyoming* 66 (1965).

1, § 25 (1869). As the following overview shows, the public policy of the State of Wyoming is, and always has been, to prohibit and criminalize abortion (subject to limited exceptions). Before *Roe v. Wade* was decided in 1973,[3] abortion was a crime in Wyoming for more than 100 years (subject to one exception). After *Roe* was decided, abortion after viability was prohibited (subject to one exception) and was a crime. Now that *Roe* has been overruled, the Wyoming Legislature has enacted the Life Act to prohibit and criminalize abortion (subject to four exceptions), thereby re-affirming the long-standing public policy on abortion that the State of Wyoming followed for a century before *Roe*.

A. From 1869 until *Roe v. Wade* was decided, abortion was a crime in Wyoming (subject to one exception).

During its inaugural legislative session in 1869, the Territorial Legislature enacted the following criminal abortion statute:

> [A]ny person who shall administer, or cause to be administered, or taken, any such poison, substance or liquid, or who shall use, or cause to be used, any instrument of whatsoever kind, with the intention to procure the miscarriage of any woman then being with child, and shall thereof be duly convicted, shall be imprisoned for a term not exceeding three years, in the penitentiary, and fined in a sum not exceeding one thousand dollars[.]

(Gen. Laws Terr. of Wyo., ch. 3, Title 1, § 25 (1869)).

The original criminal abortion statute remained unchanged for fourteen years until the Territorial Legislature amended it in 1884. Among the notable changes, the Legislature: (1) added the word abortion; (2) changed the phrase "any woman then being with child" to "any pregnant woman or women supposed by such person to be pregnant;" (3) added an

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[3] *Roe v. Wade*, 410 U.S. 113 (1973).

exception that permitted an abortion if necessary to preserve the life of the pregnant woman; and (4) increased the maximum term of imprisonment to five years and decreased the maximum fine amount to $800. (1884 Terr. Wyo. Sess. Laws ch. 1, § 2). The amended statute provided as follows:

> Every person who, with the intent to procure the miscarriage or abortion of any pregnant woman or women supposed by such person to be pregnant, unless the same be necessary to preserve her life; shall administer to her, advise or prescribe for her, or cause to be taken by her any poison, drug or medicine or other noxious drug, or shall use any instrument or other means whatever, or shall aid, assist or counsel any person so intending to procure or have procured a miscarriage or abortion, whether said miscarriage or abortion be accomplished or not, shall be guilty of a felony, and upon conviction thereof shall be fined not more than eight hundred dollars and imprisoned for a term not exceeding five years in the penitentiary.

(1884 Terr. Wyo. Sess. Laws ch. 1, § 2) (codified at Wyo. Rev. Stat. § 879 (1887)).[4]

The Territorial Legislature next amended the criminal abortion statute in 1890. (1890 Terr. Wyo. Sess. Laws ch. 73, § 31). Notably, the Legislature removed the reference to abortion, eliminated the monetary fine for the crime, and enhanced the maximum prison sentence from "not exceeding five years' to "not more than fourteen years." (*Id.*). The amended statute provided as follows:

> Whoever prescribes or administers to any pregnant woman, or to any woman he supposes to be pregnant, any drug, medicine or substance whatever, with intent thereby to procure the miscarriage of such woman; or with like intent

[4] There are two discrepancies between the 1884 session law and the provision codified in the 1887 statutes. First, the session law says "any pregnant woman, or **women** supposed by such person to be pregnant," while the statute says "any pregnant woman, or **woman** supposed by such person to be pregnant[.]" Second, the session law says "imprisoned for a term not exceeding five years in the penitentiary," while the statute says "imprisoned for a term not exceeding five years **nor less than one year,** in the penitentiary[.]" The State Defendants have not been able to find a session law from 1886 that confirms the Legislature made the changes reflected in the 1887 statute.

> uses any instrument or means whatever, unless such miscarriage is necessary to preserve her life, shall, if the woman miscarries or dies in consequence thereof, be imprisoned in the penitentiary not more than fourteen years.

(1890 Terr. Wyo. Sess. Laws, ch. 73, § 31) (codified at Wyo. Rev. Stat. § 4969 (1899)).

The State of Wyoming was admitted to the union as a state in 1890. Larson, *History of Wyoming* 259. The first Legislature of the State of Wyoming adopted the Revised Statutes and Session Laws of the Territory of Wyoming for the years 1888 and 1890 as "the laws of the State of Wyoming" to the extent that the territorial laws did not conflict with the Wyoming Constitution and had not been repealed or amended and reenacted by the first Legislature. (1890 Wyo. Sess. Laws ch. 35, § 1). As a result, the 1890 territorial criminal abortion statute became state law.

B. After *Roe v. Wade* was decided, the Wyoming Legislature enacted statutes to prohibit abortion to the extent permissible under *Roe* (with one exception) and to make a violation of the abortion statute a crime.

After 1890, the criminal abortion statute remained in effect and substantively unchanged until the 1970's.[5] In January 1973, the United States Supreme Court held that the United States Constitution protects a woman's right to have an abortion before viability. *See generally Roe v. Wade*, 410 U.S. 113 (1973). Seven months after *Roe* was decided, the Wyoming Supreme Court declared the Wyoming criminal abortion statute to be unconstitutional. *Doe v. Burk*, 513 P.2d 643, 644-45 (Wyo. 1973).

[5] The statute was renumbered in 1899, 1910, 1931, 1945, and 1957. *See* history line, Wyo. Stat. § 6-77 (1957).

After *Doe v. Burk*, the criminal abortion statute remained on the books until 1977, when the Wyoming Legislature repealed it and replaced it with the following statute:

> An abortion shall not be performed after the embryo or fetus has reached viability except when necessary to preserve the woman from an imminent peril that substantially endangers her life or health, according to appropriate medical judgment.

1977 Wyo. Sess. Laws ch. 11, §§ 1-2 (codified as Wyo. Stat. Ann. § 35-6-102 (1977)). Any physician or other person who violated § 35-6-102 was "guilty of a felony punishable by imprisonment in the penitentiary for not more than fourteen (14) years." 1977 Wyo. Sess. Laws ch. 11, § 1 (codified as Wyo. Stat. Ann. § 35-6-110 (1977)).

C. After *Roe v. Wade* was overruled, the Wyoming Legislature enacted a new statute to prohibit abortion (subject to three exceptions).

During the 2022 Budget Session, the Wyoming Legislature enacted House Enrolled Act Number 57 (original House Bill 0092).[6] Governor Gordon signed HEA57 into law and it became effective on March 15, 2022. *Journal of the House of Representatives of the Sixty-Sixth Legislature of Wyo.* 243 (Budget Sess. Feb. 14, 2022 through March 11, 2022); 2022 Wyo. Sess. Laws 306. Relevant to this case, House Enrolled Act 57 created a new statutory section that provides, in part:

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

[6] https://wyoleg.gov/2022/Introduced/HB0092.pdf

(*Id.*, §1 (Wyo. Stat. Ann. § 35-6-102(b))). Any physician who violated § 35-6-102(b) was "guilty of a felony punishable by imprisonment in the penitentiary for not more than fourteen (14) years" under the existing § 35-6-110.

Section § 35-6-102(b) did not take effect with the rest of House Enrolled Act 57, however. In House Enrolled Act 57, the Legislature provided that the statute would take effect only after the Governor certified to the Secretary of State that the U.S. Supreme Court overruled *Roe v. Wade* "in a manner that would authorize the enforcement of this subsection … without violating any conditions, rights or restrictions recognized by the supreme court." (*Id.*) (ellipsis added). Section § 35-6-102(b) would take effect five days after such a certification. (*Id.*).

On June 24, 2022, the U.S. Supreme Court issued an opinion in *Dobbs v. Jackson Women's Health Organization*, — U.S. —, 142 S. Ct. 2228 (2022). In *Dobbs*, a five-Justice majority held that the United States Constitution "does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives."[7] *Dobbs*, 142 S. Ct. at 2284. The *Dobbs* majority also stated that the U.S. Constitution "does not confer a right to abortion." *Dobbs*, 142 S. Ct. at 2279.

On July 22, 2022, Governor Gordon certified that § 35-6-102(b) was authorized under the *Dobbs* decision. Section 35-6-102(b) took effect five days later, but was

[7] "*Casey*" refers to *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

immediately restrained and then preliminarily enjoined by this Court in *Johnson v. State*, Wyoming Ninth Judicial District (Teton County) Civil Action Number 18732.

D. In 2023, the Wyoming Legislature repealed §§ 35-6-102(b) and 35-6-110 and enacted new statutes to prohibit and to criminalize abortion.

During the 2023 General Session, the Wyoming Legislature enacted House Enrolled Act 88.[8] Governor Gordon allowed House Enrolled Act Number 88 to become law without his signature. (*See* Attach. A at 13). As a result, House Enrolled Act Number 88 is now in effect.

In House Enrolled Act Number 88, the Legislature significantly revised the statutes governing the regulation of abortion by creating several new statutes, by renumbering several existing statutes, and by repealing several existing statutes. (Attach. A, §§ 1, 4, 5). The Legislature designated the new regulatory scheme as the "Life is a Human Right Act." (Attach. A, § 1 at 1).

Relevant to this case, House Enrolled Act Number 88 repealed §§ 35-6-102(b) and 35-6-110. (Attach. A, § 5). To replace these statutes, the Legislature enacted three new statutory sections – Wyo. Stat. Ann. § 35-6-123, § 35-6-124, and § 35-6-125. (Attach. A, § 1 at 4-6). Section 35-6-123 prohibits abortion and provides as follows:

> **35-6-123. Abortion prohibited.**
>
> (a) Except as provided in W.S. 35-6-124, no person shall knowingly:
>
> (i) Administer to, prescribe for or sell to any pregnant woman any medicine, drug or other substance with the specific intent of causing or abetting an abortion; or

[8] https://wyoleg.gov/2023/Enroll/HB0152.pdf

(ii) Use or employ any instrument, device, means or procedure upon a pregnant woman with the specific intent of causing or abetting an abortion.

(Attach. A, § 1 at 4-5).

The prohibition in § 35-6-123 is subject to the following four exceptions set forth in § 35-6-124:

35-6-124. Exceptions to abortion prohibition; applicability.

(a) It shall not be a violation of W.S. 35-6-123 for a licensed physician to:

(i) Perform a pre-viability separation procedure necessary in the physician's reasonable medical judgment to prevent the death of the pregnant woman, a substantial risk of death for the pregnant woman because of a physical condition or the serious and permanent impairment of a life-sustaining organ of a pregnant woman, provided that no separation procedure shall be deemed necessary under this paragraph unless the physician makes all reasonable medical efforts under the circumstances to preserve both the life of the pregnant woman and the life of the unborn baby in a manner consistent with reasonable medical judgment;

(ii) Provide medical treatment to a pregnant woman that results in the accidental or unintentional injury to, or the death of, an unborn baby;

(iii) Perform an abortion on a woman when the pregnancy is the result of incest as defined by W.S. 6-4-402 or sexual assault as defined by W.S. 6-2-301. Prior to the performance of any abortion under this paragraph the woman, or the woman's parent or guardian if the woman is a minor or subject to a guardianship, shall report the act of incest or sexual assault to a law enforcement agency and a copy of the report shall be provided to the physician; or

(iv) Perform an abortion on a woman when in the physician's reasonable medical judgment, there is a substantial likelihood that the unborn baby has a lethal fetal anomaly or the pregnancy is determined to be a molar pregnancy.

(Attach. A, § 1 at 5-6).[9]

[9] In § 35-6-124(b), the Legislature stated that nothing in the Life Act prohibits the "use, sale, prescription or administration of a contraceptive measure, drug, chemical or device"

Section 35-6-125 makes it a felony to violate § 35-6-123. (Attach. A, § 1 at 6). Any person who is convicted of committing this felony will be subject to a fine not to exceed $20,000, a prison term of not more than five years, or both. *Id.*

In the Life Act, the Wyoming Legislature made the following findings regarding the Act:

> **35-6-121. Findings and purposes.**
>
> (a) The legislature finds that:
>
> (i) As a consequence of an unborn baby being a member of the species homo sapiens from conception, the unborn baby is a member of the human race under article 1, section 2 of the Wyoming constitution;
>
> (ii) The legislature acknowledges that all members of the human race are created equal and are endowed by their creator with certain unalienable rights, the foremost of which is the right to life;
>
> (iii) This act promotes and furthers article 1, section 6 of the Wyoming constitution, which guarantees that no person may be deprived of life or liberty without due process of law;
>
> (iv) Regarding article 1, section 38 of the Wyoming constitution, abortion as defined in this act is not health care. Instead of being health care, abortion is the intentional termination of the life of an unborn baby. It is within the authority of the state of Wyoming to determine reasonable and necessary restrictions upon abortion, including its prohibition. In accordance with Article 1, Section 38(c) of the Wyoming constitution, the legislature determines that the health and general welfare of the people requires the prohibition of abortion as defined in this act;
>
> (v) The legislature, in the exercise of its constitutional duties and powers, has a fundamental duty to provide equal protection for all human lives, including unborn babies from conception;

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if done so according to manufacturer instructions and not done so "with the specific intent to cause or induce an abortion." (Attach. A, § 1 at 6).

(vi) Wyoming's "legitimate interests include respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability." Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022) (internal citations omitted).

(Attach. A, § 1 at 1-2).

Also in the Life Act, the Wyoming Legislature defined the following terms (and other terms) that help to define the scope of the prohibition in § 35-6-123 and the exceptions in § 35-6-124:

(i) "Abortion" means the act of using or prescribing any instrument, medicine, drug or any other substance, device or means with the intent to terminate the clinically diagnosable pregnancy of a woman, including the elimination of one (1) or more unborn babies in a multifetal pregnancy, with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn baby. "Abortion" shall not include any use, prescription or means specified in this paragraph if the use, prescription or means are done with the intent to:

(A) Save the life or preserve the health of the unborn baby;

(B) Remove a dead unborn baby caused by spontaneous abortion or intrauterine fetal demise;

(C) Treat a woman for an ectopic pregnancy; or

(D) Treat a woman for cancer or another disease that requires medical treatment which treatment may be fatal or harmful to the unborn baby.

(ii) "Pregnant" means the human female reproductive condition of having a living unborn baby or human being within a human female's body throughout the entire embryonic and fetal stages of the unborn human being from fertilization, when a fertilized egg has implanted in the wall of the uterus, to full gestation and childbirth;

(iii) "Reasonable medical judgment" means a medical judgment that would be made by a reasonably prudent physician who is knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved;

(iv) "Unborn baby" or "unborn human being" means an individual living member of the species homo sapiens throughout the entire embryonic and fetal stages from fertilization to full gestation and childbirth;

* * * * *

(Attach. A, § 1 at 3-4).

II. The Legislative History of Article 1, Section 38

Article 1, section 38 was adopted through the process established by article 20, section 1 and article 3, section 41 of the Wyoming Constitution. Under Article 20, section 1, either the House of Representatives or the Senate may propose an amendment to the Wyoming Constitution. To propose a constitutional amendment, one or more legislators must sponsor the proposed amendment as a formal joint resolution. *Legislative Handbook, State of Wyoming Legislature*, at 4.9 (Dec. 2018).[10] If at least two thirds of all of the members of each house approve the joint resolution, the resolution is presented to the Governor for his approval or disapproval. Wyo. Const. art. 20, § 1; art. 3, § 41; *see also Geringer v. Bebout*, 10 P.3d 514, 520-24 (Wyo. 2000) (explaining how article 20, section 1 and article 3, section 41 should be interpreted *in pari materia*).

If the Governor approves the joint resolution, the amendment proposed by it is presented to the electors of the State of Wyoming at the next general election. Wyo. Const. art. 20, § 1. If the electors ratify the proposed amendment, the State Canvassing Board must

[10] https://wyoleg.gov/leginfo/policies/lhbook/l-hbook07.pdf

determine whether that result should be officially certified. Wyo. Stat. Ann. § 22-20-108. If the State Canvassing Board officially certifies that the amendment has been adopted, the Governor shall issue a "proclamation of adoption" no later than ten days after the certification. *Id.* The amendment takes effect on the date the Governor officially proclaims that it has been adopted. *Id.*

During the 2011 legislative session, Senate Joint Resolution No. SJ0002 was introduced in the Senate and proposed to create a new section 24 in article 7 of the Wyoming Constitution.[11] As introduced, the title to SJ0002 provided as follows:

> A JOINT RESOLUTION proposing to amend the Wyoming Constitution by creating a new section specifying that no federal or state law shall compel participation in any health care system by any person, employer or health care provider.

(https://wyoleg.gov/2011/Introduced/SJ0002.PDF at 1).

The introduced version of SJ0002 created seven subsections in the proposed article 7, section 24. Subsection (a) provided as follows:

> All persons shall have the right to choose and provide for their own health care.

(*Id.* at 2).

Subsections (b), (c), and (e) essentially prohibited any person from being compelled under federal or state law to participate in any health care system. (*Id.* at 2-3). Subsection (d) authorized persons and employers to pay directly for health services and authorized health care providers to "accept direct payment for lawful health care services[.]"(*Id.* at 2-

[11] *See* https://wyoleg.gov/2011/Introduced/SJ0002.PDF.

3). Subsection (f) listed four things the proposed section 24 did not do, including that it did not "[a]ffect which health care services are permitted by law[.]"(*Id.* at 3-4). Subsection (g) provided definitions for certain words or phrases used in SJ0002, including the phrase "lawful health care services." (*Id.* at 4-5).

As introduced, SJ0002 included the following proposed language to be endorsed on the ballot for the proposed amendment:

> The adoption of this amendment will preserve the right of all persons **to make their own health care decisions**. It expressly prohibits all government from mandating individuals or entities to participate in any type of health care system or health insurance plan or exchange. The amendment will prohibit laws imposing fines, taxes or any other penalties upon an individual or entity for choosing to obtain or decline health care coverage or to participate in any health care system, plan or exchange, or to pay directly or receive payment directly for health care services.

(*Id.* at 5-6) (emphasis added).

As SJ0002 made its way through the legislative process, it was amended six times – four times in the Senate and twice in the House of Representatives. (Attach. B – *Journal of the Senate of the Sixty-First Legislature of Wyo.* 294-300 (Gen. Sess. Jan. 11, 2011, through March 3, 2011). Of these six amendments, only the amendments adopted by the Senate provide possible insight into the likely legislative intent of article 1, section 38.[12]

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[12] In the House of Representatives, the engrossed version of SJ0002 (the version with the final Senate amendments incorporated into it) was amended on second reading (SJ0002H2001) to delete the second sentence in section 38(a) regarding parents, guardians, or legal representatives making health care decisions for other persons. (Attach. B – *2011 Senate Journal* 300). On third reading, the House voted to delete the second reading amendment. (*Id.* at 300). As a result, the engrossed version of SJ0002 remained unchanged.

After it was introduced in the Senate, SJ0002 was referred to the Senate Judiciary Committee.[13] (Attach. B – *2011 Senate Journal* 294). The Judiciary Committee proposed several changes as one omnibus amendment (SJ0001SS001) to the introduced version of SJ0002 and recommended that the Senate pass SJ0002 with the proposed changes. (Attach. B – *2011 Senate Journal* 294-95).

In Committee of the Whole, the Senate first adopted the Judiciary Committee amendment, but subsequently adopted a Committee of the Whole amendment (SJ0002SW001) that deleted the Judiciary Committee amendment entirely and significantly altered the language and structure of the introduced version of SJ0002.[14] (Attach. B – *2011 Senate Journal* 295-96). As a result of this Committee of the Whole amendment, the proposed constitutional provision in SJ0002 was designated as article 1, section 38 with the catchline "Right of health care access." (Attach. B – *2011 Senate Journal* 296). The seven subsections in the introduced version were replaced with the following sentence:

> The right to health care access as defined by the legislature is reserved to the citizens of the state of Wyoming.

Id. The Committee of the Whole amendment also changed both the title and the ballot endorsement language to mirror the new language of the proposed section 38. *Id.*

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[13] SJ0002 was referred to standing committee S01, which was the Senate Judiciary Committee. *See* (Attach. B – *2011 Senate Journal* 294).

[14] In Committee of the Whole, the Senate rejected another proposed amendment (SJ0002SW002) that would have significantly changed the introduced version of SJ0002. (Attach. B – *2011 Senate Journal* 296-97).

On second reading, the Senate adopted a new amendment (SJ0002S2001) that deleted almost all of the Committee of the Whole and Judiciary Committee amendments in favor of new proposed language and a new structure. (Attach. B – *2011 Senate Journal* 297). Under the second reading amendment, the placement of the proposed constitutional provision remained as article 1, section 38 and continued to be entitled "Right of health care access." *Id.* The title of SJ0002 was changed to read as follows:

> A JOINT RESOLUTION proposing to amend the Wyoming Constitution by creating a new section providing that the right to make health care decisions is reserved to the citizens of the state of Wyoming, providing for direct payments to healthcare providers, allowing the legislature to establish restrictions and requiring the state of Wyoming to protect healthcare rights from undue governmental infringement.

Id.

The second reading amendment created four subsections in section 38. Subsection (a) provided as follows:

> Each competent adult shall have the right to make his or her own healthcare decisions. The parent, guardian or legal representative of any other natural person shall have the right to make healthcare decisions for that person.

Id. Subsection (b) authorized any person to pay directly for health services and health care providers to accept direct payment for health services. *Id.* Subsection (c) provided that the Wyoming Legislature "may determine reasonable and necessary restrictions on the rights granted" under section 38 "to protect the health and general welfare of the people and accomplish the purposes set forth in the Wyoming Constitution." *Id.* Subsection (d) directed the State of Wyoming to act to preserve the rights conferred by section 38 "from undue governmental infringement." *Id.*

The second reading amendment also changed the language to be endorsed on the ballot for the proposed amendment. *Id.* After the second reading amendment, the proposed endorsement language provided as follows:

> The adoption of this amendment will provide that the right to health care access is reserved to the citizens of the state of Wyoming. It permits any person to pay and any healthcare provider to receive direct payment for services. The amendment permits the legislature to place reasonable and necessary restrictions on healthcare consistent with the purposes of the Wyoming Constitution and provides that this state shall act to preserve these rights from undue governmental infringement.

Id.

On third reading, the Senate adopted an amendment to clarify language in subsection (c) and to clarify the endorsement language.[15] In subsection (c), the amendment changed the phrase "to protect the health and general welfare of the people and accomplish the purposes set forth in the Wyoming Constitution" to "to protect the health and general welfare of the people or to accomplish the other purposes set forth in the Wyoming Constitution." (Attach. B – *2011 Senate Journal* 298). In the endorsement language, the amendment changed the phrase "right to health care access" to "right to make health care decisions." *Id.*

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[15] The Senate voted down three amendments proposed on third reading. Two of the failed amendments would have re-adopted the language from the Committee of the Whole amendment. (Attach. B – *2011 Senate Journal* 298-99). The third failed amendment would have replaced the four subsections in the second reading amendment with the following sentence: "The right to healthcare independence, including individual healthcare autonomy, open access to services and an unrestricted choice of providers, shall be reserved to the people of Wyoming." (Attach. B – *2011 Senate Journal* 299).

SJ0002 appeared on the ballot as Constitutional Amendment A at the general election held on November 6, 2012.[16] The endorsement language for Constitutional Amendment A provided as follows:

> The adoption of this amendment will provide that the right to make health care decisions is reserved to the citizens of the state of Wyoming. It permits any person to pay and any health care provider to receive direct payment for services. The amendment permits the legislature to place reasonable and necessary restrictions on health care consistent with the purposes of the Wyoming Constitution and provides that this state shall act to preserve these rights from undue governmental infringement.

(https://sos.wyo.gov/Elections/Docs/2012/2012BallotIssues.pdf, at 2).

To ratify Constitutional Amendment A, at least 125,351 electors needed to vote for Amendment A. (https://sos.wyo.gov/Elections/Docs/2012/2012BallotIssues.pdf at 1). The final results showed that 181,984 electors voted for the amendment. (*Id.*). The version of article 1, section 38 approved by the voters provides as follows:

> (a) Each competent adult shall have the right to make his or her own health care decisions. The parent, guardian or legal representative of any other natural person shall have the right to make health care decisions for that person.
>
> (b) Any person may pay, and a health care provider may accept, direct payment for health care without imposition of penalties or fines for doing so.
>
> (c) The 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.
>
> (d) The state of Wyoming shall act to preserve these rights from undue governmental infringement.

[16] *See generally* https://sos.wyo.gov/Elections/Docs/2012/2012BallotIssues.pdf.

Wyo. Const. art. 1, § 38.

On November 14, 2012, the State Canvassing Board officially certified that Constitutional Amendment A had been adopted.[17] That same day, Wyoming Governor Matthew H. Mead proclaimed that Constitutional Amendment A had been adopted in compliance with state law.[18] As a result, article 1, section 38 took effect on November 14, 2012. *See* Wyo. Stat. Ann. § 22-20-108 (Stating that a proposed amendment to the Wyoming Constitution "is effective on the date it is proclaimed adopted by the governor.").

Legal Standard

I. The Standards Governing Temporary Injunctions

In Wyoming, state statute and case law govern the substantive requirements for the issuance of a temporary injunction with notice to the adverse party. Wyoming Statute § 1-28-102 provides, in pertinent part:

> When it appears by the petition that the plaintiff is entitled to relief consisting of restraining the commission or continuance of some act the commission or continuance of which during the litigation would produce great or irreparable injury to the plaintiff, or when during the litigation it appears that the defendant is doing, threatens to do, or is procuring to be done some act in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual, a temporary order may be granted restraining the act. ...

Wyo. Stat. Ann. § 1-28-102.

"[T]he award of a temporary injunction is an extraordinary remedy which will not be granted except upon **a clear showing** of probable success **and** possible irreparable

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[17] https://sos.wyo.gov/Elections/Docs/2012/2012BallotIssues.pdf, at 10.

[18] *Id.*

injury to the plaintiff, lest the proper freedom of action of the defendant be circumscribed when no wrong has been committed." *Weiss v. State ex rel. Danigan*, 434 P.2d 761, 762 (Wyo. 1967) (emphasis added). "The purpose of a temporary injunction is to preserve the status quo until the merits of an action can be determined." *Id.*

Requests for injunctive relief "are not granted as a matter of right but are within the lower court's equitable discretion." *In re Kite Ranch, LLC v. Powell Family of Yakima, LLC*, 2008 WY 39, ¶ 21, 181 P.3d 920, 926 (Wyo. 2008). "Injunction is an extreme remedy," so a reviewing court "should proceed with caution and deliberation before exercising the remedy." *In re Kite Ranch*, ¶ 21, 181 P.3d at 926 (citation and internal quotation marks omitted). "To justify an injunction, there must be a showing the potential harm is irreparable and there is no adequate remedy at law to compensate for the harm." *In re Kite Ranch*, ¶ 22, 181 P.3d at 926. Moreover,

> [i]n granting temporary relief by interlocutory injunction courts of equity do not generally anticipate the ultimate determination of the questions of right involved. They merely recognize that a sufficient case has been made out to warrant the preservation of the property or rights in issue *in statu quo* until a hearing upon the merits, without expressing, and indeed without having the means of forming a final opinion as to such rights.

CBM Geosolutions, Inc. v. Gas Sensing Tech., Inc., 2009 WY 113, ¶ 7, 215 P.3d 1054, 1057 (Wyo. 2009) (quoting *Stowe v. Powers*, 116 P. 576, 581 (Wyo. 1911)).

To be entitled to temporary injunctive relief, Plaintiffs must clearly show both probable success on the merits of their constitutional claims and possible irreparable injury to them if a temporary injunction does not issue.

II. The Principles Governing Challenges to the Constitutionality of Statute

Plaintiffs ask this Court to declare that the Life Act violates one or more of several provisions in the Wyoming Constitution. (*See generally* Compl.). To determine whether these statutory sections are unconstitutional, this Court should apply long-established legal principles that define Plaintiffs' burden of proof and impose limits on this Court's review. *See, e.g., Powers v. State*, 2014 WY 15, ¶ 7, 318 P.3d 300, 303 (Wyo. 2014) (summarizing the applicable principles).

Under these principles, this Court presumes that the statute is constitutional. *Powers*, ¶ 7, 318 P.3d at 303. Plaintiffs bear a "heavy" burden of "clearly and exactly" showing that the Life Act is unconstitutional "beyond any reasonable doubt." *Id.* (citations omitted). To satisfy this burden, they must show they have a constitutionally protected right and that the Life Act infringes upon that right in an impermissible way. *Baessler v. Freier*, 2011 WY 125, ¶ 13, 258 P.3d 720, 725 (Wyo. 2011).

Plaintiffs challenge the constitutionality of the Life Act on its face. Asserting that a statute is unconstitutional on its face "is the most difficult challenge to mount successfully" because Plaintiffs "must establish that no set of circumstances exists under which the [statute] would be valid." *Dir. of Office of State Lands & Invs. v. Merbanco, Inc.*, 2003 WY 73, ¶ 32, 70 P.3d 241, 252 (Wyo. 2003) (citation and internal quotation marks omitted) (alteration added).

This Court should declare a statute to be unconstitutional only if such a result "is clear, palpable, unavoidable, and beyond reasonable doubt." *Id.* (citations omitted). It is "duty bound to uphold statutes where possible and resolve all doubts in favor of

constitutionality." *Id.* To this end, this Court should "not conjure up theories to overturn and overthrow the solemn declarations of the legislative body." *State v. Johnson Cnty. High Sch.*, 5 P.2d 255, 258 (Wyo. 1931). That being said,

> the rule that statutes are presumed to be constitutional is a rule of construction, not an independent rule of law. Courts do, indeed, have a duty to maintain the constitutionality of a statute where possible, but there is an equally imperative duty to declare a statute unconstitutional if it transgresses the state constitution.

Cathcart v. Meyer, 2004 WY 49, ¶ 48, 88 P.3d 1050, 1068 (Wyo. 2004).

Plaintiffs dismiss the foregoing legal standards and insist that this Court must apply a strict scrutiny standard because they have "raise[d] a host of claims involving fundamental rights[.]" (TRO mem. at 4). But, legally, it is not enough for them to simply "raise" constitutional claims. Strict scrutiny applies only if Plaintiffs clearly show this Court that they have a fundamental right and the Life Act affects a fundamental right. *See Vaughn v. State*, 2017 WY 29, ¶ 26, 391 P.3d 1086, 1095 (Wyo. 2017). "Fundamental rights are those liberties that are objectively deeply rooted in this country's history and tradition." *Vaughn*, ¶ 27, 391 P.3d at 1095 (citing *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)).

For purposes of the motion for TRO, Plaintiffs assert that the Life Act affects four fundamental rights: control of health care decisions, establishment of religion, equal protection, and unenumerated fundamental rights.[19] (TRO mem. at 4). They also argue that

[19] In the legal memorandum in support of the motion for TRO, Plaintiffs do not make an argument addressing unenumerated rights.

the Life Act is unconstitutionally vague, which implicates the right to due process. (TRO mem. at 29-32).

For the reasons explained below, strict scrutiny does not apply to the article 1, section 38 claim or the vagueness claim. For strict scrutiny to apply to their establishment of religion claim, Plaintiffs must show that the Life Act actually affects a right protected by the establishment of religion or the free exercise of religion provisions in the Wyoming Constitution. And for strict scrutiny to apply to their equal protection claim, they must show that abortion is deeply rooted in the history and tradition of the United States. Strict scrutiny does not apply to the religion claim or the equal protection claim unless Plaintiffs make the required showing for each.

Argument

I. Plaintiffs have not made a clear showing of probable success on the merits.

For the probable success prong of the temporary injunction test, Plaintiffs must show that they have a likelihood of succeeding on the merits of their claim that the Life Act violates the Wyoming Constitution. *See, cf., CBM Geosolutions,* ¶ 8, 215 P.3d at 1057-58 (explaining that "likelihood of success on the merits is a factor that a district court must consider before granting a preliminary injunction" under the temporary injunction standard set forth in *Weiss*).

In seeking a TRO, Plaintiffs argue that the Life Act violates the following constitutional provisions in the Wyoming Constitution: (1) the right to make health care decisions in article 1, section 38; (2) the prohibition on the establishment of religion and the protection of free exercise of religion reflected in article 1, sections 17 and 18, article

7, section 12, and article 21, section 25; (3) the right to equal protection provided in article 1, section 3; and (4) the right to due process in article 1, section 6 and 7 (their vagueness claim). (TRO mem. at 16). A close examination of their arguments reveals that Plaintiffs have not clearly shown that the Life Act likely violates any of these provisions.

A. The Life Act does not violate the right to make health care decisions in article 1, section 38.

Plaintiffs assert that the Life Act violates the right to make health care decisions as provided by article 1, section 38 of the Wyoming Constitution. (TRO mem. at 18-29). They essentially offer two arguments in this regard. First, Plaintiffs argue that the plain meaning of "health care" in section 38 includes abortion. (TRO mem. at 19-21). Second, they argue that the Life Act does not achieve a compelling governmental interest. (TRO mem. at 21-29). Neither argument has merit.

Article 1, section 38 confers a right for individuals in Wyoming to make their own health care decisions. It provides in pertinent part:

> (a) Each competent adult shall have the right to make his or her own health care decisions. The parent, guardian or legal representative of any other natural person shall have the right to make health care decisions for that person.
>
> * * *
>
> (c) The 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.
>
> (d) The state of Wyoming shall act to preserve these rights from undue governmental infringement.

Wyo. Const. art. 1, § 38. To interpret section 38, this Court should seek to determine the intent of the Wyoming Legislature (as the drafters of the provision) and the voters (as the adopters of the provision) as reflected in the language of section 38. *Mgt. Council of Wyo. v. Geringer*, 953 P.2d 839, 843 (Wyo. 1998).[20]

1. The Life Act does not impermissibly infringe upon the right to make health care decisions because the Wyoming Legislature has declared that abortion is not health care for purposes of article 1, section 38.

In the Life Act, the Wyoming Legislature made extensive legislative findings in support of the Act. (Attach. A, § 1 at 1-2). Relevant to section 38, the Legislature found:

> (iv) **Regarding article 1, section 38 of the Wyoming constitution, abortion as defined in this act is not health care. Instead of being health care, abortion is the intentional termination of the life of an unborn baby**. It is within the authority of the state of Wyoming to determine reasonable and necessary restrictions upon abortion, including its prohibition. **In accordance with Article 1, Section 38(c) of the Wyoming constitution, the legislature determines that the health and general welfare of the people requires the prohibition of abortion as defined in this act**[.]

(Attach. A, § 1 at 2) (emphasis added).

The Wyoming Supreme Court has recognized that "legislative findings are controlling in absence of a controversy questioning their validity." *Witzenburger v. State ex rel. Wyo. Cmty. Dev. Auth.*, 575 P.2d 1100, 1131 (Wyo. 1978). Here, Plaintiffs have not

[20] *See also, cf., Perez-Crisantos v. State Farm Fire & Cas.*, 389 P.3d 476, 479 (Wash. 2017) (explaining that the legislative intent of a statutory act approved by a vote of the people "includes the intent of the voters who ultimately ratified" the act).

identified a controversy that reasonably calls into question the validity of the findings in § 35-6-121(a)(iv).

Plaintiffs assert that these findings do not align with the plain meaning of "health care" as used in section 38. (TRO mem. at 19-20). They argue that, in the preliminary injunction order (PI order) issued in Civil Action Number 18732, this Court has already concluded that the plain meaning of "health care" includes abortion. (TRO mem. at 19) (citations omitted). In doing so, this Court looked to a Black's Law Dictionary definition of "health care" and the statutory definitions of "health care" and "health care decision" in the Wyoming Health Care Decisions Act. (PI order, ¶ 30) (citations omitted). Plaintiffs' argument fails because the Black's Law Dictionary definition of "health care" does not encompass abortion and the legislative findings in paragraph (iv) trump the statutory definitions in the Wyoming Health Care Decisions Act.

The Black's Law Dictionary definition quoted in the PI order provides that "health care" means "[c]ollectively, the services provided, usually by medical professionals, to maintain and restore health." (PI order, ¶ 30) (citation omitted) (alteration in original). Plaintiffs have not explained how or why an abortion either maintains or restores the health of a pregnant woman. Absent such an explanation, they cannot reasonably argue that the plain meaning of "health care," as defined in Black's Law Dictionary, includes abortion.

The statutory definitions from the Wyoming Health Care Decisions Act necessarily must take a backseat to the legislative findings in paragraph (iv) because the findings interpret the term "health care" in article 1, section 38, whereas the definitions from the Wyoming Health Care Decisions Act were crafted to define the scope of that act. If this

Court intends to rely on statutory definitions to define "health care" or "health care decisions" in section 38, then the findings in § 35-6-121(a)(iv) provide the most relevant analogous definition.

Plaintiffs also attack the findings in § 35-6-121(a)(iv) by characterizing them as an attempt by the Wyoming Legislature to usurp this Court's role in interpreting the Wyoming Constitution. (TRO mem. at 20-21). In Wyoming, a legislative interpretation of the Wyoming Constitution does not bind a reviewing court, but the court should give much weight to the legislative interpretation and should "be loath to interpret the constitution otherwise." *Geringer*, 10 P.3d at 522. Here, Plaintiffs have given this Court no reason to disregard the legislative finding that abortion is not health care for purposes of article 1, section 38.

Viewed in its totality, Plaintiffs' analysis of the plain meaning of "health care" betrays the premise of their argument. They say that the plain meaning of "health care" includes abortion, but they resort to numerous outside sources of information to show this to be true. Plaintiffs quote language from Wyoming statutes and language from various documents published by different sources (a medical group, a federal agency, and two non-governmental organizations) in an attempt to show that the plain meaning of "health care" includes abortion. (TRO mem. at 19-20) (citations omitted). If statutory language conveys a plain meaning, there is no need to look to extrinsic sources to determine the plain meaning. *See Cranston v. Cranston*, 879 P.2d 345, 349 (Wyo. 1994) (a court should not resort to extrinsic information if a statute communicates a plain meaning). Here, the

substance of Plaintiffs' plain meaning argument confirms that the premise of the argument is wrong.

In the final analysis, this Court should defer to the Legislature's finding that abortion is not health care for purposes of article 1, section 38 and, as a result, section 38 does not implicitly confer a right to abortion.

2. Even if this Court does not defer to the Legislature's finding that abortion is not health care for purposes of article 1, section 38, that constitutional provision cannot be reasonably interpreted as implicitly conferring a right to abortion.

Even if this Court does not defer to the legislative findings in the Life Act, the phrase "health care decisions" in article 1, section 38 cannot reasonably be interpreted as implicitly conferring the right to abortion. To understand why, it helps to distinguish between the two sides of the health care process – the patient side and the health care provider side. In the health care process, patients purchase health care treatment services from health care providers. Patients are consumers of health care treatment services and have no direct role in determining what services are offered.

Health care providers offer health care treatment services to patients, but as participants in a highly regulated profession, they may only offer health care treatment services that comply with applicable law. The Wyoming Legislature, through its police powers, regulates health care in Wyoming. "Police powers are an essential attribute of the state as sovereign[.]" *State Highway Comm'n of Wyo. v. Sheridan-Johnson Rural Electrification Ass'n*, 784 P.2d 588, 591 (Wyo. 1989). "The police power can be generally described as a government's ability to regulate private activities and property usage without

compensation as a means of promoting and protecting the public health, safety, morals and general welfare." *Cheyenne Airport Bd. v. Rogers*, 707 P.2d 717, 726 (Wyo. 1985).

Through its police powers, the Legislature may place restrictions on the specific types of health care treatment services that are offered by health care providers in Wyoming. Section 38(c) recognizes as much, providing 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." Wyo. Const. art. 1, § 38(c).

Section 38(a) confers a right for individuals as patients to make "health care decisions." The word "decision" is a nominalization of the verb "decide" which, in the context of section 38, means "to choose or select as a future course of action[.]" *Webster's Third New Int'l Dictionary* 585 (2002). Thus, the word "decisions" contemplates a patient choosing which health care treatment services to purchase, if any, but any health care services the patient purchases necessarily must be legally available.

To say otherwise would be to say that the Legislature and the voters intended for section 38 to allow patients to determine what health care treatment services are available, regardless of whether those services are prohibited by law. This result cannot be because section 38(c) unambiguously acknowledges the authority of the Wyoming Legislature to regulate health care in Wyoming. Thus, the phrase "health care decisions" cannot reasonably be interpreted to include an implied right to abortion because section 38(a) only grants the right for an individual to decide to pursue legally available health care treatment

services. If abortion is not legal, an individual does not have a right to abortion under the guise of making a "health care decision."

Plaintiffs' interpretation of "health care" would allow a person to engage in otherwise unlawful activities under the guise of making a "health care decision." Under their interpretation, section 38 would empower a patient in Wyoming to receive any medical treatment the patient wants regardless of the state laws regulating health care or other matters. For example, under Plaintiffs' interpretation, a person with a medical condition that can be treated with marijuana would be constitutionally authorized to possess and consume marijuana regardless of the state criminal laws prohibiting them from doing so.

It is absurd to think that the Legislature and the voters intended to give patients such unfettered, unilateral authority to disregard the law. Section 38(a) cannot be interpreted in a manner that leads to such an absurd result. *See Cantrell v. Sweetwater Cnty. Sch. Dist. No. 2*, 2006 WY 57¶ 11, 133 P.3d 983, 986-87 (Stating that constitutional provisions "should not be read so as to produce absurd results."). As explained above, section 38(a) gives patients the right to decide what legally available heath care treatment options to pursue – it does not give them the right to decide what heath care treatment options are legally available.

In the PI order, this Court noted that, at the time article 1, section 38 was adopted by Wyoming voters, state law permitted abortion without restriction before viability. (PI order, ¶ 32). This fact in no way supports an argument that the right to make health care decisions implicitly confers a right to abortion. To the contrary, this fact aligns with the

interpretation that section 38(a) only gives patients the right to decide what legally available heath care treatment options to pursue. To say that section 38(a) forever implicitly confers a right to abortion because abortion before viability was legal under state law at the time section 38(a) was adopted would be to say that section 38 removed the Wyoming Legislature's authority to regulate health care as of November 14, 2012. Such an interpretation cannot be squared with section 38(c), which unambiguously recognizes the Legislature's authority to regulate health care under its historic police powers.

In the final analysis, section 38(a) cannot reasonably be interpreted as conferring an implicit right to abortion. The Life Act falls squarely within the Legislature's historic police powers, which means that abortion is not an available health care option and therefore not within the scope of the right to make "health care decisions" conferred by section 38(a). Any doubt as to whether section 38 implicitly confers a right to abortion must be construed in favor of finding the Life Act to be a lawful exercise of lawmaking authority and construed against finding an implied right to abortion in section 38(a).

If this Court finds that the phrase "health care decisions" in section 38(a) is ambiguous, the historical circumstances surrounding the ratification of section 38 show that the Legislature and the voters did not intend for that section to implicitly confer a right to abortion. To start, the statement endorsed on the general election ballot for the proposed amendment said nothing about abortion. The endorsement provided as follows:

> The adoption of this amendment will provide that the right to make health care decisions is reserved to the citizens of the state of Wyoming. It permits any person to pay and any health care provider to receive direct payment for services. The amendment permits the legislature to place reasonable and necessary restrictions on health care consistent with the purposes of the

> Wyoming Constitution and provides that this state shall act to preserve these rights from undue governmental infringement.[21]

No voter could read this endorsement and reasonably believe that, in voting to ratify section 38, she was amending the Wyoming Constitution to implicitly confer the right to abortion.

Also, at the time section 38 was ratified, the common belief was that it was intended to give Wyoming citizens an alternative to the federal Affordable Care Act. In the weeks before the 2012 general election, one national news magazine characterized the proposed section 38 as an attempt "to let individuals sidestep" the Affordable Care Act.[22] Immediately after the 2012 general election, a Wyoming newspaper reported that section 38 was proposed in response to the Affordable Care Act. *See* (Attach. C). Consistent with this view, the leading scholar on the Wyoming Constitution has opined that section 38 "is perhaps best described as a 'message' amendment, expressing the state's displeasure with the controversial federal Affordable Care Act[.]" Robert B. Keiter, *The Wyoming State Constitution* 110 (2d ed. 2017).

The structure of section 38 confirms the view that the Legislature and the voters intended for section 38 to counteract the Affordable Care Act. Section 38(b) confers the constitutionally protected right for individuals to make "direct payment for health care without imposition of fines or penalties for doing so." Wyo. Const. art. 1, § 38(b). Health care providers generally accept direct payment for services rendered, so this subsection

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[21] https://sos.wyo.gov/Elections/Docs/2012/2012BallotIssues.pdf, at 2.

[22] https://swampland.time.com/2012/10/31/ballot-initiative-of-the-day-will-wyoming-resist-obamacare/

only makes sense when viewed in light of the individual mandate in the Affordable Care Act. "[T]he individual mandate requires most Americans to maintain 'minimum essential' health insurance coverage." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 539 (2012). By creating a state constitutional right to make direct payment for health care services, the Legislature and the voters intended to give Wyoming citizens an alternative to the individual mandate.

Section 38(d) dictates that the State "shall act to preserve" the rights conferred in section 38 "from undue government infringement." Wyo. Const. art 1, § 38(d). In this phrase, the word "government" necessarily means the federal government. It makes no sense to direct the State of Wyoming to take action to preserve the rights conferred in section 38 from undue infringement by the State of Wyoming. Section 38(d) thus directs the State to take action to preserve the rights conferred in section 38 from undue infringement by the federal government.

As a matter of general knowledge, the enactment of the Affordable Care Act raised a concern that the federal government would dictate health care decisions for individuals in the future. It therefore makes sense that section 38 was only intended to counteract the Affordable Care Act. Section 38 thus cannot be reasonably interpreted as implicitly conferring a right to abortion because it was intended to push back on the federal government's implementation of the Affordable Care Act.

3. Even if this Court concludes that article 1, section 38 implicitly confers a right to abortion, Plaintiffs have not shown that the Life Act unreasonably restricts that right.

Asserting that the right to make health care decisions is a fundamental right, Plaintiffs spend eight pages arguing that the Life Act does not pass the strict scrutiny standard for assessing the constitutionality of a statute. (TRO mem. at 22-29). As a preface to this argument, they acknowledge that article 1, section 38(c) dictates the Wyoming Legislature may impose "reasonable and necessary restrictions" on the right to make health care decisions. (TRO mem. at 21). But, in their analysis, Plaintiffs focus solely on the strict scrutiny standard. (TRO mem. at 22-29).

The strict scrutiny standard does not apply here because section 38(c) establishes the standard for assessing whether the Life Act impermissibly infringes upon the right to make health care decisions. To do so, this Court must assess whether the Life Act imposes "reasonable and necessary restrictions" on the right to make health care decisions "to protect the health and general welfare of the people or to accomplish the other purposes set forth in the Wyoming Constitution." Wyo. Const. art. 1, § 38.

Section 38(c) imposes a different legal standard than strict scrutiny. Under strict scrutiny, a statute that regulates a fundamental constitutional right must serve a compelling state interest and must be "narrowly drawn so as to not unnecessarily interfere with" the fundamental right. *Galesburg Constr. Co. v. Bd. of Trs. of Mem'l Hosp. of Converse Cnty.*, 641 P.2d 745, 748 (Wyo. 1982). The phrases "reasonable and necessary restrictions" and "to protect the health and general welfare of the people or to accomplish the other purposes set forth in the Wyoming Constitution" impose a much lower standard than "narrowly

drawn" and "compelling state interest." The strict scrutiny standard cannot be reconciled with the standard in section 38(c) and therefore strict scrutiny does not apply here.

Near the beginning of their article 1, section 38 analysis and at the end of it, Plaintiffs assert that the Life Act does not further the State's interests in regulating abortion, but instead undermines them. (TRO mem. at 22, 29). To support this argument, they look to the statement of legitimate interests in Wyo. Stat. Ann. § 36-6-121(a)(vi) of the Life Act. (TRO mem. at 22). Viewed holistically, their argument attempts to show that the Life Act does not actually serve the compelling government interests it purports to serve. Or, in other words, it is a misplaced strict scrutiny argument.

Regardless, Plaintiffs' attempt to attack the interests listed in § 36-6-121(a)(vi) falls flat. They contend that the Life Act is "inconsistent with preserving potential life." (TRO mem. at 23-24). To this end, Plaintiffs point out instances where the Life Act allows for an abortion to be performed. *Id.* This argument ignores the fact that the prohibition on abortion and the exceptions to that prohibition in the Life Act balance the constitutional rights of the pregnant woman with the constitutional rights of the unborn baby.

Plaintiffs also assert that the Life Act is contrary to the other purposes stated in § 36-6-121(a)(vi). (TRO mem. at 24-29). Viewed objectively, their arguments in this regard amount to nothing more than a multi-faceted explanation of why Plaintiffs disagree with the public policies embodied in the Life Act. The mere fact that Plaintiffs disagree with the policies of the Life Act does not mean that the Act is unconstitutional.

Finally, Plaintiffs argue that the Life Act violates section 38(d) because it unduly infringes upon the right of women to make health care decisions. (TRO mem. at 26). The

unambiguous language in section 38(d) refutes this argument. Section 38(d) dictates that the State "shall act to preserve" the rights conferred in section 38 "from undue government infringement." Wyo. Const. art 1, § 38(d). As explained above, in this phrase the word "government" in section 38(d) necessarily means the federal government.

Although Plaintiffs open and close their article 1, section 38 argument with language quoted from section 38(c), they base their legal analysis upon the strict scrutiny standard. (TRO mem. at 21, 29, 22-28). Plaintiffs thus have not shown that they probably will succeed on their article 1, section 38 claim because they have argued the wrong legal standard.

B. The Life Act does not violate the establishment of religion provisions in the Wyoming Constitution.

Plaintiffs contend that four different provisions in the Wyoming Constitution prohibit the establishment of religion – article 1, sections 18 and 19; article 7, section 12; and article 21, section 25. (TRO mem. at 32-38). They then argue that the Life Act violates these provisions by imposing "on all Wyoming citizens the distinctly religious viewpoint that life begins at conception." (TRO mem. at 32). In making this argument, Plaintiffs appear to conflate two related but distinct constitutional concepts – the establishment of religion and the free exercise of religion.

To the extent that Plaintiffs are making an establishment of religion argument, their argument must be limited to article 1, section 19 and article 7, section 12. *See In re Neely*, 2017 WY 25, ¶ 48, 390 P.3d 728, 744 (Wyo. 2017) (Characterizing article 1, section 19

and article 7, section 12 as a variation of the federal Establishment Clause in the Wyoming Constitution). Article 1, section 19 provides:

> No money of the state shall ever be given or appropriated to any sectarian or religious society or institution.

Wyo. Const. art. 1, § 19. In turn, article 7, section 12 provides:

> No sectarian instruction, qualifications or tests shall be imparted, exacted, applied or in any manner tolerated in the schools of any grade or character controlled by the state, nor shall attendance be required at any religious service therein, nor shall any sectarian tenets or doctrines be taught or favored in any public school or institution that may be established under this constitution.

Wyo. Const. art. 7, § 12.

Plaintiffs do not explain how or why the Life Act violates either of these constitutional provisions. In the non-codified provisions in House Enrolled Act Number 88, the Wyoming Legislature did not give or appropriate money to any sectarian or religious society or institution and the Life Act says nothing about such topics. The Life Act also does not have anything to do with public education. Thus, Plaintiffs' argument that the Life Act establishes religion contrary to article 1, section 19 and article 7, section 12 is wrong.

Plaintiffs note that "[t]he Wyoming Supreme Court has favorably cited the federal establishment clause in its decisions," but do not explain why this point matters here. (TRO mem. at 33 (citing *Snyder v. Snyder*, 2021 WY 115, ¶ 24, 496 P.3d 1255, 1261 (Wyo. 2021) and *Wilson v. Wilson*, 473 P.2d 595, 598-99 (Wyo. 1970)). Presumably they made this point to set up their argument asking this Court to adopt an establishment of religion test

from a 1971 United States Supreme Court opinion (*Lemon v. Kurtzman*) that, as Plaintiffs acknowledge, has been abandoned. (TRO mem. at 33-34) (citations omitted).

Plaintiffs' argument in favor of the *Lemon* tests fails in at least two respects. First, to the extent that Plaintiffs argue that the establishment of religion provisions in the Wyoming Constitution should be interpreted in the same manner as the federal Establishment Clause, the U.S. Supreme Court no longer follows the *Lemon* test to interpret federal Establishment Clause claims. *Kennedy v. Bremerton Sch. Dist.*, — U.S. —, —, 142 S.Ct. 2407, 2427 (2022).

Second, to the extent that Plaintiffs argue that this Court should apply the *Lemon* test under the guise of the Wyoming establishment clause provisions offering broader protections than the federal Establishment Clause, they have not properly argued the issue. When a plaintiff argues that a provision in the Wyoming Constitution affords different or greater protections or rights than an analogous federal constitutional provision, the plaintiff must perform a comparative analysis of the state and federal provisions using a "precise, analytically sound approach." *Dworkin v. L.F.P., Inc.*, 839 P.2d 903, 909 (Wyo. 1992). Plaintiffs have made no such argument here and, as a result, this Court should not consider Plaintiffs' argument in this regard.[23] *See Lovato v. State*, 901 P.2d 408, 413 (Wyo. 1995)

[23] Plaintiffs also suggest that this Court should adopt the Establishment Clause test now followed by the U.S. Supreme Court but do not support this suggestion with a cogent legal argument. (TRO mem. at 34) (Referencing the "coercion" test from *Kennedy v. Bremerton School District*). Moreover, *Kennedy* involved a free exercise of religion issue, not an establishment of religion issue. *Kennedy*, 142 S.Ct. at 2419.

(Stating that the Wyoming Supreme Court will refuse to consider an independent state constitutional argument that is not supported by a precise, analytically sound approach).

Plaintiffs refer to article 1, section 18 and article 21, section 25 in advocating for this Court to adopt the *Lemon* test. (TRO mem. at 35-37). Both of these constitutional provisions address the free exercise of religion. Article 1, section 18 provides that

> **[t]he free exercise and enjoyment of religious profession and worship without discrimination or preference shall be forever guaranteed in this state**, and no person shall be rendered incompetent to hold any office of trust or profit, or to serve as a witness or juror, because of his opinion on any matter of religious belief whatever; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state.

Wyo. Const. art. 1, § 18 (emphasis added). In turn, article 21, section 25 provides:

> Perfect toleration of religious sentiment shall be secured, and no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship.

Wyo. Const. art. 21, § 25.

Plaintiffs have not provided this Court with a cogent legal argument to explain how or why the Life Act violates either article 1, section 18 or article 21, section 25. (TRO mem. at 35-37). This Court therefore, should not consider their argument in this regard. *Cf. Pier v. State*, 2019 WY 3, ¶ 26, 432 P.3d 890, 898 (Wyo. 2019) (stating that the Wyoming Supreme Court will not consider legal arguments unsupported by cogent argument or citation to pertinent legal authority).

Regardless, the Life Act does not violate the free exercise provisions in the Wyoming Constitution. The Wyoming Supreme Court has not directly addressed whether article 1, section 18 affords greater protections than the Establishment Clause in the First

Amendment to the United States Constitution. In one case, it stated that article 1, section 18 "may offer broader protections than does the United States Constitution," but ultimately determined that section 18 did not apply in that case. *In re Neely*, ¶ 42, 390 P.3d at 742.

Absent definitive guidance from the Wyoming Supreme Court, "decisions in other states bearing on the same or similar constitutional language" should be given "persuasive effect" in interpreting article 1, section 18. *Saunders v. Hornecker*, 2015 WY 34, ¶ 23, 344 P.3d 771, 778 (Wyo. 2015). The language in article 1, section 18 "is very similar" to a provision in the North Dakota Constitution (originally article 1, § 4 and now article 1, § 3). Richard K. Prien, *The Background of the Wyoming Constitution* 48 (Aug. 1956) (unpublished M.A. Thesis, Univ. of Wyo.) (emphasis in original). The free exercise clause in the North Dakota Constitution "affords protections similar to those provided by the Establishment Clause." *North Dakota v. Burckhard*, 579 N.W.2d 194, 196 (N.D. 1998). Accordingly, this Court should interpret the free exercise clause in section 18 as affording protections similar to the free exercise clause in the federal Establishment Clause.

Article 21, section 25 does not provide broader or different protections than article 1, section 18. The Wyoming Supreme Court has not addressed this question, but the leading scholar on the Wyoming Constitution has opined that section 25 is redundant of article 1, section 18. *See* Keiter, *The Wyoming State Constitution* 331 (stating that article 21, sections 24 through 28 "are redundant of earlier provisions" in the Wyoming Constitution).

On its face, the Life Act says nothing about religion or faith, and Plaintiffs have cited no evidence to show that the Wyoming Legislature intended for the Life Act to prefer one faith-based view over others. In the federal context, a statute does not violate the

Establishment Clause just "because it happens to coincide or harmonize with the tenets of some or all religions." *Harris v. McRae*, 448 U.S. 297, 319 (1980) (citation omitted). Here, any similarity between the Life Act and any particular faith-based view is coincidental and therefore does not run afoul of section 18.

Plaintiffs support their establishment and free exercise arguments with an extensive block quote from a Kentucky circuit court order. (TRO mem. at 37 (quoting *EMC Womens Surgical Ctr. v. Cameron*, No. 22-CI-3255 (Ky. Cir. Ct. July 22, 2022)). They offer this passage without explaining why it is factually or legally relevant to this Court's interpretation of the Wyoming Constitution or the Life Act. The order in question was issued by a trial level court in Kentucky based on facts unique to that case. In addition, it appears that the circuit court judge in the Kentucky case raised the religion question *sua sponte*. *See Cameron v. EMC Womens Surgical Ctr., PSC*, — S.W.3d —, 2023 WL 2033788, at *57 (Ky. 2023) (Nickell, J. concurring in part and dissenting in part). In sum, Plaintiffs have given this Court no reason to believe that the Kentucky case provides persuasive authority for addressing the religion claims Plaintiffs have raised in this case.

Plaintiffs cite to a finding in the introduced version of House Bill 152 as evidence that the Life Act violates the religion provisions in the Wyoming Constitution. (TRO mem. at 37-38). This particular proposed finding was removed by an amendment in the Senate.[24] In making this argument, Plaintiffs maintain that the intent of the "authors of the bill" reflects the legislative intent of the Life Act and removing the finding from the bill did not

[24] *See* https://wyoleg.gov/2023/Amends/HB0152SS001.pdf

remove the intent conveyed by the jettisoned finding. (TRO mem. at 38). Plaintiffs are wrong on both counts. The intent of individual legislators does not reflect the intent of the Wyoming Legislature as a whole. *Barlow Ranch, Ltd. P'ship v. Greencore Pipeline Co. LLC*, 2013 WY 34, ¶ 45, 301 P.3d 75, 89-90 (Wyo. 2013). And it defies logic to argue that language the Legislature amended out of a bill in any way continues to be legally relevant in discerning the legislative intent of the bill after it becomes law.

C. The Life Act does not violate the guarantee of equal protection in article 1, section 3.

Plaintiffs rely on the PI order in Civil Action Number 18732 to argue that the Life Act violates the guarantee of equal protection in article 1, section 3 of the Wyoming Constitution. (TRO mem. at 39) (citations omitted). This argument fails for two reasons.

First, Plaintiffs do not actually make a legal argument in this regard. They simply quote a passage from the PI order (in which this Court explained why it found that the repealed Wyo. Stat. Ann. § 35-6-102(b) may violate article 1, section 3) and then say "[t]he same reasoning applies with equal force" to the Life Act. (TRO mem. at 39-40). They have not independently analyzed the Life Act in light of article 1, section 3 or explained why it violates section 3. This Court, therefore, should not consider this argument. *Cf. Pier*, ¶ 26, 432 P.3d at 898 (stating that the Wyoming Supreme Court will not consider legal arguments unsupported by cogent argument or citation to pertinent legal authority).

Second, Plaintiffs argument fails because the Life Act does not violate article 1, section 3. This constitutional provision provides:

> Since equality in the enjoyment of natural and civil rights is only made sure through political equality, **the laws of this state affecting the political**

> **rights and privileges of its citizens** shall be without distinction of race, color, sex, or any circumstance or condition whatsoever other than individual incompetency, or unworthiness duly ascertained by a court of competent jurisdiction.

Wyo. Const. art. 1, § 3 (emphasis added). The plain language of section 3 makes clear that the framers intended for it to protect political rights and privileges. *Maxfield v. State*, 2013 WY 14, ¶ 29, 294 P.3d 895, 902 (Wyo. 2013). Nothing in the Life Act in any way affects the political rights and privileges of the citizens of the State of Wyoming.

Viewed more broadly, the equal protection doctrine simply does not apply here. "The Wyoming Constitution does not contain [] an express 'equal protection' clause; rather, it contains a variety of equality provisions, viz., Article 1, §§ 2, 3, and 34; and Article 3, § 27." *Greenwalt v. Ram Rest. Corp. of Wyo.*, 2003 WY 77, ¶ 39, 71 P.3d 717, 730 (Wyo. 2003) (alteration added). Under these provisions, "[e]qual protection requires that all persons similarly situated … be treated alike." *Martin v. Bd. of Cnty. Comm'rs of Laramie Cnty.*, 2022 WY 21, ¶ 12, 503 P.3d 68, 72 (Wyo. 2022) (citations and internal quotation marks omitted). As the Supreme Court of Idaho recently noted, "[m]en and women are not similarly situated when it comes [to] pregnancy and abortion. Only women are capable of pregnancy; thus, only women can have an abortion." *Planned Parenthood Great Nw. v. State*, 522 P.3d 1132, 1198 (Idaho 2023) (alteration added). As a result, the Life Act does not implicate the equal protection provisions (either individually or collectively) in the Wyoming Constitution.

D. The Life Act is not unconstitutionally vague.

Plaintiffs argue that the Life Act violates the Wyoming Constitution because it is impermissibly vague. (TRO mem. at 29-32). This Court should reach the vagueness argument only if it finds that the Life Act does not otherwise infringe upon a constitutionally protected right of one or more of the Plaintiffs. If this Court concludes that the Life Act is otherwise unconstitutional, the vagueness challenge becomes moot.

The Wyoming Constitution prohibits the Wyoming Legislature from enacting "vague or uncertain statutes. This requirement of certainty, particularly in the criminal code, is recognized as an element of due process." *Moore v. State*, 912 P.2d 1113, 1114-15 (Wyo. 1996) (internal citation omitted). "Consistent with principles of due process, a penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Crain v. State*, 2009 WY 128, ¶ 12, 218 P.3d 934, 940 (Wyo. 2009) (cleaned up). As the Wyoming Supreme Court has explained:

> **[T]he vagueness doctrine** embodies a rough idea of fairness, and that it **is not intended to create a constitutional dilemma from the practical difficulties in crafting criminal statutes** that are both sufficiently general to take into account the desired scope of behavior and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.

Guilford v. State, 2015 WY 147, ¶ 15 n.6, 362 P.3d 1015, 1018 n.6 (Wyo. 2015) (emphasis added). Thus, the vagueness doctrine

> **does not invalidate every statute which a reviewing court believes could have been drafted with greater precision**. Many statutes will have some inherent vagueness, for in most English words and phrases there lurk uncertainties. Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say

> with any certainty what some statutes may compel or forbid. **All the Due Process Clause requires is that the law give Sufficient warning that men may conduct themselves so as to avoid that which is forbidden.**

Sorensen v. State, 604 P.2d 1031, 1033 (Wyo. 1979) (cleaned up) (emphasis added).

"[S]uccessful challenges to statutes for facial vagueness are rare." *Teniente v. State*, 2007 WY 165, ¶ 86, 169 P.3d 512, 536 (Wyo. 2007). To prevail on a claim that a statute is unconstitutionally vague on its face, a plaintiff must show that the statute: (1) "reaches a substantial amount of constitutionally protected conduct"; or (2) specifies "no standard of conduct at all." *Jones v. State*, 2011 WY 115, ¶ 8, 256 P.3d 536, 540 (Wyo. 2011).

Plaintiffs assert that the Life Act "implicates protected conduct—a woman's right to control her own health care under article 1, section 38[.]" (TRO mem. at 30). They also assert that the Life Act "specifies no meaningful standard of conduct." *Id.* Neither argument has merit.

For purposes of the vagueness doctrine, it is not enough to say that the Life Act "implicates protected conduct" – Plaintiffs must show that the Life Act "reaches a substantial amount of constitutionally protected conduct." *See Jones*, ¶ 8, 256 P.3d at 540. They have not done so. They devote the entirety of their legal analysis to the standard of conduct part of the vagueness test. Regardless, article 1, section 38 cannot be the source of the constitutionally protected conduct here because the vagueness claim will be ripe only if this Court determines that section 38 does not implicitly confer a right to abortion or that section 38 implicitly confers such a right but the Life Act imposes reasonable and necessary restrictions on that right. Either way, section 38 would not be a source of constitutionally protected conduct.

Plaintiffs fair no better with their standard of conduct argument. For purposes of the vagueness doctrine, "[a] statute specifies a standard of conduct if, by its terms or as authoritatively construed in prior opinions, it applies without question to certain activities, even though its application to other activities is uncertain." *Fraternal Order of Eagles Sheridan Aerie No. 186, Inc. v. State, ex rel. Forwood*, 2006 WY 4, ¶ 46, 126 P.3d 847, 863 (Wyo. 2006). A party asserting that a statute is facially vague because it lacks a standard of conduct "must do more than identify some instances in which the application of the statute may be uncertain or ambiguous; he must demonstrate that the law is impermissibly vague in all of its applications." *Alcalde v. State*, 2003 WY 99, ¶ 15, 74 P.3d 1253, 1260-61 (Wyo. 2003) (cleaned up).

This legal standard dooms Plaintiffs' vagueness challenge. They give this Court numerous examples of arguably ambiguous or uncertain words or phrases used in the Life Act, but they have not shown that the Life Act, or any specific part of it, is impermissibly vague in all of its applications. (TRO mem. at 30-32). Without such a showing, this Court should not conclude that the Life Act is unconstitutionally vague.

Before a temporary injunction may issue, the movant must make "a clear showing of probable success **and** possible irreparable injury to the plaintiff[.]" *Weiss*, 434 P.2d at 762 (emphasis added). Plaintiffs have not shown that they probably will succeed on the merits of the four constitutional claims addressed in their legal memorandum in support of the motion. Accordingly, this Court should deny the motion for a TRO.

II. Plaintiffs have not clearly shown that the Life Act will possibly cause them irreparable injury.

This Court does not need to address the irreparable injury prong because Plaintiffs have not clearly shown probable success on the merits of this case. Under the irreparable injury prong, this Court assesses possible injuries that may result from the enforcement of a statute that ultimately may be declared unconstitutional. In making this assessment, this Court assumes the challenged statute may be unconstitutional because the probable success prong has been satisfied. Plaintiffs have not clearly shown that they likely will succeed on the merits of their constitutionality claim, so this Court has no reason to address possible irreparable injuries.

If this Court addresses the merits of the irreparable injury prong, however, it will find that Plaintiffs also have not shown that the Life Act possibly will cause irreparable injury to them. To satisfy the irreparable injury prong, that party must show that "the potential harm is irreparable and there is no adequate remedy at law to compensate for the harm." *In re Kite Ranch*, ¶ 22, 181 P.3d at 926. "An injury is irreparable where it is of a peculiar nature, so that compensation in money cannot atone for it." *CBM Geosolutions,* ¶ 10, 215 P.3d at 1058 (citation omitted).

Plaintiffs make four distinct irreparable injury arguments. First, they argue that the Life Act irreparably harms "Wyomingites" who "will be forced to remain pregnant against their will." (TRO mem. 6-12). The party seeking a temporary injunction cannot rely on irreparable injury to a non-party to satisfy the irreparable injury requirement. *See Weiss*, 434 P.2d at 762 (The legal standard for granting a temporary injunction is "a clear showing

of probable success and possible irreparable injury **to the plaintiff**[.]") (emphasis added). Plaintiffs focus the vast majority of this argument on how the Life Act arguably will affect unnamed individuals in the future. (TRO mem. 7-12).

Plaintiffs specifically argue that "patients will suffer a range of irreparable physical, mental, and economic consequences" due to forced pregnancy, but they do not say that any of the named Plaintiffs will suffer such injuries. (TRO mem. at 6). Instead, they say that Ms. Johnson and Ms. Dow "affirmatively resist" the "imposition of the legislators' moral values into their family planning decisions," that Dr. Anthony and Dr. Hinkle will prevent the listed irreparable harms to patients, and that the two non-profits will not be able to "provide medical care to pregnant women[.]" *Id.* Thus, to the extent that Plaintiffs have argued that the Life Act causes irreparable injury to non-parties who will be forced to remain pregnant against their will and have not shown that any of the Plaintiffs likely will suffer this alleged injury, their argument fails. *See Weiss*, 434 P.2d at 762.

Second, Plaintiffs argue that the Life Act irreparably harms those patients forced to meet the exceptions for abortion. (TRO mem. at 12-13). To support this argument, Plaintiffs address three distinct classes of patients – "pregnant persons with rapidly worsening medical conditions," "some patients facing devastating fetal diagnoses," and "sexual assault survivors." *Id.* Their argument also focuses mostly on how the Life Act arguably will affect unnamed individuals in the future, although Plaintiffs do say that Ms. Johnson "presently intends to have additional children in the State of Wyoming" and that Ms. Dow "intends to become pregnant in Wyoming after her upcoming wedding" but may leave the State. (TRO mem. at 12-13).

To the extent that Plaintiffs have argued that the exceptions in the Life Act cause irreparable injury to non-parties, their argument fails. *See Weiss*, 434 P.2d at 762. To the extent that Ms. Johnson and Ms. Dow intend to become pregnant in the future while living in Wyoming, the possibility of one of the exceptions applying to them is too remote and speculative to qualify as an irreparable injury under the temporary injunction test. *Cf. Getty Images News Servs. Corp. v. Dep't of Defense*, 193 F.Supp.2d 112, 122 (D.D.C. 2002) ("It is axiomatic that speculative injury will not support emergency injunctive relief, and that the threat of irreparable injury must be real and imminent.")

Third, Plaintiffs argue that the Life Act irreparably harms Dr. Anthony, Dr. Hinkle, and Circle of Hope because the Life Act "will eliminate their ability to offer abortion services or provide evidence-based medical care which may result in the termination of a pregnancy." (TRO mem. at 14). They also quote the PI order in Civil Action Number 18732 in noting that this Court previously had found that Dr. Anthony and Dr. Hinkle faced the possibility of felony prosecution, imprisonment, and loss of their professional licenses if they violated the now repealed Wyo. Stat. Ann. § 35-6-102(b). (TRO mem. at 14). Regarding the Life Act, they merely say that the exceptions in the Act "are unworkable, vague, and not based on medical terminology." *Id.*

To the extent that Plaintiffs argue that the staff at Circle of Hope may be irreparably injured, their argument fails because injury to employees does not constitute injury to Circle of Hope. And with respect to Dr. Anthony and Dr. Hinkle, Plaintiffs have not shown how the Life Act possibly may cause them irreparable injury. Plaintiffs' argument is based

almost entirely on findings this Court made regarding the now repealed § 35-6-102(b) and they have not explained how or why the Life Act poses a similar threat of injury.

Finally, Plaintiffs argue that the Life Act irreparably harms Wyomingites who seek to obtain an abortion out of state because of the: (1) "physical, emotional, and financial implications" of being forced to remain pregnant until they can obtain care out of state; (2) "additional costs and burdens of substantial travel;" (3) possible compromise of "the confidentiality of their decision to have an abortion in order to obtain transportation, leave from work, or childcare;" and (4) loss of the availability of medical treatment from the physician of their choice. (TRO mem. at 15). This argument focuses entirely on injuries that may be suffered by non-parties in the future and says nothing about possible injury to any of the named Plaintiffs. As a result, this argument fails. *See Weiss*, 434 P.2d at 762.

III. The public interest and the balance of the equities weigh in favor of denying the request for a TRO.

Plaintiffs argue that the public interest and the balance of the equities "weigh decisively" in favor of this Court issuing a TRO in this case. (TRO mem. at 40). The Wyoming Supreme Court has not adopted a balance of the equities requirement for temporary injunctions. However, to the extent that the equities are relevant, they weigh in favor of allowing the Life Act to take effect.

The public interest favors allowing the Life Act to take effect because it represents a lawful exercise of legislative power. The Wyoming Constitution

> is not a grant but a limitation upon legislative power. Consequently, the [Wyoming] legislature may enact any law not expressly or inferentially prohibited by the constitution. This plenary power of the legislature is the

> rule for all purposes of civil government, and a prohibition to exercise a particular power is an exception.

Cathcart, ¶ 45, 88 P.3d at 1067 (internal citations omitted) (alteration added).

No constitutional provision, state or federal, confers a right to abortion in Wyoming. The Wyoming Constitution does not explicitly confer a right to abortion and Plaintiffs have not shown that it implicitly confers such a right. In addition, the U.S. Constitution "does not confer a right to abortion." *Dobbs*, 142 S. Ct. at 2279. As a result, the Wyoming Legislature properly exercised its plenary lawmaking authority in enacting the Life Act.

The public interest also favors allowing the Life Act to take effect because, throughout the history of the State of Wyoming, state law has prohibited abortion. The first year that Wyoming was established as a Territory, the Territorial Legislature enacted a statute that made abortion a crime. (1869 Sess. Laws of Wyo., ch. 3, Title 1, § 25). This criminal abortion statute was in effect until 1977. Four years after *Roe* was decided, the Wyoming Legislature repealed the criminal abortion statute and replaced it with a statute that prohibited abortion after viability and made it a crime to violate the statute. (1977 Wyo. Sess. Laws ch. 11, §§ 1-2 (codified as Wyo. Stat. Ann. §§ 35-6-102, 35-6-110 (1977)). After *Roe* was overturned in 2022, § 35-6-102(b) reinstated the longstanding public policy of the State of Wyoming on abortion. Wyo. Stat. Ann. § 35-6-102(b) (2022). Now, the Legislature has enacted the Life Act to further define the contours of the State's policy on abortion.

The Wyoming Legislature is the policy-making branch of state government. *Starrett v. State*, 2012 WY 133, ¶ 12, 286 P.3d 1033, 1038 (Wyo. 2012). The laws enacted by the

Wyoming Legislature thus reflect the public policy of the State of Wyoming. Since the first year that Wyoming was a territory, state law has prohibited and criminalized abortion (subject to exceptions) to the extent permitted by federal law. The Life Act is consistent with this long-standing public policy, so the balance of the equities factor weighs in favor of permitting a properly enacted state statute to take effect.

IV. This Court should not require a bond if a TRO is issued.

If this Court issues the requested TRO, the State Defendants do not believe that a bond should be required.

Conclusion

For the foregoing reasons, this Court should deny Plaintiffs' motion for a TRO in its entirety.

DATED this 21st day of March 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of March, 2023, a true copy of the foregoing was served via email, and mailed, postage prepaid, to the following:

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